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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERMS, 1870 AND 1871.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XII.

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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.

SOLICITOR-GENERAL.

BENJAMIN H. BRISTOW.

[Appointed October 11th, 1870.]

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

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

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.		
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, ARKANSAS, AND NEBRASKA.	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 did not hear the cases prior to page 163; they having been argued in the spring of 1871, and before his recovery from his late indisposition.

Mr. Justice NELSON heard no cases in this volume but the Legal Tender cases.

DEATH OF THE HON. THOMAS EWING.

ALTHOUGH it is not a usual matter for this court to notice in its proceedings the death of members of the bar—the venerable years of Mr. EWING, his eminence as a lawyer, the long term, ending only with his life, in which he was constantly engaged at this bar, and the reputation which he had throughout the country, both in professional and public life, seem to have caused a departure from the practice in his case.

Mr. Ewing was born in Ohio County, Virginia, December 28th, 1789. His father, who had served in the American army during the Revolution, and had become reduced in circumstances, removed his family in 1792 to the Muskingum River, and thence to a place in what has since become Athens County, Ohio. He was here taught to read, by an elder sister, and by extraordinary efforts of his own acquired a fair elementary education. At the age of nineteen he left home, and worked in the Kanawha salt establishments, until, in the course of two or three years, he had saved money enough to enter the Ohio University, at Athens. His money being exhausted, he returned to his salt works, saved his earnings again, then resumed his studies, and in 1815 received the first degree of A.B. ever granted by the Ohio University. He studied law in Lancaster, Ohio, and was admitted to the bar in 1816, and practiced with great success in the State courts and in this court. In March, 1831, he took his seat in the Senate of the United States as a member of the Whig party, and became associated with Mr. Webster and Mr. Clay in resisting what were deemed the encroachments of the executive, and in support of the Whig measures generally. In March, 1837, his term of office having expired, he resumed the practice of the law. Upon the election of President Harrison, in 1841, he was appointed Secretary of the Treasury; an office which he retained under Mr. Tyler (who by President Harrison's death, in one month after his inauguration, succeeded to his office), so long as Mr. Tyler acted in accordance with the views of the party by whose electors he was elected. With most of the other members of President Tyler's

Cabinet, he resigned office in September, 1841. On the election of President Taylor in 1849 he was appointed Secretary of the then recently-created Department of the Interior, which was still unorganized. On the death of that President, July 9th, 1850, and the accession of Mr. Fillmore, a division in the Whig party caused a change in the Cabinet. Mr. Corwin became Secretary of the Treasury and Mr. Ewing was appointed by the Governor of Ohio to fill the unexpired term of Mr. Corwin in the Senate. In 1851 he retired very much from public life—in which he was engaged, taking it all together, for about nine years—and resumed the practice of the law. However, in 1861, when the Rebellion was imminent, he became a member of the assemblage known as the Peace Conference. This Conference was invited by the State of Virginia. The members of Ohio were appointed by the governor of that State. The Conference sat twenty-three days. But conciliations were impossible. The South was determined on rebellion, and the war came.

Mr. Ewing died on the 26th of October, 1871, at his residence, in Lancaster, Ohio, in the eighty-second year of his age. His abilities were known to those of the departed or departing generation perhaps more than to those of the present one, although he continued to practice in this court until within a short time; the last case which he argued having been, I think, *Maguire* v. *Tyler*, at December Term, 1869,* which, on account of his venerable years and imperfect strength, he was graciously requested by the court to argue sitting. Among the most elaborate of his written professional arguments are those in the case of *Oliver* v. *Pratt et al.*, involving the title of a large part of Toledo, Ohio; the case of the Methodist Church division; the *McIntire Poor-School* v. *Zanesville*, and the McMicken Will case, involving large bequests for education. By those who did not personally know Mr. Ewing, nor remember him in earlier life, the remarks of the Hon. Henry Stanbery, of the same State with Mr. Ewing, made on the occasion of his death, and than whom all will concede no one is more competent, by words to say, or by example better illustrates, what an honored and able and finished lawyer is, will be read with interest:

"I first knew Mr. EWING in May, 1824, then in his thirty-fifth year, a man marked with a grand physical organization, such as is rarely seen united to such mental powers as he possessed. Age had not yet impressed

* 8 Wallace, 651.

any traces of its advance. It was in the seven years, from 1824 to 1831, before he entered political life, and when his great powers and forensic abilities were all in full play, that Mr. EWING was to be seen to the greatest advantage. I confess I missed something of that fire when he left the bar for political life. I shall never forget him as he was from the age of thirty-five to forty-two, though from that day to this we must regard him as one of the greatest men of the nation. I may say that with one exception, and that is WEBSTER, I have seen none in whom I could recognize more ability and forensic power than in EWING. Among his chief qualities was his ability in discussing questions of fact before a jury. Though able to discuss any question before a court, it seems to me that his grandest efforts were as an advocate before a jury. Of all the men I have ever listened to, he was the greatest in the handling of facts. When he entered political life, our relations, though not so close, continued. He was often engaged in the Supreme Court, where I met him frequently, with Wirt, Lee, Webster, Choate, Davis, and the two Johnsons, and our own Doddridge and Hammond, among the greatest lawyers that we ever had. Among these he took his place in the foremost rank, second to none, as a great lawyer, save Webster alone. How these two names are associated in my recollection! Nothing could be more delightful than to hear their ordinary conversation, when the lawyers sat around, a listening and attentive audience.

"There are many that did not understand EWING in his character as a man. Great as he was as a lawyer, his private, domestic, friendly traits, his moral nature, attracted me even more. Never was there a more affectionate son, never a more devoted husband, never a more loving father. Some have supposed, seeing him at particular times, and when abstracted, that he was forbidding and repulsive. There never was a more loving nature than his. I have seen his manly face time and again suffused with tears. He was liberal, all-embracing in his friendship, never deserting a friend. That was the character of the man, and no one feels or can feel his loss more as a friend than I do; for, Mr. Chairman, if I have at all learned what must go to make up a lawyer, if I have attained to any success at the bar, whatever it may be, I owe more to the teaching and example of THOMAS EWING than to any man living or dead."

On the 28th of October, after the intelligence of his death reached Washington, a meeting of the bar of this court was held, when, on motion of Mr. Carlisle, the Hon. B. H. BRISTOW, Solicitor-General, was called to the chair, and Mr. D. W. Middleton appointed secretary. The resolutions set out below were unanimously passed. On the opening of the court, on Monday, the 30th, Mr. Attorney-General AKERMAN in appropriate terms announced the melancholy event which had led to them, and laid them before the court, as follows:

"*Resolved*, That the members of the bar of the Supreme Court of the United States have received with profound sensibility the announcement of the death of the late THOMAS EWING, of Ohio, long and eminently distinguished as a jurist and statesman.

"*Resolved*, That we hold in high estimation the memory of the deceased as one of the great men of the country, illustrious for public services in the councils of the nation, and eminence and ability in the profession of the law.

"*Resolved*, That the Attorney-General of the United States be requested to communicate these resolutions to the court, with the request that they may be entered on the record; and, further, that they be communicated to the family of the deceased, with the expression of the sympathies of the meeting."

The CHIEF JUSTICE made the following reply:

"The court share with the bar the sentiments expressed by their resolutions, which will be entered upon the records, in accordance with their request.

"We all feel that whatever honors can be paid to the memory of Mr. EWING are properly paid.

"His is the record of a youth patient of toil and full of aspiration; of a manhood worthily employed in various and honorable public trusts, and in forensic labors, which gave as frequent occasion to note the remarkable grasp and vigor of his intellect, and the great variety and extent of his attainments; of a protracted and serene old age, and of a calm and peaceful death, surrounded by children worthy of their father.

"To family and friends, the death of a relative and friend, so honored and beloved, however long deferred, comes always too soon. Counting ourselves as not the least affectionate among the friends of Mr. EWING, we yet find, and doubt not that all near to him in friendship or relationship will ever find, consolation in reflecting upon the brightness of the example he has left for the imitation of his countrymen."

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERMS, 1870, 1871.

PROPERTY OF UNITED STATES SENATE LIBRARY.

THE COLLECTOR *v.* HUBBARD.

1. A promise on the part of a collector of taxes to repay a tax illegally collected and paid only under protest cannot be implied where statute makes it the duty of such officer to pay into the public treasury without any deduction on account of claims of any description the gross amount that he receives.
2. The 19th section of the act of July 13th, 1866, which enacts that no suit shall be maintained in *any* court to recover a tax illegally assessed, except on certain conditions stated in the section, operates on all suits brought subsequently to the time fixed by the act for it to take effect, and on suits brought in State courts as well as in Federal.
3. Prior acts giving persons a right to sue, without similar conditions, did not confer on them any such vested right so to sue, in regard to transactions which occurred before the passage of the act of 1866, as that they still could sue irrespective of the conditions after the time when this act by its terms was to take effect.
4. Nor had such persons, in such a case as is mentioned in the first paragraph above, any vested right to sue independently of statute.
5. The 117th section of the Internal Revenue Act of 1864, which required a stockholder in companies mentioned in the section, to return as income all gains and profits in them to which he should be *entitled*, whether the same were "divided or *otherwise*," embraces not only dividends declared, but profits not divided and invested partly in real estate, machinery, and raw material, and partly applied to the payment of debts incurred in previous years.

ERROR to the Supreme Court of Connecticut; the case being thus:

The 117th section of the Internal Revenue Act of June 30th, 1864,* which laid what was known as the income tax,

* 13 Stat. at Large, 281.

after providing for the collection of an income tax from certain classes of companies specified, and enacting that "in estimating the annual gains, profits, or income of any person," revenue from such and such sources "shall be included and assessed as part of the income of such person," proceeds:

"And the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in this section, shall be included in estimating the annual gains, profits, or income of any person *entitled* to the same, *whether divided or otherwise.*"

With this enactment in force, one Hubbard owned, A.D. 1864, certain shares in two manufacturing companies (being companies other than those previously specified in the section), which in that year made large profits and made dividends of part of them, though not of the whole of them. The excess was not divided, nor had it been in any way set apart from the general assets of the respective corporations, or appropriated for the use of the stockholders, otherwise than as the law would imply from the existence of them. On the contrary, it was part of the case as settled and admitted by the parties:

"That from time to time during said year, and without any intention to defraud the government, unless the investment hereinafter named constituted such fraud by implication of law, said corporations invested said profits in part in real estate, machinery, and raw material, proper for carrying on their business, and *in part for the payment of debts incurred in previous years*, and the same remained so invested in 1865."

Hubbard, when making in the year just named his return of income for the preceding year, returned as part of his income the dividends which had been made on his stock, but would not return the undivided profits. The assessor insisted on his returning his proportion of these also, settling the proportion by a reference to the number of shares which

he held in the company compared with the whole number into which its capital stock was divided. Under compulsion from the assessor he then did make such return, and under like compulsion did pay, on the 19th August, 1865, the tax accordingly, protesting in due form against the collection. The assessor had given Hubbard due notice of where appeals from the assessment would be held, but Hubbard did not make any appeal, either to the assessor or to the Commissioner of Internal Revenue, according to the provisions of law in that regard, which allowed him to do so, though it did not make his having done so a condition of his bringing suit. On the contrary, relying on his simple payment under protest he brought suit in the Circuit Court of the United States to recover the tax. It was not denied that at the time when he brought that action such a suit could be maintained to recover such a tax illegally paid under protest though no such appeal had been made. However, after Hubbard had thus brought his suit in the Circuit Court, Congress, on the 13th July, 1866, passed an act* whose 19th section was thus:

"That no suit shall be maintained in *any* court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner shall be had thereon, unless such suit shall be brought within six months from the time of said decision, or within six months from the time this act takes effect," &c.

The suit was called for trial in June, 1867, and in consequence of this enactment and the admitted want of appeal to the commissioner, the Circuit Court dismissed the case.

The plaintiff then, on the 9th of August, 1867, sued the collector in *indebitatus assumpsit* in one of the State courts of Connecticut, a case as above stated being agreed on, and it

* 14 Stat. at Large, 152.

being further admitted that the collector had, prior to the bringing of the suit, paid over to the Treasury of the United States the whole amount of the tax collected; a payment over which was made in pursuance of the act of Congress of March 3d, 1865,* by which collectors were required to pay daily into the treasury the gross amount of all duties, taxes, and revenue received or collected in virtue of the internal revenue acts, without any abatement or deduction on account of compensation, &c., or claims of any description whatever; the act, however, or other acts containing provisions authorizing a person from whom a tax has been collected to sue the collector for its recovery, and provisions for repayment by the treasurer to the collector of whatever should be thus recovered against him.

In the suit in the State court, the collector set up the fact of his payment over, and more particularly the act of 1866 as a bar to the suit; maintaining, also, as a second ground, that if the suit was not thus barred the tax had been rightly assessed and levied.

The court in which this second suit was brought gave judgment for the plaintiff, and on error to the Supreme Court that judgment was affirmed. The case was now brought here under the 25th section of the Judiciary Act. The questions being:

I. Did the act of Congress of 1866 incapacitate Hubbard from bringing the second suit?

II. If not, were the undivided profits, applied as they had been, "income" within the meaning of the act of 1864?

Mr. C. E. Perkins, in support of the judgment below:

I. The fact of payment over is plainly no bar to our suit, Congress authorizing suits against collectors to recover taxes illegally paid, and making abundant provision for repayment to the collector if judgment go against him.

Neither is the act of 1866, requiring a previous appeal to the commissioner, a bar.

* 13 Stat. at Large, 488.

Argument for the stockholder.

1. The act was prospective only. It was not intended to affect the rights of parties already vested. Courts refuse to give statutes a retroactive construction, unless the intention is so clear and positive as by no possibility to admit of any other construction.* It would be grossly unjust to us to apply this rule. At the time when the act was passed we had a suit pending in the Circuit Court. It was not reached for trial till June, 1867, more than six months after the act took effect. The court then dismissed the case because the act took away its jurisdiction, and we were deprived of any redress. A construction which would bring about such a result should be avoided.

2. The act only refers to proceedings in courts of the United States.†

3. It is a kind of statute of limitations, and it is set up as a bar to an action in a State court arising at common law. But Congress has no power to pass acts barring such suits. It is only when causes of action arise under laws of the United States that that body can prohibit or limit proceedings in State courts. This case does not so arise. One citizen of Connecticut has here money belonging to another citizen, for which, by the laws of Connecticut, an action of *indebitatus assumpsit* will lie. Congress cannot affect *this* right of action. As soon as the money was illegally collected and paid under duress, a right to recover it *vested* in the plaintiff with which Congress could not interfere.

II. *As to the merits.* The internal revenue enactment says expressly that only the gains and profits to which a stockholder is "entitled" shall be returned. In no possible sense of the word is a stockholder *entitled* as income to moneys spent by the corporation during the year in paying its debts and preparing for its future business. This is a Connecticut corporation, and the question of the right of a

* Plumb *v.* Sawyer, 21 Connecticut, 351; McEwen *v.* Den, 24 Howard, 242.

† Carpenter *v.* Snelling, 97 Massachusetts, 452; Griffin *v.* Ranney, 35 Connecticut, 239.

stockholder to their property should be and is fixed by Connecticut law. In *Phelps* v. *Farmers' Bank*,* the court say:

"The profits of a bank, no matter when made, until separated from the stock by declaring a dividend, are mere increment and augmentation of the stock. They are properly stock themselves, composing a part of the stock of the bank, and will pass with the stock under that name either by contract, bequest, or levy of execution."

The rule is the same in other States.

In *Minot* v. *Paine*,† a Massachusetts case, the court say:

"The net earnings of a railroad corporation remain the property of the company as fully as its other property till the directors declare a dividend. A shareholder *has no title to them* prior to the dividend being declared. . . . The money in the hands of the directors may be income to the corporation, but it is not so to a stockholder till a dividend is made; and where the company invest it in buildings and machinery, or in railroad tracks, depots, rolling stock, or any other permanent improvements for enlarging or carrying on their legitimate business, it never becomes income to the shareholder."

In *Goodwin* v. *Hardy*,‡ a case in Maine, the court say:

"The stockholders have no claim to a dividend until it is declared. Until that time it belongs to the corporation precisely as any other property it may own."

If these cases are good law they are decisive.

Apart from decisions, this is the only reasonable construction. How can a stockholder be *entitled* to money which the corporation has used in paying off its debts? The same principle applies to replacing wornout machinery, buying new, and purchasing raw material to carry on the business.

* 26 Connecticut, 272.

† 99 Massachusetts, 106, 111.

‡ 57 Maine, 143.

Mr. Akerman, Attorney-General, and Mr. Bristow, Solicitor-General, contra:

I. *As to the bar.*

1. The act of 1866 does not act retrospectively in barring this suit, for the suit was not brought until after it was passed.

2. It bars, by its terms, suits in "*any* court," and interpreted in accordance with its purposed meaning it is constitutional.*

3. The plaintiff had no vested right to recover by the principles of the common law the money illegally taken by the collector; for acts of Congress compelled the collector to pay the money immediately to the government. No promise can be implied to refund in such a case. The whole right to sue came by necessary implication from the revenue laws,† and the authority to sue could at any time be qualified or even taken away by Congress, which gave it.

II. *As to the merits.* It was the design of Congress to tax the *undivided* gains and profits made by all corporations, as well as those which are divided among the stockholders. This appears by considering the 117th section of the act of 1864 in connection with the 120th and 122d of the same act. The corporations mentioned in the 120th section are banks, trust companies, and insurance companies, and the tax is thereby made to cover not only "dividends," but also "all undistributed sums, or sums made or added during the year to their surplus or contingent funds." Those mentioned in the 122d section are railroad, canal, turnpike, canal-navigation, and slack-water companies; and the tax is thereby made to cover, not only gains and profits divided, but, in addition, "all profits of such company carried to the account of any fund or used for construction." All other corporations not specified in those sections are covered by the 117th section, which expressly declares that the gains and profits thereof shall be included in estimating the annual gains,

* Cary *v.* Curtis, 3 Howard, 254; Curtis *v.* Fiedler, 2 Black, 461.

† Philadelphia *v.* The Collector, 5 Wallace, 731.

profits, or income of any person entitled to the same, *whether divided or otherwise.*

The purpose is the same in each of these sections, the only difference being in the mode of effectuating it. Where the gains and profits are those made by a corporation specified in either the 120th or the 122d sections, the tax thereon is collected directly from the corporation, whether such gains and profits are divided or not. Where they are the gains and profits made by any corporation included in the 117th section, the tax thereon is collected directly from the stockholders, or persons entitled thereto, whether the same are divided or otherwise. In all cases the entire annual gains and profits of every corporation, divided or undivided, seem to be within the aim and purview of the statute as objects of taxation.

The decisions cited on the other side, if pertinent at all to the question of an income tax, which they are not, are not strong enough to control an enactment which includes "all gains and profits," "whether divided or *otherwise;*" that is to say, whether divided or undivided.

Mr. Justice CLIFFORD delivered the opinion of the court.

Suits to recover back moneys illegally exacted as internal revenue duties cannot, under existing laws, be commenced in the Circuit Courts, except in cases where the taxpayer and the defendant, whether the assessor or collector, are citizens of different States. * Such suits under any other circumstances must be commenced in the State courts, as the Circuit Courts have no jurisdiction to hear and determine the same, except when they are removed from a State court into the Circuit Court for the same district, on motion of the defendant.† Where the parties are citizens of the same State the action must be brought in the State court, but the defendant, if he sees fit, and seasonably takes the proper steps, may remove the case into the Circuit Court for trial.‡

* Philadelphia *v.* The Collector, 5 Wallace, 728.

† Hornthall *v.* The Collector, 9 Id. 564.

‡ The Assessor *v.* Osbornes, Ib. 572.

Both parties in this case were citizens of the same State, and the action was accordingly commenced by the plaintiff in the State court, and the collector, as the defendant, not having taken any steps to remove the suit into the Circuit Court, the same was heard and determined in the State court in which it was commenced.

Taxes were assessed against the plaintiff, under the internal revenue laws, in the sum of one thousand five hundred and ninety-seven dollars, and the findings of the court show that the assessor duly returned his assessment list to the collector; that the collector demanded of the plaintiff the amount of the tax assessed, and that he threatened if the plaintiff refused to pay the same that he would coerce the collection of the whole amount; that the assessor gave due notice to the plaintiff when and where appeals from the assessment would be heard, but that the plaintiff did not appeal from the same, either to the assessor or to the Commissioner of Internal Revenue, and that he paid the whole amount of the assessment under protest.

Pursuant to the practice in that jurisdiction, the Superior Court reserved the questions of law arising upon the facts found, and the question what judgment ought to be rendered in the case, for the opinion and advice of the Supreme Court of Errors, and the record shows that the Supreme Court of Errors advised the Superior Court to render judgment for the plaintiff, as exhibited in the transcript of the record removed here by the writ of error for re-examination.

1. Remarks respecting the jurisdiction of the court to re-examine the judgment rendered by the State court may well be omitted, as the claim of the plaintiff as set forth in the declaration necessarily draws in question the acts of Congress imposing internal revenue duties and the authority exercised by the defendant in collecting the same, and the decision of the State court was against the validity of both, if the acts of Congress be construed as authorizing the assessment and collection of the duties.

2. Tried as the case was by the judge of the Superior Court, as a substitute for a jury, the Supreme Court of

Errors was bound to take the facts as found by that court, and this court in re-examining the judgment must proceed upon the same basis, as the finding of facts is made a part of the record.*

By the finding, it appears that at the time of the assessment the plaintiff owned a majority of the stock in two certain manufacturing corporations, whose affairs respectively were managed by three or more directors, of which the plaintiff was one; that the profits realized by the respective companies the year preceding the assessment was greater than the dividends which they made within the same period; that the profits at the time of the assessment had not been divided nor had they been in any way set apart from the general assets of the respective corporations, nor had they been appropriated for the use of the stockholders, otherwise than the law will imply from the fact of the existence of such profits; that the profits made by the respective corporations during that year were to such an amount that if the interest of the plaintiff therein was legally subject to the assessment the amount assessed and collected was the proper amount; that the plaintiff delivered, under oath, his list to the assistant assessor on the day of its date, omitting the amount now in controversy from the list; that the assessor required him to add the same to the list, which he declined to do, and that the same was then added to the list by the assessor; and the court also found that the assessment was legally made, if such profits were in law liable to such an assessment.

3. Such an amount of profits was made by the two corporations during that year that if the interest of the plaintiff therein was legally subject to any assessment it is conceded that the amount assessed and collected was correct, but the proposition is that the interest of the plaintiff in such profits was not legally subject to any such assessment, as it appears that the corporations invested the profits in part in real estate, machinery, and raw material proper for carrying on their

* Tancred v. Christy, 12 Meeson & Welsby, 323.

business, and in part for the payment of debts incurred in previous years, and that the same remained so invested at the time the duties were assessed and collected. Part only of the profits of that year was so invested, and it was that part of the same which was not included in the dividends of the year, and which the plaintiff refused to add to the list he delivered to the assistant assessor, and which is now the subject of controversy.

4. Intention to defraud the government is not imputed, either to the corporations or to the plaintiff, unless the investment, in view of the circumstances, and the refusal of the plaintiff to add the proportional amount of the same to his list of annual gains and profits, constitute such fraud by implication of law; but the defendant contends that the plaintiff was required by law to pay the regular income tax on such proportion of the entire net profits made by the two companies as his stock bore to the whole stock of the corporations.

Apart from the defence to the merits of the claim, that the tax was lawfully assessed and collected, the defendant also set up in his notice of special matters to be given in evidence under the general issue that he paid over the amount to the Treasury of the United States before the suit was brought, and that the suit was barred by the nineteenth section of the act of Congress, entitled an act to reduce internal taxation, which provides, among other things, that no suit except under certain conditions not existing in the case before the court, shall be maintained *in any court* for the recovery of any tax alleged to have been erroneously or illegally assessed or collected until appeal shall have been duly made to the Commissioner of Internal Revenue, and a decision shall be had thereon, except in certain cases not material to be noticed in this investigation, as the case, if affected at all by the provision, falls within the rule and not within either of the exceptions.*

5. Payment of the amount into the public treasury before

* 14 Stat. at Large, 152; Braun *v.* Sauerwein, 10 Wallace, 218.

the suit was brought would be a good defence to the action if the right of the plaintiff depended solely upon an implied promise at common law, as the payment was made in pursuance of the requirement of an act of Congress, and the rule is well settled that the law will not imply a promise by a public officer to pay money in his hands as such officer twice, nor to pay it to a private party in a case where the law requires him to pay it into the public treasury, and he has complied with that requirement.* *Indebitatus assumpsit* is founded upon what the law terms an implied promise on the part of the defendant to pay what in good conscience he is bound to pay to the plaintiff. Where the case shows that it is the duty of the defendant to pay, the law imputes to him a promise to fulfil that obligation. Such a promise to pay, however, will never be implied unless some duty creates such an obligation, nor will the law ever imply a promise to do an act contrary to law or in violation of a public duty.† Collectors of internal revenue, as well as collectors of import duties, are required to pay all moneys by them collected into the Treasury of the United States, and where such moneys have been collected and the payment has been made into the treasury as required by the act of Congress, the law, in the absence of any other statutory regulations upon the subject, would not imply any promise on the part of the collector to pay back the amount to the taxpayer, even if it appeared that the assessment was erroneous or illegal, as he could not, in such a case, be under any obligation to pay the money twice, and to have paid it back to the taxpayer in the first place would have been contrary to his official duty as prescribed by an act of Congress. But the right of the plaintiff to recover in such a case, if the tax is illegal and he is not otherwise in fault, does not depend alone upon an implied promise as at common law, as the same act of Congress which requires the collector to collect the tax and pay the money into the public treasury, contains

* 13 Stat. at Large, 236; 13 Id. 485; Cary *v.* Curtis, 3 Howard, 250.

† Curtis *v.* Fiedler, 2 Black, 478.

other provisions from which the implication necessarily arises that the taxpayer in such a case, if the tax is illegal, may maintain an action against the collector to recover back the amount. Much examination of that question, however, is unnecessary at this time, as the rule upon the subject is definitely settled by prior decisions of this court.*

Such a defence, therefore, cannot avail the defendant in this cause, as the right of action, though in form an action of assumpsit, is grounded upon the act of Congress providing for the assessment and collection of taxes, which will sufficiently appear from a single suggestion. None of the internal revenue acts contemplate that the collectors shall reimburse themselves for the amount of any judgment recovered against them on account of duties illegally or erroneously assessed and collected. On the contrary, the act of Congress expressly provides that the Commissioner of Internal Revenue shall repay to collectors or deputy collectors the full amount of such sums of money as shall or may be recovered against them in any court for any internal duties or licenses collected by them, with the costs and expenses of suit.†

6. Prior to the passage of the act of the 13th of July, 1866, it is quite clear that the taxpayer, if he was illegally assessed, might maintain an action of assumpsit against a collector to recover back the amount, if he paid it under protest, although he had not taken any appeal to the Commissioner of Internal Revenue.‡ Such were the views of this court in the case of *Philadelphia* v. *The Collector*,§ and no doubt is entertained that the decision was entirely correct, but it is a great mistake to suppose that the right to maintain the action, as there conceded, was founded in the theory that the collector held money in his hands belonging to the plaintiff which he was bound to refund, as the

* Philadelphia *v.* Collector, 5 Wallace, 731; Curtis *v.* Fiedler, 2 Black, 479; 13 Stat. at Large, 236, 239.

† 13 Stat. at Large, 239.

‡ Philadelphia *v.* Collector, 5 Wallace, 730; 14 Stat. at Large, 152.

§ 5 Wallace, 730.

decision was placed expressly upon the ground that the several provisions in the internal revenue acts, before referred to, warranted the conclusion as a necessary implication that Congress intended to give the taxpayer such remedy.

Remedies of the kind, given by Congress, may be changed or modified, or they may be withdrawn altogether at the pleasure of the law-maker, as the taxpayer cannot have any vested right in the remedy granted by Congress for the correction of an error in taxation.*

Suits for such causes of action are absolutely prohibited until the taxpayer shall appeal to the Commissioner of Internal Revenue, and until the appeal has been decided, unless the decision is postponed longer than six months, in which case he is at liberty to sue within one year from the time when his appeal was taken.†

Three answers are made by the plaintiff to that defence, as presented in the record: (1.) He contends that the provision is prospective, and that Congress did not intend that it should retroact so as to affect a vested right. (2.) That the act of Congress in question, even if it is a bar to such a suit in a Federal court, is inoperative, as such, in a State court. (3.) That the money paid for the taxes, inasmuch as it was paid under protest, must be considered as money in the hands of the defendant belonging to the plaintiff, and that the plaintiff in that view of the case has a vested right at common law to his remedy to recover it back.

Pending suits, it may be conceded, are not affected by that provision, but it is impossible to say that any suit subsequently commenced for such a cause of action is not embraced within its scope and meaning, as the language is, "No suit shall be maintained *in any court* for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue," &c., as more fully set forth in the section. Authority was vested in the commis-

* Curtis *v.* Fiedler, 2 Black, 479.

† Nichols *v.* United States, 7 Wallace, 130; Braun *v.* Sauerwein, 10 Id. 218.

sioner by the prior act to remit, refund, and pay back, "*on appeal to him made*," all duties erroneously or illegally assessed or collected, and all duties that appeared to be unjustly assessed or excessive in amount.*

Appeals were permitted by that act, though not required as a condition to a right of action, but inasmuch as the right of appeal and the right of action were conferred by the same act, the court is of the opinion that it was entirely competent for Congress to add new conditions to the exercise of that right whenever in its discretion the public interest might require such additional regulation. Unless the meaning of the section can be restrained by construction it is quite clear that it includes the State courts as well as the Federal courts, as the language is that no suit shall be maintained *in any court* to recover any tax alleged to have been erroneously or illegally assessed or collected, and there is not a word in the section tending to show that the words "in any court" are not used in their ordinary sense. Unquestionably if the provision is a good bar in the Federal courts, it is a good bar in all courts acting under the same act of Congress, and furnishes the rule of decision for all.†

Special reference is made to the fact that a prior suit was commenced by the plaintiff, which was pending in the Circuit Court at the time the act was passed taking away the original jurisdiction of the Circuit Courts in all such cases, except where the parties are citizens of different States, but the only answer which need be made to that suggestion is that the present suit is wholly unaffected by that circumstance.

Regulations exist in some of the States that where the first suit is abated and a second suit is brought within a prescribed time the statute of limitations shall cease to run from the date of the first suit, but Congress has not passed any law to that effect, and it is conceded that none such exists in the State where the suit was commenced.

Sufficient has already been remarked to show that the

* 13 Stat. at Large, 239.

† Cary *v.* Curtis, 3 Howard, 254.

third proposition of the plaintiff cannot be sustained, as a party cannot have any vested right in a remedy conferred by an act of Congress to prevent Congress from modifying it or adding new conditions to its exercise.

7. Suppose, however, that the rule is otherwise, that the provision in question is not a bar to the present suit, still the court is of the opinion that the addition made to the list rendered by the plaintiff was proper, that the tax was lawfully assessed, and that the plaintiff is not entitled to recover in this case.

Assessed as the duties in this case were under the act of the thirtieth of June, 1864, attention will be called chiefly to the provisions of that act. Congress evidently intended by that act, as appears by the one hundred and sixteenth, and the six following sections, to tax all the annual gains, profits, and income of every person residing here, and of every citizen residing abroad, whether derived from any kind of property, rents, interests, dividends, salaries, or from any profession, trade, employment, or vocation, or from any other source whatever, except as therein mentioned, if such annual gains, profits, or income exceed six hundred dollars. Section one hundred and seventeen declares what shall be included in estimating the annual gains, profits, or income of any person, and, among other things, expressly provides that the gains and profits of all companies, whether incorporated or partnership, other than the companies specified in that section, shall be included in estimating the annual gains, profits, or income of any person, entitled to the same, *whether divided or otherwise.**

Manufacturing companies are not mentioned in that section, and of course they fall within that clause of the section which in terms applies to all companies, whether incorporated or partnership, not specified in that section. Lists or returns of the amount of income are required by section one hundred and eighteen, and section one hundred and nineteen prescribes the time of payment and defines the penalty in case of neglect and refusal.

* 13 Stat. at Large, 282.

Support to the view that the list of an individual should include undivided as well as divided profits is derived from the requirements of the one hundred and twentieth section, which levies a duty of five per centum on all dividends in scrip or money thereafter declared due, whenever the same shall be payable to stockholders, policy-holders, or depositors, as part of the earnings, income, or gains of certain described companies, not including manufacturing companies, and on all undistributed sums, or sums made or added during the year, to their surplus or contingent funds. Strong confirmation of that view is also derived from section one hundred and twenty-one of the same act, which requires banks of circulation, if they neglect to make dividends, or additions to their surplus or contingent fund, as often as once in six months, to make a list or return in duplicate of the amount of profits which have accrued or been earned within that period, and to present the list or return to the collector of the district and pay to him five per cent. on such profits.*

Substantially the same requirement is made of every railroad, canal, turnpike, canal-navigation and slack-water company, and the provision is that all profits of such a company carried to the account of any fund or used for construction shall be subject to and pay a duty of five per centum on the amount of all such profits.† Other references to the same effect might be made, but it is believed that these are sufficient to show that the policy of Congress in that act was to tax all gains and profits, whether divided or undivided, and that the construction that the undivided gains and profits of manufacturing companies are properly included in that rule is just and reasonable.

Decided cases are referred to,‡ in which it is held that a stockholder has no title for certain purposes to the earnings, net or otherwise, of a railroad prior to the dividend being

* 13 Stat. at Large, 284. † 13 Id. 284, § 122.

‡ Minot v. Paine, 99 Massachusetts, 106; Goodwin v. Hardy, 57 Maine, 145.

declared, and it cannot be doubted that those decisions are correct as applied to the respective subject-matters involved in the controversies. Grant all that, still it is true that the owner of a share of stock in a corporation holds the share with all its incidents, and that among those incidents is the right to receive all future dividends, that is, his proportional share of all profits not then divided. Profits are incident to the share to which the owner at once becomes entitled provided he remains a member of the corporation until a dividend is made.* Regarded as an incident to the shares, undivided profits are property of the shareholder, and as such are the proper subject of sale, gift, or devise. Undivided profits invested in real estate, machinery, or raw material for the purpose of being manufactured are investments in which the stockholders are interested, and when such profits are actually appropriated to the payment of the debts of the corporation they serve to increase the market value of the shares, whether held by the original subscribers or by assignees. But the decisive answer to the proposition is that Congress possesses the power to lay and collect taxes, duties, imposts, and excises, and it is as competent for Congress to tax annual gains and profits before they are divided among the holders of the stock as afterwards, and it is clear that Congress did direct that all such gains and profits, whether *divided or otherwise*, should be included in estimating the annual gains, profits, or income liable to taxation under the provisions of that act. Annual gains and profits, whether divided or not, are property, and, therefore, are taxable.

JUDGMENT REVERSED with costs and the cause remanded for further proceedings

IN CONFORMITY TO THE OPINION OF THIS COURT.

* March v. Railroad, 43 New Hampshire, 520.

STURGES *v.* THE COLLECTOR.

Under the 6th section of the act of March 3d, 1865, which enacts that "there shall be hereafter collected and paid on *all* goods, wares, and merchandise, of the growth or produce of countries east of the Cape of Good Hope (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine), when imported from places west of the Cape of Good Hope, a duty of *ten per centum ad valorem, in addition* to the duties imposed on any such article when imported directly from the place or places of their growth or production," a duty of ten per cent. is chargeable on such goods, &c., when imported from places west of the Cape, though the same goods be freed from duty, when imported from the place of their growth or production, east.

ERROR to the Circuit Court for the District of New York.

This was an action brought in the court below against the collector of the port of New York, to recover a sum exacted as a ten per cent. *ad valorem* duty upon a quantity of indigo, the product of a country east of the Cape of Good Hope, and which had been imported into New York, on the 7th of July, 1865, from England.

Whether the right to lay the duty did or did not exist, depended on the construction of the 6th section of an act of Congress of March 3d, 1865,* relating to the importations of goods from places west of the Cape of Good Hope, in cases where the goods were the products of places east of it. It was not denied, apparently, that if the indigo had been imported directly from the place of its growth, the duty would not have been payable. The difficulty was under the act just mentioned and in regard to an importation not direct, but from England, a place west.

This act of March 3d, 1865, already referred to, as in force when this particular cargo was imported, had been preceded by other acts on the same subject, and by some judicial construction on one of them. That history was thus:

By section 14 of the act of July 14th, 1862, entitled an

* 13 Stat. at Large, 493. See the act *infra*, p. 22.

act "*increasing* temporarily the duties on imports and for other purposes,"* it was enacted, that:

"There shall be levied, collected, and paid on ALL goods, wares, and merchandise, of the growth or produce of countries beyond the Cape of Good Hope, when imported from places *this side* of the Cape of Good Hope, a duty of ten per cent. *ad valorem*, AND in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

In the official edition of the statutes the word "and" just above printed in large capitals, was printed in italics; a form of printing which indicated that the compiler of the edition supposed it an accidental insertion, and superfluous. An act subsequent to that above-quoted act, namely, of March 3d, 1863,† enacted that the above-quoted section should be so modified as

"To allow cotton, and raw silk as reeled from the cocoon, of the growth or produce of countries beyond the Cape of Good Hope, to be exempt from any *additional* duty when imported from places this side of the Cape of Good Hope, for two years from and after the passage of this act."

These two articles were exempt from duty at the time of the passage of the above-quoted act of 1862.

Soon after the passage of the act of 1862, but before the act of 1863, modifying it, one Hadden, imported into New York from England, a quantity of raw silk, the product of Persia, and which it was admitted but for the act of 1862 would have been free from duty. A duty of ten per cent. being exacted and paid under protest, Hadden brought suit in the Circuit Court for New York, against the collector, to recover what he had paid; his idea in bringing suit to recover the duty paid on the silks, being that:

1st. That the expression in the act of 1862, "AND IN ADDITION to the duties imposed on such articles when imported

* 12 Stat. at Large, 557. † Ib. 742.

directly from the place or places of their growth or importation," laid the ten per cent. only in cases where the product was already subject to some prior duty, large or small.

2d. That by the words "*this side of the Cape*," goods imported into the Atlantic ports were within the terms and chargeable with duty, while goods imported into the Pacific ports were not within them, and not chargeable, and so that the clause of the Constitution, which requires all duties to be uniform throughout the United States, was contravened; and the enactment itself, of course, void.

The Circuit Court, admitting that previous sections of the act did undoubtedly lend some countenance to the importer's argument that the duty was laid only where a prior duty existed, and that the 14th section itself was obscure, still considered, on the whole statute, that the silks were meant to be charged with the ten per cent. *ad valorem*, and that as the expression "*this side* of the Cape," was only another form of saying "places *west* of the Cape," that judgment was to be given for the United States. It was so given accordingly. That judgment was affirmed in this court on error;* the Supreme Court adverting to the act of 1863, modifying that of 1862, as showing that the understanding of Congress was that the ten *per cent.* was imposed as an additional duty, though in fact raw silk, as already stated, was at the time exempt.

In June, 1864, seven months after the decision just mentioned of Hadden's case, on the circuit, Congress repealed section 14th of the act of 1862,† and by an act like the former one, entitled "an act to increase duties on imports," &c., enacted:

"That on and after the day and year this act shall take effect, there shall be levied, collected, and paid on all goods, wares, and merchandise of the growth or produce of countries east of the Cape of Good Hope (except raw cotton), when imported from places *west* of the Cape of Good Hope, a duty of ten per centum *ad valorem, in addition* to the duties imposed on any such articles

* Hadden *v.* The Collector, 5 Wallace, 107. † 13 Stat. at Large, 216.

when imported directly from the place or places of their growth or production."

The reader will observe that the words "this side" of the Cape of Good Hope, in the act of 1862, are changed in the new act to "west" of the Cape, and that the word "and" disappears.

This enactment was in substance (with an extension of the exemption from duty to raw silk in certain condition), re-enacted in section 6th of an act of March 3d, 1865,* under the provisions of which the defendant levied and collected the duties upon the plaintiff's importations. That section enacted:

"That there shall be hereafter collected and paid on all goods, wares, and merchandise of the growth or produce of countries [east] of the Cape of Good Hope (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine), when imported from places west of the Cape of Good Hope, a duty of ten per centum *ad valorem*, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production."

In the present suit, the court below gave judgment for the collector, and the importer brought the case here.

Mr. George Ticknor Curtis, and Mr. A. R. Culver, for the plaintiff in error:

1. The difficulty which existed, as to the proper construction of the 14th section of the act of 1862, was remedied by Congress in June, 1864, by an enactment, as a substitute for the 14th section of the act of 1862, leaving out in the latter act the word "*and*," substituting the word "*east*" for "*beyond*," the words "*west of*" in place of the words "*this side*," and repealing in terms the act of July 14th, 1862. This repeal and substitution took place seven months after the de-

* 13 Stat. at Large, 493.

cision on the circuit, in the case of *Hadden* v. *The Collector*, Congress being at the time aware of the construction which had been put upon the 14th section of the act of 1862, by the courts. Why after this decision in favor of the government, did it thus legislate upon the subject, repeal the act of 1862, enact a new section, and use different language in the latter act, unless for the purpose of showing that the court had misunderstood its former intentions, and of placing them beyond doubt?

2. Laws imposing duties are never construed beyond the natural import of the language used, and duties are never imposed upon the citizen upon *doubtful* interpretations.* If he who could, and ought to have explained himself clearly and fully has not done it, it is the worse for him. This is a maxim of the Roman law.

Mr. Akerman, Attorney-General, Mr. Bristow, Solicitor-General, and Mr. Hill, Assistant Attorney-General, contra:

The interpretation put upon the act of July 14th, 1862, in the Circuit Court in *Hadden* v. *The Collector*, became a part of the statute itself, and if Congress, in subsequent statutes, used the same or substantially the same language, the legal presumption is that it intended that the language should bear the judicial construction previously given to it.† Now there is no essential difference in the language of the acts. The omission in the act of 1864, of the conjunction "and" before the words "in addition to," in the act of 1862, does not indicate an intention to limit the application of this section to articles previously dutiable.

This act of 1862, was substantially re-enacted in the act of 1865, which was in force when these goods were imported, the only difference being that the exception is extended to raw silk.

The object of these duties "in addition," was, of course, to increase the revenue. In distributing the additional bur-

* Adams *v.* Bancroft, 3 Sumner, 387.

† Kirkpatrick *v.* Gibson, 2 Brockenbrough, 388; Commonwealth *v.* Hartnett, 3 Gray, 450.

den thus caused, it would seem proper that those favored articles, which had heretofore been admitted free of duty, should bear some portion of it. If, besides this, it was the purpose of Congress, as it doubtless was, to discriminate against the products of countries east of the Cape of Good Hope, when imported from places west of the Cape, no good reason can be assigned why such discrimination should not apply to articles otherwise exempt from duty as well as to dutiable articles.

Laws imposing duties and taxes are not to be construed strictly against the government, but liberally, so as to effectuate the purpose of the legislature.*

Mr. Justice CLIFFORD delivered the opinion, affirming the judgment.

Moneys paid for import duties, when illegally levied, may be recovered back by the owner, importer, or consignee in an action of assumpsit against the collector by whom the same were exacted, if the payment was made under written protest, as required by law, and the party making the payment failed to obtain redress by appeal seasonably taken to the Secretary of the Treasury.†

Forty-one chests of indigo, the product of India, were, on the seventh of July, 1865, imported by the plaintiffs from London, England, into the port of New York, and the agreed statement shows that the late collector of that port levied and exacted as duties thereon ten per centum *ad valorem;* that the plaintiffs paid the same under written protest, and that the decision of the collector levying the duties, on appeal duly taken to reverse the same, was affirmed by the Treasury Department.

They protested that the assessment was illegal upon the ground that the goods were entitled to be admitted to entry free of duty, and having failed to obtain redress from the Secretary of the Treasury for what they regarded as an ille-

* Cliquot's Champagne, 3 Wallace, 114, 145; United States *v.* Hodson, 10 Id. 395.

† 13 Stat. at Large, 215.

gal exaction, they brought an action of assumpsit against the executors of the late collector to recover back the amount so exacted and paid for the duties.

Process having been issued and served, the defendants appeared and the parties went to trial, but they ultimately submitted the case to the decision of the court upon an agreed statement of facts. Before the case was finally submitted, however, the parties were heard, and the court subsequently rendered judgment for the defendants, and the plaintiffs sued out a writ of error and removed the cause into this court.

Whether the goods imported in this case were dutiable or not depends upon the construction to be given to the sixth section of the act of the third of March, 1865, which provides that there shall be hereafter collected and paid *on all goods, wares, and merchandise*, of the growth or produce of countries east of the Cape of Good Hope (except raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown, or organzine), when imported from places west of the Cape of Good Hope, a duty of *ten per centum ad valorem*, in addition to the duties imposed on any such article when imported directly from the place or places of their growth or production.*

Strike out the last clause, commencing with the words "in addition," and the body of the section would be as clear as any enactment can be that all goods, wares, and merchandise (save the two excepted articles), imported from places west of the Cape of Good Hope, if grown or produced in any country east of the Cape of Good Hope, are by that provision subject to a duty of ten per centum ad valorem.

Argument upon that subject is unnecessary, as the proposition is as plain as anything in legislation can be, but if that clause had been omitted goods imported from London, the growth or production of India, would not have been subject to any higher rate of duty than goods of like kind imported directly here from India, the place of their growth or production, unless the goods were, by antecedent laws, sub-

* 13 Stat. at Large, 493.

jected to a rate of duty higher than that imposed in the section under consideration, which would have defeated wholly or partially both purposes which Congress had in view in enacting the new provision.

Congress desired to raise more revenue from importations consisting of articles grown or produced in countries east of the Cape of Good Hope, and at the same time to preserve and continue the discrimination established by existing laws in favor of importations made directly from the countries where the articles imported were grown or produced.

Had the last clause of the section been omitted the new provision, in any view of the subject, would not have augmented the revenue to any considerable extent, and if construed as repealing the prior laws upon the same subject its effect would have been very largely the other way, and it would have operated as a discrimination against the direct trade and in favor of the importation of such articles from countries west of the Cape of Good Hope, or in other words, it would have reversed the policy of the government by encouraging the indirect instead of the direct trade in the articles of commerce grown or produced in those distant countries. Evidently, therefore, the clause providing that the duty levied by the section was in addition to the duty imposed *on any* such article when imported directly from the place or places of their growth or production was an indispensable provision to carry into effect the purposes intended to be accomplished by the enactment.

All articles of the growth or product of countries east of the Cape of Good Hope, except the two named as exempted, when imported from places west of the Cape are declared to be subject to the rate of duty therein prescribed, and to prevent any misconception as to the intention of Congress and to close the door against any suggestion that the new provision repealed or modified the prior law, it was provided that the new duty was in addition to the duties previously "imposed on any such article" when imported directly from the place or places of their growth or production. Ten per *centum ad valorem* is imposed on all such goods, wares, and

merchandise, except the two articles named as exempted, whether they were or were not subject to duty as articles of direct trade under any antecedent law, if they fell within the conditions specified in the sixth section of the act imposing the duty.

Certain articles of the growth or production of countries east of the Cape of Good Hope were subject to duty, even when imported here directly from the place of their growth or production, while other articles, when so imported, were entitled to be admitted to entry free of duty. Articles of the kind described in the section, not dutiable as articles of the direct trade under any antecedent law, were to pay only the ten per centum ad valorem specified in the section, but all articles previously dutiable as articles of the direct trade, save the two exempted in the body of the section, were to be subject, in case they were imported here as articles of the indirect trade, to a duty of ten per *centum ad valorem* in addition to the duty imposed under any prior law, in case the articles were imported here directly from the place or places of their growth or production. Construed in that way, both of the purposes which Congress had in view were accomplished, as the provision had the effect to augment the revenue, and at the same time to preserve and continue the discrimination created by antecedent laws in favor of the direct trade, which is in accordance with the policy of our external revenue system as exhibited in all our laws upon the subject.

Raw cotton and raw silk as reeled from the cocoon, or not further advanced than tram, thrown or organzine, were exempted from the new duty, or any other, by an exception inserted in the body of the section, and it is a reasonable conclusion that if Congress had intended to exempt any other articles of the growth or production of those countries, the articles would have been enumerated and included in that exception. *Expressio unius est exclusio alterius.*

Such an exception as that inserted in the body of the section was indispensable to exempt any such article from the new duty, as the introductory words of the section include, in express terms, all goods, wares, and merchandise, of the

described character, when imported from places west of the Cape of Good Hope. Unless it can be assumed that the words "all goods, wares, and merchandise" are not used in their ordinary sense, it must be understood that they include all such articles of importation not specifically exempted, as the exception proves the rule, and shows to a demonstration that all such articles, except those two are subject to the prescribed duty, and that the last clause was not superadded to exempt any other articles from the operation of the introductory words of the section, but to prevent the entire provision from being misunderstood and misapplied, so as to defeat one or both of the purposes which Congress had in view in passing the law. Confirmation of this view is derived from the antecedent legislation of Congress upon the same subject.

Duties on imports were temporarily increased by the act of the fourteenth of July, 1862, the fourteenth section of which levied "on all goods, wares, and merchandise of the growth or produce of countries beyond the Cape of Good Hope a duty of ten per cent. ad valorem, *and* in addition to the duties imposed on any such articles when imported directly from the place or places of their growth or production."

Attention need only be called to the last clause of that enactment, as it is not controverted that the legal effect of the body of the section, under which the duties in this case were levied and collected, is substantially the same as the corresponding portion of that provision, but the suggestion is that the last clause in the last act is materially different from that of the former, as it does not contain the word "and" before the words "in addition," as employed in the prior act. Drop the word "and" before the words "in addition," as employed in the former law, and the language of the respective clauses is the same without the variation of a single letter.*

Congress having subsequently repealed that provision, found it necessary at a later period to re-enact it, and in re-

* 12 Stat. at Large, 557; 13 Id. 493.

producing the provision the word "and" before the words "in addition," as employed in the prior law, was dropped evidently because it was a redundant word wholly unnecessary to give expression to the meaning and intention of the law-makers. When the act was transcribed for official publication the word "and" was italicized by the compiler of the acts of Congress as expressive of his opinion that it was a redundant word, as it plainly appears to be to every one acquainted with the revenue laws and the subject-matter to which the particular provision relates.*

Importations of raw silk, soon after the passage of that act, were made from Liverpool, England, into the port of New York, and it was agreed in the statement of the case that the articles imported were the products of Persia and China. Ten per cent. duty was exacted, and the merchant paid the same under protest and brought assumpsit against the collector to recover back the amount paid. He was defeated in the Circuit Court and he removed the cause into this court, where the judgment of the Circuit Court was affirmed by the unanimous opinion of this court. In disposing of the case the court say that the latter clause does not qualify the general language, "on all goods, wares, and merchandise," employed in the body of the section, so as to exclude from it the articles exempted from duty under prior acts of Congress. Instead of that, the court proceeds to say that it only provides that the duty laid by the body of the section "shall be in addition to existing duties on such articles when imported directly from their places of growth or production;" that such articles as already pay a duty when imported directly from those places shall pay a further duty, as therein prescribed, if imported from countries west of the Cape, the object being to increase the duty upon the articles when not imported directly from their places of growth or production.†

Based as that opinion is upon the proposition that the

* 13 Stat. at Large, 216; Ib. 493.

† Hadden *v.* The Collector, 5 Wallace, 112.

latter clause of the section does not qualify the first clause imposing the new duty, it is decisive of the question before the court, as it is clear that the word "and" before the words "in addition" was not regarded as of any importance or as contributing in any degree to that conclusion. On the contrary, the court decided on that occasion, what undoubtedly is correct, that the words "any such articles," in the last clause of the section, "do not mean all the articles embraced in the first clause, but only such of them as were already subject to duty," to which we add, leaving all the rest subject to the new duty imposed by the first clause or the body of the section.

Support to that conclusion was also drawn, in that opinion, from the second section of the act of the third of March, 1863, modifying the fourteenth section of the prior act, and providing that cotton and raw silk, as reeled from the cocoon, of the growth or produce of countries beyond the Cape of Good Hope, should be exempted from any additional duty when imported from places this side of the Cape for two years from and after the passage of the act.*

Unaided by one or two remarks of the circuit judge in disposing of that controversy in the Circuit Court, the defence here would be entirely without support, but it is a sufficient answer to those remarks to say that the decision of the case when removed here by writ of error was not placed upon that ground; that the ground assumed in this court was that the last clause of the section, when properly construed, did not qualify the body of the section in respect to the articles not previously dutiable; that it merely provided that the new duty was an additional one in respect to articles subject to duty under prior laws, leaving all other articles embraced in the first clause or the body of the section subject to the new duty therein prescribed; and the court as now constituted, is clearly of the same opinion.

JUDGMENT AFFIRMED.

* 12 Stat. at Large, 557; Ib. 742.

Statement of the case.

THE MARIA MARTIN.

1. Even flagrant fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision.
2. Damages equally divided in a case of collision on an application of this rule.

APPEAL from the Circuit Court for the District of Wisconsin.

On the night of the 22d of June, 1866, the steam propeller Cleveland, in rounding Bar Point,* at the head of Lake Erie, on her way up the lake to Detroit, made the lights of a tug and tow, descending the Detroit River near its mouth into the lake, at the supposed distance of two miles. They proved to be the lights of the tug McClellan, having in tow the bark Maria Martin, bound down the lake.

At the time when the lights were made by the lookout of the propeller, this last named vessel had just obtained her offing from Bar Point and was put upon her course for Bois Blanc light,† north by east. Her course had been west by north around Bar Point until she brought Bois Blanc light to bear northeast by east, when she at once steered for it. The tug, with the bark in tow, was at this time steering south-southwest. The respective courses were, therefore, one point divergent. The propeller made the red signal-light of the tug and the red signal-light of the bark from a quarter to half a point over her starboard bow. The McClellan made the green light of the propeller one-fourth of a point over her port bow. The night was a bright starlight night, with a light wind from southwest. The propeller was running past the land from six to six and a half miles an hour. The tug and tow were at about the same speed. All three of the vessels had their red and green signal-lights properly displayed, and they were easily distinguishable. At this time another tug, the Muir, with five vessels in tow, was

* On the Canada shore; see diagram at p. 34.

† On the American side; see diagram, p. 24.

slowly ascending the Detroit River a little in advance of the propeller, and at about the same distance from the eastern or Canada shore. The bark was towed by means of a rope paid out from her starboard bow, four feet from the bowsprit, 360 feet, and made fast to a samson post in the deck of the tug, about midships, and some twenty-five feet from the taffrail, over which it of course played, from starboard to larboard, as the tow might sheer on the one hand or the other. As the vessels approached each other, their respective lights closed in until they were running nearly "stem on." At this juncture, and when separated by about half a mile, the tug and bark being pretty well on to the American shore, and the steamer having a fair berth on the Canada side, the tug sounded one sharp whistle, and in thirty seconds repeated the whistle as a signal to the propeller that she wished her to pass on her port side. The propeller responded with one blast of the whistle, and ported her helm and displayed to the tug her red signal-light. The tug ported her own helm when she turned half a point and became steady on her course. The propeller ran past the tug, port side to port side, with, however, only a narrow berth between ships, when at the instant in which her stem had passed the stern of the tug, the bark collided with the propeller on her port side; the port bow of the bark striking the port bow of the steamer, and the steamer sinking in ten minutes after the blow. The point of collision was about a mile and a half below Bois Blanc light; a point at which tugs usually prepare to cast off their tows, and the tows get ready to enter the lake, and in this case apparently when abreast the light, the bark had commenced making sail preparatory to hauling in her line and steering her course down the lake.

In consequence of the catastrophe the owners of the propeller libelled the bark in the District Court for Wisconsin. It was not asserted that the tug had been guilty of any fault; the main matter relied on in support of the libel being that the bark had not followed the tug, but had made a sudden sheer. Whether she had made such a sheer or not was a

principal point of fact in the case, and one about which much conflicting evidence was given. Numerous persons who had been on her swore that she followed straight after the tug, but not less numerous ones who had been on the propeller swore that at the instant when *her* stern had passed the stern of the tug the bark shut in her red light and showed her green light to the propeller; a fact which, if true, would show that she had left her line of direction and shot off at nearly right angles with the course of the tug.* It seemed to be in proof that the bark, though a well-steering vessel, had not steered well after the tug through the night; and the allegation of the steamer was that the bark having begun to make sail preparatory to steering down the lake, had misunderstood the whistle sounded by the tug, a theory which the evidence of the mate supported. But whether she had made any *such* sheer as would have made this accident unavoidable, if the steamer had not been first guilty of the greatest faults, was another question; and whether, if she had made such a sheer, the steamer had not been the cause of her doing so, was yet a third one.

The reader thus sees that the case involved two points:

First. One of mere fact, dependent on conflicting testimony, which it would not be at all worth while to report, whether there was a sheer but for which the catastrophe would not have occurred.

Second. A point of law, whether, if so, it was in view of the propeller's previous conduct, a fault.

The District Court, taking one view of the evidence, considered, apparently, that the alleged sheer was nothing more than the bark's keeping on her course before she had time to swing round and follow the tug, a matter which that court considered would, to those on the steamer, look just like a sheer.

That court held, therefore, that the propeller was alone to blame, and it dismissed the libel.†

* The theory of the libellants is illustrated in their diagram on p. 34.

† The view of the District Court, which was that pressed by the respondents, is illustrated by their diagram on p. 35.

Diagram illustrating the libellant's general view.

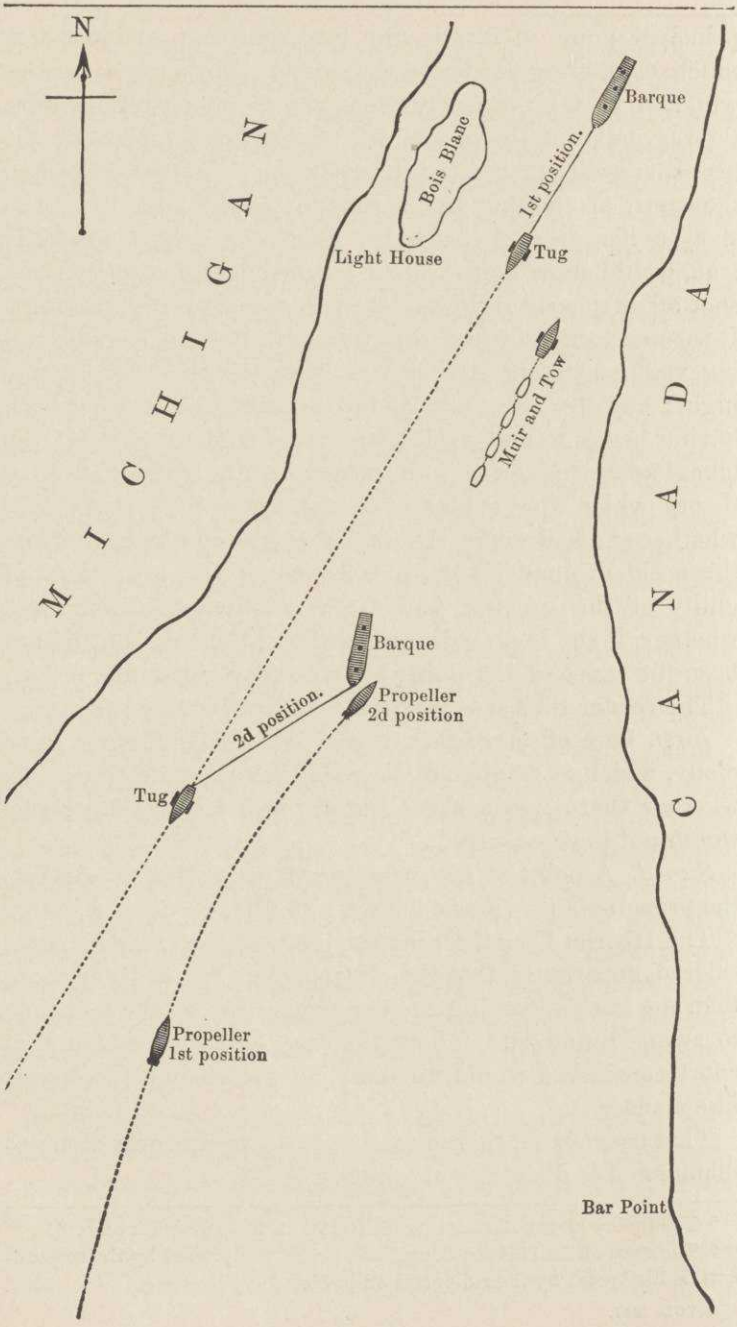
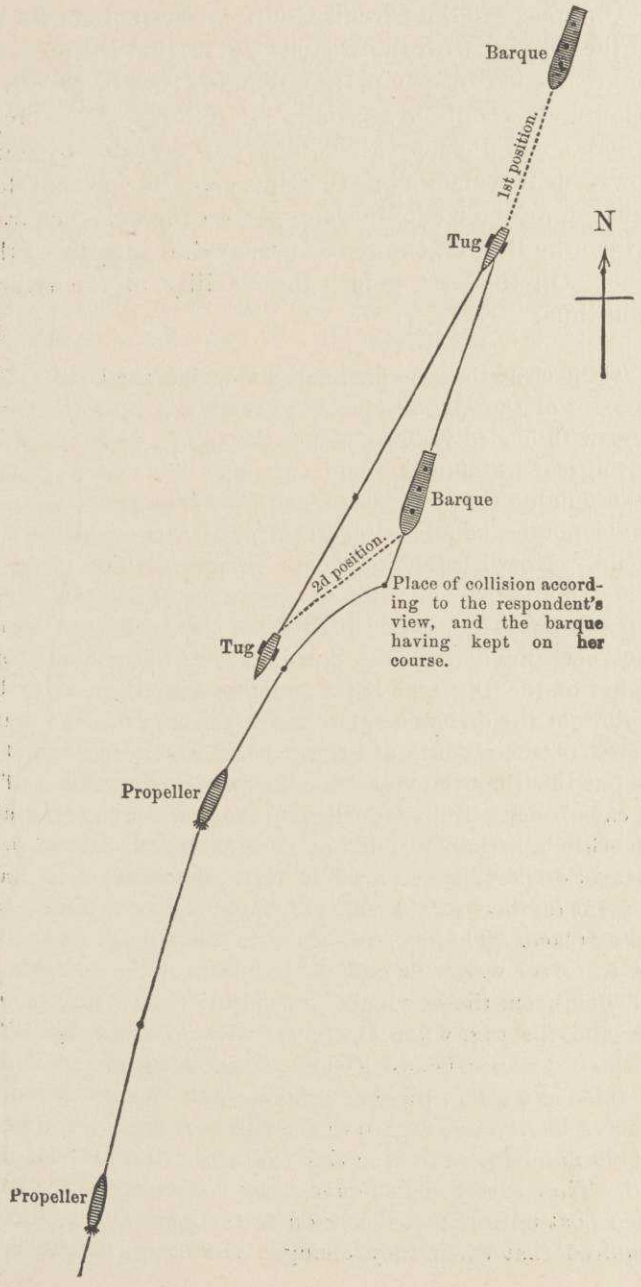


Diagram illustrating the respondent's general view.



On appeal to the Circuit Court, while that court was fully of the opinion with the District Court, that the propeller was in great fault in driving at a reckless rate in narrow water, where vessels in tow usually cut off from their tugs, and where a small channel is liable to be crowded by numerous tows—as this channel at this time actually was crowded—yet making a somewhat different case on the evidence from that which the District Court had assumed, it inculpated the bark also. On the first point—the liability of the steamer—it said thus:

"It is clear that the libellants knew that the Detroit River, on account of the magnitude of its commerce, and the number of tugs with loaded vessels passing through it, had to be navigated with great watchfulness and care, and that the tug and bark whose lights they had made, as they were descending the river, could not be handled, in case of peril, as well as the propeller could. Notwithstanding these things, we find these officers managing their boat without regard to the dangers of navigating this river, and exercising no more watchfulness than if they had been navigating the open lake. Although they saw the lights of the tug and bark, and pronounced them to be very bright, at the distance of two miles, yet they did not change the course of their boat until the tug had signalled them to do it, and at this time the vessels had approached within half a mile of each other. But even then, by the practice of reasonable seamanship, all trouble could have been avoided. If the propeller, instead of porting half a point, or three-fourths even, had gone a point further to the eastward, the collision could not have taken place. There was nothing in the way of her doing this, for the river was wide enough, and there were no lights closing on them from the east. To put only one hundred feet between her and the tug, when she could, with safety to herself, put a greater distance between them, considering the circumstances of this navigation, was bad seamanship. Watchful and careful officers, having due regard to the rights of persons and property, would not have taken the risk that the officers of the propeller did. They surely risked enough by not changing the course of their boat until she was close on to the tug. Common vigilance required that when they changed the course of the propeller

they should have made a more decided change. But these officers, besides not going further to the eastward, were in fault in not checking the speed of their boat. They should not have entered a narrow river where in the night there is always more or less danger of collision, without materially slackening the speed at which they had been running. And this was only the more incumbent on them, because, at so short a distance from the tug and bark, they should, as careful seamen, have apprehended the possibility of danger."

On the second point—the liability of the bark after examining the evidence—the Circuit Court said thus:

"It is plain, notwithstanding the faults of the propeller, that this disaster would not have occurred had the bark followed, as she was required to do, the course of the tug. That she did not follow after the tug, but when the propeller was abreast of the tug, sheered to the port of the tug, shutting out from the propeller her red light, and showing only her green light, and continued on in this course until she struck the propeller on her port side, as she was swinging to starboard, is a fact clearly established by the weight of the evidence. . . . I agree that it is not easy to reconcile the sheering of the bark, with the testimony of those on board of her, but we are more concerned to know that the sheering *did* occur, than to show *how* it occurred. . . . The conduct of the bark was the result of either mistaken orders or careless management. We have the testimony of the mate that an important signal was mistaken, and it is not at all unlikely that the error in management commenced with this mistake. It is in proof, that the bark through the night did not steer after the tug, and as she was a good steering vessel, the inference is plain, that there was a want of proper observation on the part of those who had her in charge. The approach of the propeller was not regarded by her, because the officers of the deck understood the signal of the tug for casting off line, instead of an approaching vessel. If a vessel is in tow, she is not therefore excused from keeping close watch, and observing and obeying all signals. The duty of watchfulness was the greater, because the river was full of boats, and light as the night was, there was more necessity for it, than if it had been daylight, but this duty does not seem to have been appreciated by the officers of the bark. When the bark made the sudden

sheer to port, the propeller not being required to anticipate it, did all she could under the circumstances, put her wheel hard a port.

"*It follows from what has been said,* that a decree should be entered, dividing the loss."

The case was now here on appeal by the *owners of the bark.* The owners of the steamer did not appeal, being content to pay half the loss; and they seeking simply an affirmance of the decree of the Circuit Court.

Mr. George B. Hibbard, for the appellant:

I. Collated the evidence with skill, to show

1. That in point of fact there was no sheer, but that the tug's running off to starboard upon a line divergent half a point, while the bark sagged down the stream, caused the same appearance which the vessels would have presented had the tug kept her course and the bark sheered, and that this most natural ocular deception caused such of the witnesses as swore innocently that the bark sheered, to make that mistake; and that this running to starboard of the tug, and sagging down stream of the heavily laden bark, with her deep draught of water, unable as she was to obey her port helm as quickly as did the tug, caused the collision to happen in the precise manner in which it did.

2. That it was a physical impossibility that the bark could have *so* sheered as to have caused the exact sort of collision, which confessedly had taken place, and the particular form of wound which was found to have been left. This position was elaborately and ably argued on the evidence, with the aid of diagrams.

II. Passing to the point of law, Mr. Hibbard argued that it was difficult to reconcile the two parts of the opinion in the Circuit Court. Upon the facts set forth and arguments made in the first part, the conclusions reached in the second did not properly "follow." The reverse of them were the true consequences. Upon perusal of the latter part of the opinion, the conclusion, it was argued, could not be avoided, that the court had lost sight of the substantial rule, that that

Argument for the bark.

vessel, which, through fault, causes haste, alarm, and peril, shall not escape the consequences of such fault by imputing something to another vessel which has been caused by the haste, alarm, and peril thus brought about. The maritime law, the learned counsel contended, would not tolerate inquiry in favor of a wrongdoer, as to even probable error committed by another. It would not countenance the weighing of possible culpabilities against the ascertained faults of a positive offender, much less the comparison of some shade of imaginable mistake with the transgressions of one absolutely and indefensibly in the wrong. The Circuit Court had assumed that if the bark did sheer division of damages must follow. This was fundamental error. To make any vessel wholly or partly responsible she must commit *a fault.* To commit a fault is to violate some rule, some duty. To sheer is not a fault, it is but an accident. For accident no man is responsible. The actual question in collision cases never is, "What was done?" It is, "Which committed fault?" It was a great mistake to say, as was said, in the Circuit Court, that "the court was more concerned to know that the sheering *did* occur than to show *how* it occurred." The very opposite of this proposition was the true one. *How* anything occurs in a collision case is of every consequence, for it is in the manner of the occurrence, its cause, that *fault* must exist or not exist. The ascertainment of the facts only aids in arriving at the conclusion, wherein, and what, and how many were the faults which produced the result. It is of but little if any aid to conclude, if this thing had been done or not done, no collision would have happened. In almost every collision, if anything different had been done, there would have been no collision. In the opinion delivered in the Circuit Court, it is assumed that if the bark sheered, it was something which the propeller was not bound to guard against. But was not the propeller bound to guard against the natural consequences of the haste, alarm, and peril she created? Nay, more, was she not bound so to navigate, so to obey plain rules, that haste, alarm, and peril should not arise?

That the propeller was guilty, many times guilty; that she violated statute and rule, is emphatically declared and enforced by the Circuit Court; that she brought about the haste, alarm, and peril, in the midst of which this collision took place, is not to be doubted. Can it be that under such circumstances the bark can be held even partly responsible for the result thus caused? Such a doctrine will inflict a blow upon commerce which commerce can scarcely sustain; for practical men will not risk property and incur the hazards of a hazardous business beneath rules of such impracticable severity.

Messrs. Spalding and Dickman, contra, argued in support of the decree below.

Mr. Justice CLIFFORD delivered the opinion of the court.

Appeals under the additional act "to amend the judicial system" are subject to the same rules, regulations, and restrictions as are prescribed in case of writs of error.* Both parties in a civil action may sue out a writ of error, to a final judgment, but where one party only exercises the right the other cannot assign error in the appellate court; and the same right to remove the cause from the subordinate to the appellate court for re-examination is secured to both parties by the act of Congress allowing appeals, instead of writs of error, in cases of equity or of admiralty and maritime jurisdiction, or of prize or no prize, as provided in the second section of the act allowing such appeals.† Subject to the same rules and regulations as in case of writs of error, both parties may appeal, in an equity, admiralty, or prize suit, from the final decree of the subordinate court, but the appeal, when entered in the appellate court, is also subject to the same restrictions as are prescribed in case of writs of error. Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the

* 2 Stat. at Large, 244. † 1 Ib. 84; 2 Ib. 244.

appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.* Apply that rule to the present case and it is clear that the appellees cannot be heard in opposition to the decree of the Circuit Court, as they did not appeal from that decree.

They were owners and freighters of the steam propeller Cleveland, and they filed the libel in the District Court in a cause of collision, civil and maritime, against the bark Maria Martin to recover damages for the loss of the steamer and her cargo on the twenty-second of June, 1867, occasioned by a collision between the bark and the steamer, near the mouth of the Detroit River, whereby the steamer, with all her cargo on board, consisting of sugar, and other merchandise of great value, was sunk in five fathoms of water and became a total loss.

Four days before the disaster the steamer started from Ogdensburg, in the State of New York, and she was bound on a voyage from that port to the port of Chicago, in the State of Illinois, laden as aforesaid, and having fifty persons on board as passengers. None of these facts are denied by the claimants, but the libellants also allege that the collision was occasioned without any fault on the part of the steamer, and by the negligence, inattention, and want of proper care and skill on the part of those in charge of the bark, which is expressly denied in the answer.

Heavily laden with a cargo of grain, the bark was proceeding down the river, and was bound on a voyage from Chicago to Buffalo, in the State of New York, both the colliding vessels being duly enrolled and licensed for the coasting trade on those waters. Propelled by her own motive power the steamer had complete and effective command of her own movements. On the other hand the principal motive power of the bark was the engine of the tug, with which she was connected by means of a hawser paid out

* The William Bagaley, 5 Wallace, 412; The Quickstep, 9 Ib. 665; The Alonzo, 2 Clifford, 550.

from the forward part of the vessel, three hundred feet or more in length, and made fast to the samson post of the tug, being what is called in such navigation a stern line, as the design was that the vessel without motive power should follow the tug which had her in tow, but the bark on this occasion had unfurled, or "pretty well made," her mainsail, and her mainstaysail, as she had nearly reached the place in the river where vessels in tow usually cast off from the tug, and her master and other officers were in charge of her deck.

Prior to rounding Bar Point, on the Canada shore, the course of the steamer had been west by north, but shortly after passing that point she changed her course to north by east, and headed for Bois Blanc light, as alleged by the libellants. In coming round, or immediately after she was put upon her new course, she made the lights of the tug and tow descending the river towards the lake, heading south-southwest, at the distance, as supposed, of two miles, and not far from two o'clock in the morning.

Attempt is made in argument to show that the lookout of the steamer was incompetent, but the objection is without any legal importance, as the lights of the tug and tow were seasonably seen by all those in charge of the deck of the steamer. They first made the red signal light of the tug and of the tow half a point over their starboard bow, and the evidence shows that the tug having the bark in tow made the green signal light of the steamer one-fourth of a point over her port bow.

Mutual fault is charged, that is, each charges the other with fault, and it is quite evident that one or both must be guilty of the charge, as neither imputes any fault to the tug, and the evidence fully satisfies the court that it was good weather, a bright starlight night, a moderate wind, and smooth water.

Where negligence or fault is shown to have been committed by either party the rule that the loss must rest where it fell, as in case of inevitable accident, can have no application, for if the fault was one committed by the claimant's vessel

alone, then the libellant is entitled to recover; or if by the libellant's vessel alone, then the libel must be dismissed; or if both vessels were in fault, then the settled rule of law is that the damages must be apportioned between the offending vessels.*

Doubtless the district judge applied the second rule, as he entered a decree dismissing the libel, but the Circuit Court came to the conclusion from the evidence that both of the colliding vessels were in fault, and reversed the decree of the District Court, and entered a decree that each should pay a moiety of the damages and their own costs, and from that decree the claimants of the bark appealed to this court, but the libellants did not appeal, and of course they cannot assign error nor can they be heard in opposition to the last-named decree. On the contrary the decree is conclusive as against the libellants, that the steamer was in fault, and the only question presented by the appeal of the claimants is whether the Circuit Court erred in determining that the bark also was in fault, for if she was, then the decree of the Circuit Court must be affirmed, but if she was not, then the decree of the Circuit Court must be reversed, and the cause remanded with directions to enter a decree affirming the decree of the District Court.

Vessels engaged in commerce are held liable for damage occasioned by collision on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel.

Allusion was frequently made in the course of the argument to the fact that the bark was in charge of a tug, which renders it necessary to make one or two remarks upon that subject before proceeding to examine the real question presented for decision.

* The Morning Light, 2 Wallace, 557; Union Steamship Co. *v.* New York and Va. Steamship Co., 24 Howard, 313; The Catharine, 17 Ib. 170

Whenever the tug is under the charge of her own master and crew, and in the usual and ordinary course of her employment undertakes to transport another vessel, which for the time being has neither her master nor crew on board, from one point to another, over waters where such accessory motive power is necessary, or usually employed, she is legally responsible for the navigation of both vessels. Cases arise, undoubtedly, where both the tug and the tow are jointly liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the master and crew of each vessel are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation. Where the officers and crew of the tow, as well as the officers and crew of the tug, participate in the navigation of the vessels, and a collision with another vessel ensues, the tug alone, or the tow alone, or both jointly may be liable for the consequences according to the circumstances, as the one or the other or both jointly were either deficient in skill or were culpably inattentive or negligent in the performance of their duties.* Much examination of that subject, however, is unnecessary in this case, as neither party imputes any fault to the tug, and it is clear from the evidence that the imputation, if made, could not be sustained, as it fully appears that she seasonably ported her helm and allowed the steamer to pass her in safety.

All three of the vessels, that is, the tug, the tow, and the steamer, had their signal lights properly displayed, and the respective lights were burning brightly and were easily distinguishable. Suggestion is made that the lookout of the steamer was incompetent, but the suggestion is entitled to no weight, even if it be well founded in fact, as the proof is entirely satisfactory that the two colliding vessels were seen by each other in season to have taken every precaution to have avoided a collision. They were approaching each other from nearly opposite directions, which clearly rendered it

* Sturgis *v.* Boyer, 24 Howard, 121; Sproul *v.* Hemmingway, 14 Pick. 5

proper, as between the tug and the steamer, that each should port their helms and pass to the right. Seasonable attention to that rule would certainly have prevented a collision if the tow had followed the movement of the tug, as she was bound to do, without unnecessary delay.

Although the bark was larger than the steamer, yet her headway was about the same as that of the steamer, as she was somewhat aided by the current in addition to the motive power of the tug. Larger in size and of greater length than the steamer she probably would not obey her helm quite as quick as the tug or the steamer, but the evidence in the case fails to satisfy the court that the difference in that respect contributed in any degree to the collision.

Probably those in charge of the steamer hesitated for a time as to which side of the tug they would pass, as they proceeded on their course, heading nearly stem on, until the tug and steamer approached within half a mile or less of each other, when the tug sounded one whistle and in half a minute repeated the same, as a signal that she wished the steamer to pass on her port side. To that signal the steamer responded, giving one whistle to signify her assent to that request, and immediately ported her helm, and the tug at the same time ported her own helm, turning the vessel half a point to the starboard, and became steady on her course, the tug and steamer passing each other port to port, leaving a berth between the vessels of about one hundred feet, as appears by the weight of the testimony.

Undisputed proof is exhibited that the steamer ported her helm, and that she turned to the right half a point and then steadied and continued her course, and it is quite clear that there would have been no collision if the bark had ported her helm and followed the tug, and it is highly probable that the disaster would not have happened if she had kept her course without changing her helm, but she neither ported her helm nor kept her course, as is fully shown by the evidence. Instead of turning to the right, as she should have done, she starboarded her helm when the steamer was alongside the tug and sheered to port, shutting out from the steamer

the view of her red light and showing only her green light, and continued on that course till she struck the steamer. Orders were given by those in charge of the steamer to put her helm hard-a-port, but it was too late, and the collision took place.

Many theories have been advanced by the claimants as showing that the bark did not sheer, but it is not possible to adopt any one of them without rejecting conceded facts or facts fully proved, or without coming to the conclusion that the two vessels did not collide, which would be in direct conflict both with the libel and answer and the testimony of every witness in the case who was present when the steamer sunk in the river.

Ingenious efforts are also made in argument to show that the berth between the steamer and the tug when they passed each other was not so great as that represented by the libellants. Suppose that theory be admitted, still it cannot benefit the claimants, so long as it is conceded that the distance between them at the time was sufficient to enable them to pass in safety, and that the steamer, while they were abreast, ported her helm and turned to the right, which is as satisfactorily proved as it is that the steamer and tug passed each other in safety.

Proved as these facts are beyond doubt, it is vain to suppose that any theory can be adopted by the court which will make it necessary for the court to shut their eyes to the evidence by which those facts are established. Suffice it to say, the collision did occur, and the court is satisfied that the wheelsman of the bark misunderstood the order to port and supposed it was an order to starboard preparatory to casting off from the tug. He knew that the bark, while she continued in tow, ought to follow the tug, but they had reached the place where vessels in tow usually cast off from the tug, and the master was engaged in adjusting the towage account, and all on deck were looking for the order to cast off, and under those circumstances it is less strange than it otherwise might have been that the wheelsman should have made such a mistake. Undoubtedly it was a great mistake,

but it has been fully proved, and it is clear that the collision would not have occurred if it had not been made.

Whether the steamer was or was not also in fault is not a question in this case, as that question was conclusively settled in the Circuit Court, but it may not be improper to remark that if she was so it was because she did not put her helm hard-a-port before she passed the tug, and the moment those in charge of her navigation noticed that the bark had shut in her red light and began to display her green light, showing that she had starboarded her helm and was turning to the left.

Errors committed by one of two vessels approaching each other from opposite directions do not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision, as the act of Congress provides that in obeying and construing the prescribed rules of navigation due regard must be had to the special circumstances rendering a departure from them necessary in order to avoid immediate danger.*

Viewed in the light of that exceptional rule, the better opinion, perhaps, is that the entire decree of the Circuit Court was correct.

DECREE AFFIRMED.

RAILROAD COMPANY *v.* DUBOIS.

1. Construction of Dubois's patent, of September 23d, 1862, "for building piers for bridges, and setting the same." *Held*, to be for a device or instrument used in a process, and not for the process itself.
2. It is not a bar to an action for an infringement of a patent, that before making his application to the Patent Office, the patentee had explained his invention orally to several persons, without making a drawing, model, or written specification thereof, and that subsequently, though prior to his application for a patent, the defendant had devised and perfected the same thing, and described it in the presence of the patentee, without his making claim to it.
3. Silence of a party works no estoppel, unless it has misled another party to his hurt.

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* 13 Stat. at Large, 61.

Statement of the case.

4. The novelty of a patented invention cannot be assailed by any other evidence than that of which the plaintiff has received notice. Hence the state of the art, at the time of the alleged invention, though proper to be considered by the court in construing the patent, in the absence of notice, has no legitimate bearing upon the question whether the patentee was the first inventor.

ERROR to the Circuit Court for the District of Maryland.

Dubois brought suit against the Philadelphia, Wilmington and Baltimore Railroad Company, for damages for an infringement of a patent granted to him September 23d, 1862, for "a new and useful improvement in the mode of building piers for bridges and other structures and setting the same." The alleged improvement was asserted to have been used by the company in building their railroad bridge across the Susquehanna at Havre de Grace.

In his specification, Dubois, the patentee, after reference to diagrams accompanying his schedule, thus described his inventions, referring to the diagrams by corresponding letters; here with the diagrams themselves omitted, as occupying space, and not indispensably necessary to a comprehension of the invention.

"In the building and setting of piers for bridges and other structures in beds of rivers or streams, it has been found necessary, in most instances, to erect stationary coffer-dams at the points where the piers are to be located. This operation requires a water-tight chamber to be constructed up from the bed of the river, and then emptied of its water by a pumping process, before the building of the pier can be proceeded with. The expense and inconvenience of this operation, as well as that of all other modes of building and setting piers in rivers, greatly enhances the cost of building bridges.

"With my invention much of the inconvenience and expense thus incurred will be obviated, and a much firmer structure obtained.

"To enable others skilled in the art to perform with my invention, I will proceed to describe its construction and operation:

"To construct piers for a bridge across a river or stream from

a solid foundation, by first driving long temporary piles into the bed of the stream, outside of a given space. These piles are left extending up above the surface of the water. Then either drive down between and near about the long piles other short piles or firmly imbed rock or other substantial material into the earth or river bed, and, if desirable, slip down over the piles one or more broad and heavy stones or timbers, and imbed the same firmly into the soil, so that they rest down upon the foundation, and form a flat surface. Next construct a strong timber or other suitable character of platform, and bolt to its upper side one section of a hollow rectangular or other desirable form of box or tube, which is used to incase and strengthen the pier; the said tube being composed of boiler-plate metal, or other suitable material, and its lower section having a bolting flange on its lower edge, running inward at right angles to its sides, so as to bolt horizontally to the platform. This platform and section of the tube are caulked and pitched, or cemented, so as to be water-tight at bottom and on all sides, except at top, where it is fully open. The first and several other sections of the tube should be strengthened laterally and longitudinally from sides and ends by means of strong rods.

"The structure should now be filled to slide down over the sustaining and guide piles by cutting vertical holes, corresponding with the shape of the piles, through the platform. The structure, when thus fitted to the piles and let down to the surface of the water, floats, by reason of its buoyancy. The upper ends of the piles are now framed together with ties, so as to stand firm. The preparatory steps for building and setting the pier having thus been consummated, and additional sections provided, so as to be brought into use as required, the stone-mason commences to lay the solid pier within the floating coffer-dam, using for the purpose common stone, or other material deemed suitable. As soon as a sufficient height of mason-work has been set in the first section to cause the structure to descend nearly level with the surface of the water, another section is bolted, or otherwise firmly fastened upon the top edge of the first, so as to give the proper buoyancy and safety for continuing the work. This done, the mason proceeds further with his work, and builds up the pier until it again becomes necessary to increase the buoyancy, when he bolts on other sections of boiler tubing, and proceeds with the building of the pier until

the platform and pier rest down and become 'set' upon the foundation. He now finishes the pier above the water without using any more sections of tubing, and may, if he deems best, use fine-cut stone, or other finished material, or he may, if desirable, continue the tubing to the top of the pier, so as to obtain additional strength.

"When the pier is completed, the piles are sawed off just above the top of the platform, and their stumps, in connection with the weight of the pier, serve to prevent lateral movement of the platform and pier on its foundation.

"A metal sectional boiler-plate tube has been described as the casing for the pier, because such tube possesses great strength at small expense, and will serve to bind and support the masonry of the pier. It however is obvious that a floating water-tight coffer-dam, operating on the principle described, might be made of wood, or other material than boiler-plate metal, and when the pier is finished, the floating coffer-dam may be removed from around it, leaving the pier wholly uncovered from base to top. The removed structure may be used in erecting other piers, if desirable.

"I have given a minute description of means for carrying out my invention, but I do not wish to be confined to those means, but desire to be protected in the principle of operation embodied in a floating coffer-dam, substantially as described for building and setting piers for bridges and other structures.

"Having described one mode of carrying out my invention, what I claim and desire to secure by letters-patent is:

"1st. Building and setting piers by means of a floating coffer-dam, substantially as set forth.

"2d. The use of the tube which constitutes the dam for incasing and strengthening the pier, substantially as set forth.

"3d. The guide-piles (A A) in combination with a floating coffer-dam, substantially, as and for the purpose set forth."

The defendant pleaded three pleas:

1st. The general issue.

2d. That the letters-patent were obtained by fraud and imposition on the Patent Office.

3d. Want of originality.

Issue was joined on the first plea, and on replications to the second and third.

Statement of the case.

At the trial it became a material question for what invention the patent was granted, and especially what the *first* claim of the patentee was intended to cover.* Was it a device, a structure, or an instrument designed for use in a process, or was it a process itself? The defendants contended that the patent, so far as it covered the first claim, was for a process of building and setting piers, which process consisted of driving temporary piles in the bed of a stream outside of a given space, then preparing a suitable foundation for a pier, then making a strong timber, or other suitable character of platform, and bolting upon its upper surface a section of a hollow rectangular or other desirable form of box, to be made of boiler-plate metal, or other suitable material, strengthened laterally and longitudinally from sides and ends by means of strong rods, and fitted to slide down over the guide piles first driven, by cutting vertical holes through the platforms, then laying the masonry of the pier in this box, made water-tight, adding sections from time to time as the increasing weight of the masonry required, and as the box with its contents sunk, until the platform and pier, incased by the different sections of the box, rested and became set upon the foundation prepared, when the guide-piles are sawed off just above the top of the timber or other platform so that their stumps in connection with the weight of the pier may serve to prevent lateral movement of the platform and pier on the foundation. Holding such opinions of the nature of the invention the defendants asked the court thus to construe the patent, and to instruct the jury that the words "substantially as described" in the specification (when speaking of the "principle of operation" which

* One portion of the company's evidence had tended to show that while it used a platform, it was not one perforated with holes, for the insertion of guide-piles; that while it had used an iron tube of boiler-metal plate, it was not a hollow tube with a bolting-flange on its lower edge, so as to be bolted horizontally to the platform; that it had used no caulk, pitch, or cement; that its tube had an iron bottom, part of the tube itself; that while using the buoyancy of water it had not used it in combination with the plaintiff's apparatus; that one pier had been guided by screws alone; that another had been partly lowered by fall and block, and guided by furring.

the patentee desired to have protected), and the words "substantially as set forth" in the first claim, refer to that process, and hence, that unless the defendants used that process as detailed, as well the platform, composing in part the floating coffer-dam fitted to slide down the guide-piles referred to, by cutting vertical holes through it, and sawing off the stumps of the piles just above the top of the platform, when the pier is completed, as also the other parts of the process claimed in the first claim, the plaintiff could not recover for an infringement of that claim. This instruction the court refused to give, construing the claim to be, not for a process, but for a device, or instrument to be employed in a process, the instrument being a floating coffer-dam constructed as described in the specification, in which the masonry of the pier might be laid and sunk to the foundation by its own gravity.

In construing the *second* and *third* claims, the court thus charged:*

"*The second* claim of the plaintiff's patent is for the use of the tube or material of which the dam is made, for incasing and strengthening the pier; that is, it shall be so constructed that it can be used for the casing and strengthening the pier, no matter whether it be first placed in position entire, or be built in sections as the masonry progresses.

"*The third* claim of the plaintiff's patent is for a combination of a floating coffer-dam, as claimed in the first claim, with guide-piles, which are driven into the bottom of the river, around the site of the proposed pier, and reach above the surface of the water, and pass through holes in the platform, and have their tops framed together with ties; when the pier is building, they are to sustain and keep upright the tube with its pier inside, and to guide it down to its foundation prepared at the bottom of the river; when the pier is finished they are then to be cut off just above the top of the platform, and their stumps left to prevent any lateral movement of the platform and pier on its foundation."

* The company had introduced some evidence tending to show that one of its caissons was constructed on shore, and then floated to its place, and set on its foundation before any masonry was put in.

Statement of the case.

In the course of the trial, and in support of the plea that the letters-patent were obtained by fraud and imposition, the testimony of one George A. Parker, the engineer of the railroad company, defendant in the case, by whom the bridge was designed and built, and of a certain Crossman, in the service of the company, and standing in some intimate subordinate relation to Parker, was given by the defendant, the object of which was to show that the plaintiff had fraudulently obtained his patent for what was in fact the invention of Parker. It tended to show that prior to 1861, Parker, a civil engineer since 1838, and who, as already stated, had built the bridge, in the laying of whose piers the alleged infringement consisted, had conceived the plan on which the piers in this bridge were laid, going to different places to look at large bridges, and making many experiments and investigations; all with a view to building the piers for this particular bridge. That in the spring of 1861, when work on the bridge had been begun, and estimates for iron in the piers had been received, Crossman informed Mr. Parker that "a man named Dubois, who had some notions about bridge building, wanted to see him." That Parker being willing to see him, some delay intervening, a time was fixed for an interview, and the man, this Dubois, introduced; that Dubois had previously told Crossman that he wanted to talk with Parker about the foundations of the Susquehanna bridge; that he himself, when thus speaking with Crossman about the foundations, described the cribwork for foundation, but never described sectional caissons; and that when afterwards introduced to Parker, he "described" a simple wooden structure, a crib made of raft timbers, put together in the ordinary way, in form a parallelogram, to be built partly on shore and partly on the river. How he was to sink it, or how guide it to the bottom, Parker, the witness, did not remember: it was to be filled with rough stones, and was to sink as it was filled; that on this Parker asked Dubois if he was aware that his masonry would be torn away by the floods, to which Dubois replied that he would throw out ballast on the outside and bring it to the top of

the pier. Parker then said, "Now, I will tell you my plan," and proceeded to describe it accordingly, when Dubois remarked, "I like your plan, all except the iron." Parker then replied that the iron was the only new thing about it, the especially valuable thing. Dubois then objected to the expense of iron, when Parker made a calculation showing that it would be cheap; Dubois then said, "Your plan is the best," and asked whether Parker could not give him something to do for the bridge, as he had a lumber-yard and sawmill at Havre de Grace. Parker promised to apply to him if there was any occasion, and they parted. In September Dubois got his patent. Afterwards meeting Dubois, Dubois said to him, "I understand you claim to be the inventor of this way of putting down the piers." To which Parker replied, "Don't speak to me again during your natural life. If you have any business with me or the company, do it through your lawyer." This was in the autumn of 1862.

On the other hand, Dubois himself being examined, testified that in June, 1862, when he asked Crossman to procure for him an interview with Mr. Parker, he described confidentially to Crossman his plan of building piers; that this plan was essentially the same as that adopted in the Susquehanna bridge; that being introduced some days afterwards to Parker, whom Crossman in the meantime had seen, in order ostensibly to get Parker's leave to introduce Dubois to him, Parker described to him, as his own, the same plan that he, Dubois, had described a few days before to Crossman, except that the same use was not made of the boiler-iron. Dubois in giving his testimony proceeded: "Witness did not then state to Parker that the plan was his own, because from circumstances he felt sure that Crossman had disclosed it. Witness at once applied for and obtained a patent. Crossman being charged with having disclosed the plan to Parker denied it, and then said perhaps he did, and would think it over. At a subsequent interview he denied it."

Upon this part of the case the defendant's counsel—by one of his prayers for instructions, *the eighth*—asked the court to charge:

"That if the jury should find that the plaintiff, in the spring of 1861, explained his invention to the witnesses who testified upon the subject, by verbal statements only, but without reducing the same to practice by making a drawing, model, or written specification thereof; and that, prior to the application of the plaintiff for a patent, Parker, the engineer of the defendants, superintending the construction of their bridge across the Susquehanna, had devised and perfected the plan afterwards pursued for building and setting the piers of the said bridge, and was actually engaged in preparing for the work of actual construction when, as testified by the said Parker, the plaintiff called on him and heard the plan described without making any claim thereto, but afterwards applied for and obtained the patent on which the present action is founded, then the plaintiff was not entitled to recover."

One of the pleas, having been as it will be remembered, want of originality, the defendants had given to the plaintiff this notice:

"Take notice, that at the trial of the above cause, evidence will be offered to show that you were not the original and first inventor in the improvement in the mode of building piers for bridges, for which letters-patent of the United States were issued to you on the 23d September, 1862, but that a prior knowledge of the improvement aforesaid was had by the parties whose names and residences are given in a schedule hereto annexed,* and that the same had been used in the construction of the bridge of the defendants, across the Susquehanna River, between Havre de Grace and Perryville; and that the said improvement had been described in 'Mahan's Civil Engineering' anterior to your supposed invention; and further, as special matter, testimony will be offered to show that you surreptitiously and unjustly obtained your said patent for that which was in fact invented by George A. Parker, engineer of said bridge, who was using reasonable diligence in adapting and perfecting the same."

The notice was given in professed pursuance of the 15th section of the Patent Act of 1836, which enacts that a defend-

* The names and residences of Parker, Crossman, and several other witnesses, were given in this schedule.

ant may plead the general issue and after notice give evidence that the patentee was not the original and first inventor; or that the thing patented had been described in some public work anterior to the supposed discovery, or that the patentee had surreptitiously or unjustly obtained the patent for that which was in fact invented or discovered by another who was using reasonable diligence in adapting and perfecting the same, "in either of which cases" the act declares that "judgment shall be rendered for the defendant." It proceeds:

"That whenever the defendant relies in his defence on the fact of a previous invention, knowledge, or use of the thing patented, he shall state, in his notice of special matters, the names and places of residence of *those whom he intends to prove to have possessed a prior knowledge of the thing, and where the same had been used.*"

Testimony having been given tending to show want of originality, the defendant in his last prayer asked the court to instruct the jury:

"That, upon the issues joined, the question was open before them, whether the plaintiff was or was not the first and original inventor of the improvement described in the patent of the 23d September, 1862, offered in evidence; and that in considering the said question, the jury may and ought to consider the evidence in the cause in relation to the state of the art of building and setting piers known at the time of the alleged invention of the plaintiff described in said patent."

The court refused to give this instruction, but instructed the jury thus:

"In reference to the question, whether the plaintiff is the original and first inventor of the three claims made by him in his said patent, the jury have a right to take into consideration the knowledge which they may find to have been possessed, prior to the date of plaintiff's patent, by the several witnesses whose names are given in the notice of defence in this case, and who have been examined; and also the description of such constructions in 'Mahan's Civil Engineering,' and the patent of Parker, dated 6th September, 1864; and also all description of his invention made by plaintiff to any one prior to the date of

Argument against the patentee.

his said patent, in the year 1861 or '62; and also to the conversation (whatever the jury may find that to have been) between the plaintiff and the engineer of defendants in 1862, prior to the date of plaintiff's application for a patent."

It also charged (in its 6th instruction) that if the jury found that the defendant had infringed and that the plaintiff was the true inventor, they could, in ascertaining the actual damages the plaintiff had sustained, &c., take into consideration the state of the art at the time of the plaintiff's invention, its utility over old modes, and the saving which had accrued to the defendant.

The defendants now brought the case here, on error, for refusal to give the instructions asked, and on account of the instructions given.

Messrs. W. Schley and T. Donaldson, for the plaintiff in error:

1. The first claim is for *the specified means* of effecting the result of placing a pier in a stream in a condition of preparedness for the reception of the bridge. Those means embrace a floating coffer-dam, constructed, used and guided, as described in the specification; and also embrace the specified devices and contrivances for constructing, using and guiding, the said coffer-dam, up to the point of the completeness of the pier.

The language of the claim is for "building and *setting* piers." It is not for *the coffer-dam*, nor for *the use* of the coffer-dam separately, but for the use of the coffer-dam, described in the specification, constructed as therein mentioned, gradually lowered by the weight of the masonry, and guided, in its descent, by guide-piles, in the manner mentioned in the specification, all co-operating to produce the result to be accomplished, namely: building and setting a finished pier in a river or stream.

In the first paragraph of the specification, the patentee claims to have invented "a new and useful improvement in building piers for bridges and other structures, and *setting the same.*" His first claim is for this *improvement*, and was intended to cover the whole.

In another part of the specification, after mentioning certain preparatory steps, he proceeds to show how the platform was to be constructed, the first section of the hollow tube to be bolted thereon, &c., "for the building and setting the pier;" and then follows a description of the whole process of building and lowering the pier in its gradual guided descent until, in his own language, "the pier rests down and becomes 'set' upon the foundation."

The first claim is for a *process*. A process may, undoubtedly, be the basis of a patent, where no part of the means employed, separately considered, is new, or claimed as new. The combination of co-operating constituent elements, so combined and operating as to produce a new useful result, or a known result in a new and useful way, is patentable. In such a case, the patent stands upon the combination or process.*

In the construction given, as to this first claim, it is limited to so much of the process as is necessary to *building the pier*. It ignores the idea of a *process* for building and *setting*. It does not regard the *guide-piles*, as embraced by the first claim, nor *the holes* in the platform, as part of the means employed in the mode of accomplishing what he claims as his invention in this first claim.

In view of the evidence introduced by the defendant,† it was very material that the jury should have been properly instructed as to this first claim.

2. The second claim of the plaintiff is "for the use of the tube, which constitutes the dam for incasing and strengthening the pier, substantially as set forth."

The words "substantially as set forth" require that we should recur to the specification to see what sort of a tube is there described And it seems to be plain that he claims a *sectional* caisson. His direction is,—to bolt to the upper side of the platform "one section of a hollow rectangular

* Prouty *v.* Draper, 1 Story, 568; Prouty *v.* Ruggles, 16 Peters, 336, 341; Davis *v.* Palmer, 2 Brockenbrough, 298, 304; McCormick *v.* Talcott, 20 Howard, 405; Vance *v.* Campbell, 1 Black, 427.

† See it *supra*, p. 51, in note.

box or tube." He speaks, again, of "the first and several other sections," and of "additional" sections.

But the court construes this claim as embracing the use of the tube, "whether it be first placed in position entire, or be built in sections as the masonry progresses." In this ruling the court, we think, was in error.

3. The eighth prayer of the defendant ought to have been granted. By the second plea, fraud and imposition, in the obtaining of the patent, were directly charged, and issue was joined on a replication to this plea. Strong evidence was given tending to show the alleged fraud. If found it would have been destructive of the patent.

On another ground the instruction should have been given. The testimony of Mr. Parker shows, and Dubois himself admits that, in the conversation between them, Dubois did not disclose the fact, if such was the fact, nor even pretend, that he was the inventor of the mode of building and setting bridges, which Parker, as the engineer of defendant, intended to follow, in constructing and setting the piers. It is a strong case for the application of the doctrine of estoppel *in pais*. His silence was a justification to Mr. Parker in pursuing the course which he had explained to Dubois he intended to pursue.*

The last prayer was framed on the theory that the evidence in relation to the state of the art of building and setting piers, known at the date of plaintiff's patent, was proper to be considered by the jury upon the question whether the plaintiff was the first and original inventor of what he claimed as new.† The court, in its sixth instruction, limited the consideration of the state of the art to the question of damages alone.

Messrs. W. H. Armstrong and S. Linn, contra.

Mr. Justice STRONG delivered the opinion of the court. The court below, refusing to give the first instruction

* Doe *v.* Oliver, 2 Smith's Leading Cases, 417 and notes.

† See Vance *v.* Campbell, 1 Black, 427.

asked for by the defendants, construed the first claim in the plaintiff's patent to be, not for a process, but for a device, or instrument to be employed in a process, the instrument being a floating coffer-dam constructed as described in the specification, in which the masonry of the pier might be laid and sunk to the foundation by its own gravity. In this it is now insisted the court erred. We are of opinion, however, that the construction given to this claim was correct, and that the defendants were not entitled to an affirmative response to their prayer. Undoubtedly a patentee may claim and obtain a patent for an entire combination, or process, and also for such parts of the combination or process as are new and useful, or he may claim and obtain a patent for both. That this patentee did not intend by his first claim to appropriate the process of building and setting piers which he had previously described in his specification is made evident by several considerations. The words by which the claim is immediately preceded tend strongly to show this. The patentee had described the common method of building and setting piers, by a stationary coffer-dam built up from the bottom, out of which the water was pumped. The inconvenience and expense of this he proposed to obviate. He then added, "to enable others to perform *with* my invention, I will proceed to describe its *construction* and operation." Did he mean construction of a process? Following this was a description of a floating caisson, or coffer-dam, with all the details of its construction, and also of guide-piles, with a mode for their use in directing the coffer-dam in its descent with the pier to the foundation. He then added, "I have given a minute description of means for carrying out my invention, but I do not wish to be confined to those means [by which he plainly meant process], but desire to be protected in the principle of operation embodied in a floating coffer-dam, substantially as described, for building and setting piers for bridges and other structures." This can hardly mean anything else than a claim for the principle of operating in building and setting piers through the instrumentality of a floating coffer-dam, substantially such as he had previ-

ously described. The language is awkward, but it is reasonably intelligible. It was not the principle of operating by what was embodied in a process, such as had been described, that he desired to be protected in, but that embodied, or wholly contained, in a coffer-dam. This he had described as an improved substitute for a stationary dam. If it was not the method or process that he sought protection for, it is incredible that he would have described it as *embodied* (that is, collected into a whole) in one of the devices used in the process. Now, reading the first claim in connection with this language of the specification that immediately precedes it, we cannot doubt that the claim is for the instrument, or device, denominated a floating coffer-dam, substantially such as described in the specification, to be used in building and setting piers. It is clear the invention was regarded by the patentee as a different thing from the mode of using it. "Having," said he, "described one mode of carrying out my invention, what I claim and desire to secure by letters-patent is, 1st, building and setting piers by means of a floating coffer-dam, substantially as set forth; 2d, the use of the tube which constitutes the dam for incasing and strengthening the pier, substantially as set forth; 3d, the guide-piles A A, in combination with a floating coffer-dam, substantially as and for the purpose set forth." If his intention was to claim the process, or a process substantially such as described in the specification, it was easy to say so, and it was worse than useless to mention only one of the means or instruments by which the process was conducted. Looking, also, at the third claim, which is plainly for a combination of devices, a combination of a floating coffer-dam with guide-piles, substantially as described, and for the purposes described, to wit, building and setting piers, it is evident the first claim was for the caisson, or coffer-dam. Why claim such a combination if the first claim was for a process of which the guide-piles and the floating dam were essential component parts?

At the argument much importance was attached, on behalf of the plaintiffs in error, to the fact that the language

of the claim is, "building and *setting*" piers by means of a floating coffer-dam, and it was urged that, in the construction given to it by the court, the idea of "setting" the pier is ignored. But the setting of a pier by means of a floating dam is inseparable from the construction of a pier. It is a part of the process of building. The building consists in laying the masonry of the pier within the dam, causing it to descend by its own gravity towards the bottom until it reaches the foundation. This descent is the setting. The floating coffer is, therefore, an instrument not only for building, but for setting piers. Hence, if the claim was, as we think, for the floating dam alone, when used for the purpose designated, and not for its use in combination with the other devices, and with the process described in the specification (what the inventor called "one mode of carrying out his invention"), it was well described as a means for building and setting piers.

The plaintiffs in error also complain that the court construed the second claim of the patent to be for the use of the tube, or material of which the dam is made, for incasing and strengthening the pier, no matter whether it be first placed in position entire or be built in sections as the masonry progresses. It is argued the claim embraced only an iron sectional tube or caisson. It is very manifest, however, that the construction given to it was right. The specification expressly describes the tube as "composed of boiler-plate metal or other suitable material," and, again, it states "that a floating water-tight coffer-dam, operating on the principle described, might be made of wood or other material than boiler-plate metal." It is equally plain that a tube composed of sections was not exclusively meant. The claim refers to the specification, and that explains both its construction and its possible use in strengthening the piers. By reference to it it will be seen that the tube is not necessarily constituted of several sections. Its formation is described to be, constructing a strong timber or other suitable character of platform, and bolting to its upper side one section of a hollow rectangular, or other desirable form of box or tube, which

is used to incase or strengthen the pier, the tube being composed of boiler-plate metal or other suitable material. This platform and section of the tube are then caulked and pitched, or cemented, so as to be water-tight at bottom and on all sides, except at top, and strengthened, laterally and longitudinally, by means of strong rods. It is then complete and ready for all the uses for which it is designed. Sections are added only when required by the depth of the water, and when the tube has sunk in consequence of the masonry laid in it nearly to a level of the water surface, though, if desired, they may be continued to the top of the pier. There is nothing that would justify our holding that the claim demands a tube composed of more than one section. It is the use of the tube, whether longer or shorter, no matter what its shape or material, or of how many parts consisting, that the claim sought to cover.

What has been said is sufficient to show that, in our opinion, the Circuit Court did not misinterpret the first, the second, or the third claim of the patentee.

The next assignment of error, not disposed of by the observations we have already made, is, that the court refused to charge the jury as requested in the defendants' eighth prayer.* The theory of this prayer was twofold. The defendants had pleaded that the letters-patent of the plaintiff were obtained by fraud and imposition on the Patent Office, and the prayer assumed that his not claiming the invention when Parker described his plan for building and setting the piers of the bridge established the fraud pleaded. The prayer also assumed that the plaintiff's silence, when Parker's plans were revealed, coupled with the facts that Parker was, at the time, preparing for the work of actual construction, that he subsequently proceeded with his plan, and that the plaintiff's patent was afterwards applied for and obtained, amounted to an estoppel in pais. It is impossible, however, to discover how the plaintiff's silence on the occasion mentioned tended at all to show a fraud upon the Patent Office,

* See it, *supra*, at top of p. 55.

much less that it constituted a fraud in law, so as to justify the court in ruling that he could not maintain his action. And the defendants, when sued for an infringement, were not at liberty to set up as a defence that the patent had been fraudulently obtained, no fraud appearing upon its face.*

Nor was there any case presented by the prayer that amounted to an estoppel. No principle is better settled than that a party is not estopped by his silence unless it has misled another to his hurt.† There was no evidence of any such misleading stated in the prayer or found in the case. The patent was granted September 23, 1862. It nowhere appears that before that day the defendants had expended one dollar in building their piers. Moreover, the point does not negative knowledge by Parker of the plaintiff's invention before the conversation of which it speaks took place; and there is some reason found in the evidence for believing that the plaintiff's plans had been revealed to Parker by Crossman, to whom the plaintiff had partially explained them, before that conversation. The court could not, therefore, have given the instruction asked, even if the plaintiff was under obligation to disclose his invention to Mr. Parker, which we are not prepared to assert.

The only remaining assignment of error is, that the court declined instructing the jury as requested, that in considering the question whether the plaintiff was or was not the first and original inventor of the improvement described in his patent, they might and ought to consider the evidence in the cause in relation to the state of the art of building and setting piers known at the time of the alleged invention of the plaintiff. Upon this subject the court did charge the jury that they had a right to take into consideration the knowledge which they might find to have been possessed, prior to the date of the plaintiff's patent, by the several witnesses whose names were given in the notice of defence, and who had been examined; and also the description of such constructions in Mahan's Civil Engineering, and

* Rubber Company *v.* Goodyear, 9 Wallace, 788.

† Hill *v.* Epley, 7 Casey, 334.

the patent of George A. Parker, and also all description of his invention made by the plaintiff to any one prior to the date of his patent in 1861 or '62, and also the conversation (whatever they might find it to have been) between the plaintiff and the engineer of the defendants in 1862, prior to the date of the plaintiff's application for a patent. This was all the defendants had a right to ask. They had given notice of nothing more. They had not apprised the plaintiff that the novelty of his invention would be assailed by any other evidence than such as they had particularized in their notice of defence. While, therefore, evidence in regard to the state of the art was proper to be considered by the court in construing the patent and determining what invention was claimed, it had no legitimate bearing upon the question whether the patentee was the first inventor.

DECREE AFFIRMED.

RAILROAD COMPANY *v.* HARRIS.

1. Where a Maryland railroad corporation whose charter contemplated the extension of the road beyond the limits of Maryland, was allowed by act of the legislature of Virginia—re-enacting the Maryland charter in words—to continue its road through that State, and was also allowed by act of Congress to extend into the District of Columbia, a lateral road in connection with the road through Maryland and Virginia; *Held:* (the unity of the road being unchanged in name, locality, election and power of officers, mode of declaring dividends, and doing all its business,)

   First. That no new corporations were created, either in the District or in Virginia, but only that the old one was exercising its faculties in them with their permission; and that, as related to responsibility for damages, there was a unity of ownership throughout.

   Second. That in view of such unity the corporation was amenable to the courts of the District for injuries done in Virginia on its road.

   Third. That this responsibility was not changed by a traveller's receiving tickets in "coupons" or different parts, announcing that "Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone."

2. The principle of pleading that a demurrer, after several pleadings, reaches back to a defective declaration, has no application where the defect is one of form simply.

3. A plea in bar waives all pleas in abatement.
4. A defective declaration may be cured by sufficient averments in a replication demurred to.

ERROR to the Supreme Court of the District of Columbia, the case being thus:

On the 28th February, 1827, the State of Maryland incorporated a company known as the Baltimore and Ohio Railroad Company. It was, of course, a Maryland corporation, with capacity to sue and be sued, to take and condemn lands, subject to certain restrictions, and with the ordinary powers, rights, and privileges of corporations in that State and elsewhere. The place where the board of directors was to meet was Baltimore. There its dividends from the company's earnings were to be declared, and there was to be the seat of its government generally. It had power to make lateral roads. But the principal and declared purpose of the charter of the company, a purpose indicated by the company's name, was "the construction of a railroad from the city of Baltimore to some suitable point on the Ohio River;" a matter to do which, in a line at all direct, it was necessary to have some action of the legislature of Virginia. Accordingly the legislature of Virginia, within eight days after the legislature of Maryland had passed its act of incorporation, passed an act to "confirm" the same. The Virginia act reads thus:

"Whereas, an act has passed the legislature of Maryland, entitled 'An act to incorporate the Baltimore and Ohio Railroad Company, in the following words and figures,' viz.: (setting out the Maryland act,) Therefore be it enacted by the General Assembly, that the same rights and privileges shall be and are hereby granted to the aforesaid company, within the territory of Virginia, as are granted to them within the territory of Maryland. The said company shall be subject to the same pains, penalties, and obligations as are imposed by said act; and the same rights, privileges, and immunities which are reserved to the State of Maryland, or to the citizens thereof, are hereby reserved to the State of Virginia and her citizens, except as to making lateral roads; and that the road shall not strike the

Ohio at a point below the mouth of the Little Kanawha; that the words 'other property,' in the 17th section of the Maryland act, shall not be construed to extend to any property other than materials necessary for the road, works, and buildings; and that in procuring land and materials for the road, they shall pursue the course pointed out by the Virginia laws."

Under these acts a railroad was accordingly made between Baltimore and the Ohio River.

Subsequently to this date, that is to say, on the 22d February, 1831, the legislature of Maryland gave the company authority to build a lateral road, from the main road between Baltimore to the Ohio, to the line of the District of Columbia. In immediate sequence, Congress passed a law by which a connection with the Capital was opened through the District. The act of Congress, which was approved March 2d, 1831, entitled "An act to authorize the extension, construction, and use of a lateral branch of the Baltimore and Ohio Railroad, into and within the District of Columbia," ran thus:

"Whereas, It is represented to this present Congress that the Baltimore and Ohio Railroad Company, incorporated by the General Assembly of the State of Maryland, by an act passed the 28th day of February, 1827, are desirous under the powers which they claim to be vested in them by virtue of the provisions of the beforementioned act, to construct a lateral branch from the said Baltimore and Ohio Railroad to the District of Columbia; therefore,

"Be it enacted, &c., That the Baltimore and Ohio Railroad Company, incorporated by the said act of the General Assembly of the State of Maryland, shall be, and they are hereby authorized to extend into and within the District of Columbia, a lateral railroad, such as the said company shall construct or cause to be constructed, in a direction towards the said District, in connection with the road they have located and are constructing from the city of Baltimore to the Ohio River, in pursuance of said act of incorporation. And the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions *in the construction and extension of the said lateral*

road into and within the said District, as they may exercise or be subject to under or by virtue of the said act of incorporation in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, benefits, and immunities, *in the use of said road and in regard thereto*, as are provided in the said charter, except the right to construct any lateral road or roads in said District from said lateral road."

A supplementary act of the legislature of Maryland, passed March 14th, 1832, provided that the stock issued by the company to complete this lateral road "shall, united, form the capital upon which the net profits derived from the use of *said road* shall be apportioned."

Under this act of Congress, and the act of Maryland authorizing a lateral road, a road was made from Washington to a point on the main road called the Washington Junction, not far from Baltimore, and so a complete road by rail opened from Washington to the Ohio River. At this point the Baltimore and Ohio Railroad terminated. From Belair, in Ohio, opposite this point of termination, began another road (the Ohio Central), running to Columbus. While, however, the road from Washington to the Ohio River was thus made up of two parts, one from Washington to the Junction, and one from the Junction to the Ohio River, each part, as the reader will have observed, was made in virtue of two different enactments; the former, from Washington to the Junction, by the act of Congress and the act of Maryland; the latter, or main branch, by the act of Maryland and the act of Virginia.

In this state of things, one Harris bought, at an office which the Baltimore and Ohio Railroad Company had established in Washington, a ticket with which to go to Columbus, Ohio. This ticket was made up of three coupons, one for travel between Washington City and the Washington Junction; another for travel between Washington Junction and the Ohio River, over the line of the Baltimore and Ohio Railroad, and the third and last, for travel from Belair, in Ohio, opposite the terminus of the Baltimore and Ohio Railroad, to Columbus, in Ohio, over the line of the Cen-

tral Ohio Railroad, already mentioned as confessedly disconnected with the Baltimore and Ohio one, except in the matter of running junction.*

Over the first coupon was a memorandum thus:

> "Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone."

And each coupon had printed on it

"CONDITIONED AS ABOVE."

While travelling on the Baltimore and Ohio Railroad, at *Mannington, in the State of Virginia*, Harris was severely injured by a collision between the train in which he was so travelling, and another train of the Baltimore and Ohio Railroad Company. He accordingly brought suit against the railroad in the Supreme Court of the *District of Columbia* for the injury he had suffered. The writ was served on the President of the Baltimore and Ohio Railroad Company. At the time that the writ was thus served, there was no act of Congress, authorizing suits against foreign corporations, doing business in the District. Some time afterwards, that is to say, on the 22d of February, 1867,† Congress enacted:

"That in actions against foreign corporations doing business in the District of Columbia, all process may be served on the agent of such corporation, or person conducting its business aforesaid, or in case he is absent and cannot be found, by leaving a copy thereof at the principal place of business of, in the District, and such service shall be effectual to bring the corporation before the court."

The declaration was against the company, describing it not as a citizen, or resident, or inhabitant of the District, or of

* The division of the ticket is described in a slightly different way in the opinion, *infra*, p. 85. The Reporter describes it as he himself, perhaps erroneously, understood it. The matter is not important.

† 14 Stat. at Large, 404.

any State, but as "a corporation duly and legally established by law, having and professing *a legal and recognized existence, within the limits of the District of Columbia, and exercising therein corporate powers, rights, and privileges*, in the making of the *contracts*, receiving freight and passengers, for transportation in and along their said railroad, from the city of Washington to the Ohio River;" and it relied on the purchase of the ticket, and a contract in virtue thereof, to carry the plaintiff safely to the Ohio River, and the breach of the contract in what had occurred.

The company pleaded in abatement,

1st. That the company was not an inhabitant of the District of Columbia when the writ was served.

2d. That the company was not found in the District of Columbia when the writ was served.

The view of the company in their pleas apparently was, that no new corporation had been created by the act of Congress of 1831, within the District, and so made an inhabitant of it; that the old corporation by virtue of that act, did not become such an inhabitant, or found within the District, and that the court in which the action was brought had succeeded but to the jurisdiction of the Circuit Court of the District; a court in regard to whose jurisdiction it was provided by the 6th section of an act of February 27th, 1801,* identical, so far as this suit was concerned, with the 11th section of the Judiciary Act of 1789:

"That no action or suit shall be brought before said court, by any original process, against any person who shall not be an *inhabitant of*, or found within said District at the time of serving the writ."

To the first of the above-mentioned pleas, Harris replied that the company was an inhabitant of the District of Columbia, by virtue of the act of Congress already mentioned, the date and title of which he set forth, and that they had accepted its provisions, and constructed their roads under the

* 2 Stat. at Large, 106.

act, availing themselves of the privileges thus conferred, and doing business under it in the District of Columbia.

To the second, that the company was found within the District of Columbia when the writ was served, and was within the jurisdiction of the court, by virtue of the acts of Congress mentioned in the first replication, and that due and legal service of the writ was made upon the person of the president within the District, &c.

The company demurred to these replications, adding to the demurrer an admission of the service on the president, but denying that such service was a legal service, or service on the company. The demurrers were overruled. The company thereupon filed the general issue of Not Guilty. Upon the trial, the counsel of the company asked the court to instruct the jury that upon the evidence before them the plaintiff could not recover.

The court refused to give the instruction, and the jury having found $8250 damages for the plaintiff, the company brought the case here.

It was argued at the last term, when a re-argument was directed upon one of the points raised in the first argument, to wit:

"Whether the acts of Congress and the statutes of West Virginia, relating to the Baltimore and Ohio Railroad Company, created a new and distinct corporation under that name in the said State and District of Columbia respectively, or whether they are only enabling acts, as respected the corporation under that name, created by the State of Maryland."

Messrs. Bradley and Buchanan, on the different arguments, for the plaintiffs in error:

1. The instruction asked for should have been given, for this reason among others, that the declaration was essentially defective. The decisions of this court require that the averment of jurisdiction shall be positive; that the declaration shall state expressly the fact on which jurisdiction depends.*

* Brown *v.* Keene, 8 Peters, 115.

Argument for the railroad company.

Now all that this declaration avers it could aver under the *Bank of Augusta* v. *Earle*,* though that case decided that "a corporation can have no legal existence outside of the place in which it was created; must dwell in the place of its creation, and cannot migrate to another sovereignty." For, though a non-resident corporation, it might contract, through its agents, within the District of Columbia, and thus exercise a corporate power, right, and privilege, in the making of such contracts. There is thus an absolute failure in the averment of this *narr* to state the single and necessary circumstances, essential to the jurisdiction of this court. And this defect which is reached by the demurrer, is fatal to the case of the plaintiff.

2. The company has lost none of the benefits of its pleas to the jurisdiction or its demurrer by pleading over; and if it appears, from an inspection of the whole record, either that the court below had no jurisdiction of the case at bar, or that the pleadings of the plaintiff below were so defective that the court below should have rendered judgment for the defendant, this court will reverse the judgment given.†

3. But supposing the *narr* good. Was this defendant an inhabitant of the District of Columbia, or capable of being found within it?

"If a corporation,‡ as is well settled, and is declared in words in the case of the *Ohio and Mississippi Railroad Company* v. *Wheeler*,§ can have no legal existence beyond the State or sovereignty which brings it into life," and must dwell in the place of its creation, this defendant cannot, by possibility, be an inhabitant of this District, or be found within this District, unless it can be shown that it has been *incorporated* by a law of Congress, operating within this District. Now, before a

* 13 Peters, 588.

† Louisville Railroad Company *v.* Letson, 2 Howard, 558; Lawson *v.* Snyder, 1 Maryland, 77; Tucker *v.* State, 11 Id. 322.

‡ Marshall *v.* Baltimore & Ohio Railroad Co., 16 Howard, 328; Covington Drawbridge Co. *v.* Shepherd, 20 Id. 233; Louisville Railroad Co. *v.* Letson, 2 Id. 558; Bank of Augusta *v.* Earle, 13 Peters, 519.

§ 1 Black, 297.

sovereignty can be said to give existence to a corporation, it must authorize such a body to have perpetual succession, to sue and be sued, implead and be impleaded, grant and receive by its corporate name, to have a common seal, to make by-laws, to have the power of amotion or removal of members. Certainly the act of Congress did not incorporate this company. Yet unless the company be incorporated in the District it cannot be sued there against its will. It is not enough that the corporation should be able to hold, control, and manage property, or possess certain privileges and powers within the District. All this may be done by an agent; it may still be a non-resident. The late case of *Day* v. *Newark India-rubber Company** is a case in point adverse to the right of Harris to sue the defendant in the Supreme Court of the District of Columbia. The defendant corporation was there sued in the Circuit Court for the district of New York, whose jurisdiction under the eleventh section of the Judiciary Act of 1789, is identical with that given to the Supreme Court of the District of Columbia under the act of 1801, local to the District, which regulates this case. The court relying on the cases cited by us held that there was no jurisdiction. The syllabus is thus:

"Where a manufacturing corporation, chartered by New Jersey, and having its place of business and manufactory in that State, had a store in New York, conducted by its agents, where its goods were sold, and a suit was commenced in this court by attaching the goods found in that store, and serving a summons on its president at New York, yet held that the corporation was not an inhabitant of the district of New York, or found within it at the time of serving the process."

And this view of the law is sustained by nearly every legislature in the country, as also by Congress. Certainly it has been found necessary to provide, by legislation, for giving jurisdiction, even to *State* courts, having common law powers, over foreign corporations, having agents within the State, and there exercising some of their franchises. This

* 1 Blatchford, 628.

was done in Maryland by art. 75, secs. 100, 101, and 102, of the Public General Laws of that State; in Pennsylvania, by the act of 21st March, 1849; in New York, by the act of 1849, ch. 107. In other States, as in Illinois, a foreign corporation coming into the State is required by statute to enter into a stipulation that its agents shall accept service of writs issued against it.* And what shall we say of this very District of Columbia? Why was the act of February 27th, 1867, passed, authorizing service upon a foreign corporation doing business within the District, if the power to make such service was already in existence? This act of 1867 is a declaration by Congress that its act of 1831 authorizing the introduction of the railroad into the District, gave no such right against the road. But the act of 1867 was not passed till after this suit was brought.

The language of the Virginia act is very different from that of the act of Congress. It re-enacts, *totidem verbis*, the Maryland statute of incorporation. In other words it re-incorporates the company; and hence in *The Baltimore and Ohio Railroad Company* v. *Gallahue*, reported in 12th Grattan,† it was decided that this act of Virginia did make the company a clear and complete Virginia corporation. The same view was taken—the question being afterwards regarded as hardly longer open to question—by the Court of Appeals of West Virginia in the subsequent cases of *Goshorn* v. *The Supervisors*,‡ and *The Baltimore and Ohio Railroad Company* v. *The Supervisors*.§ But, on the question of jurisdiction, we are not concerned with what the statute of Virginia did. The question is, did the act of Congress re-incorporate? Plainly it did not.

But if the company is incorporated within the District of Columbia, there were three distinct corporations; for if the act of Congress made a corporation in the District, the act of Virginia did, *a fortiori*, make one in Virginia. But if there were three distinct corporations, the instruction asked for ought certainly to have been given; for that corporation in

* See Ducat *v.* Chicago, 10 Wallace, 410.

† Page 658.

‡ 1 West Virginia, 308.

§ 3 Id. 319.

the District was no more responsible for the injuries which Harris sustained near Mannington, in Virginia, than it would have been had the same been sustained on the line of the Central Ohio Railroad in the State of Ohio. The American rule is, that in the absence of special contract, each company is only liable for the extent of its own route.*

Instead of producing and proving the ticket as laid in his *narr*, the plaintiff produced a ticket consisting of three coupons, by which the liability of each company was limited to its respective route. This was a fatal variance.

Messrs. T. I. D. Fuller and W. D. Davidge, contra, contended that the declaration, reasonably interpreted, and especially as helped by the replication, demurred to, and all whose allegations of fact were thus admitted, did show a *habitat;* which was all that was necessary for it to show; that whether the act of Congress and the act of Virginia created new and distinct corporations or were only enabling acts, was not, as respected the great point in the case—the right to sue the corporation in the District—a practical question, for that even though no new corporation was created in the District, still if the old corporation had a *habitat* there, that this was enough: that coming there to exercise its franchise, to take, condemn, and hold, to take land, fares and freight, to run its cars in and out, it was estopped to deny a *habitat.*

The true view of the case, the learned counsel contended, was that there was but one company and one road; though a road divided for convenience into sections; sections, however, not identical with the territories of the different sovereignties. It had never been pretended by any one (they argued), that there was more than one company, one organization, and one set of officers. Three distinct corporations would destroy the unity of purpose and action essential to the ends of the charter. The charter as originally conferred by the State of Maryland, contemplated the exercise of corporate powers outside of the State, and such as were not

* Nutting *v.* Connecticut River Railway Company, 1 Gray, 502.

within the power of the State alone to confer. It contemplated the extension and construction of the road into two other sovereignties for its termini. And, immediately after its creation by the State of Maryland, the company applied to Congress and the State of Virginia for the privilege of extending its road into their jurisdictions, and obtained it, with the corporate right to exercise the same powers as were conferred by the parent act. But when the corporation actually came into the District or into Virginia, whether by being "enabled" or "re-incorporated" it was not the less in the place whither it had come, and having a *habitat* there it was liable to process. The broad language used by this court in *The Ohio and Mississippi Railroad Company* v. *Wheeler*, "that a corporation can have no legal existence beyond the State which created it," should be limited to the question then before the court—that of citizenship.

If the act of Congress did not re-incorporate, and if re-incorporation was necessary to give a right to sue, to what inconvenience is the suitor not exposed! The argument cannot be better put than in the language of the court in 12th Grattan.

"It would be a startling proposition if in all such cases citizens of the District and others should be denied all remedy in its courts, for causes of action arising under contracts and acts entered into or done within its territory, and should be turned over to the courts and laws of a sister State to seek redress."

Did Congress in allowing the entry into the District design this great inconvenience?

The argument of the other side, founded on the coupons or division of the tickets, assumed that there were three separate corporations; an assumption now shown to be without foundation.

Reply: The argument *ab inconvenienti* in 12th Grattan was used to help out the argument, which logically or legally it cannot at all help out, that the legislature of Virginia had meant to create a new and separate corporation; the exact point decided in that case and affirmed in the two cases from

Recapitulation of the case in the opinion.

West Virgina. It was not used to show that a corporation of one State extending its road into another, even with its leave, became liable to be sued in that other without being re-incorporated. But the argument *ab inconvenienti* amounts to nothing. The rule of the common law and whatever of inconvenience it has, is remediable by a statute of two or three lines, and everywhere is being remedied as corporations go into foreign States, and the necessity for a remedy arises.

What Congress *meant* to do on this particular point by its act of 1831 is a point to be settled by the language of the act, not by the suggestion of an inconvenience but fancied. What Congress itself considered that it meant by its act of 1831, and what it considered had both been done and left undone by that act, Congress has itself declared by another act; its act of 1867. From the last-named year, and not before, Congress declares that it meant to change the rule of the common law. As this perhaps is the only case in the District where service on a foreign corporation has been sought for, the inconvenience has hitherto been little. Since 1867 and for all future time it is nothing.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Supreme Court of the District of Columbia.

Harris sued the Baltimore and Ohio Railroad Company for injuries which he received by a collision. The declaration sets out that the company is a corporation established by law by the name of the Baltimore and Ohio Railroad Company, having a legal and recognized existence within the limits of the District of Columbia and exercising there their corporate rights and privileges in the making of contracts and receiving freight and passengers for transportation upon their roads from the city of Washington to the Ohio River; that at the city of Washington, on the 23d of October, 1864, the plaintiff, wishing to be transported by the company over their roads to the Ohio River and towards the city of Columbus in the State of Ohio, for the sum of fifteen

Recapitulation of the case in the opinion.

dollars, paid to the company, purchased of them a ticket for a seat and passage in their cars, to be transported along their roads from the city of Washington to the Ohio River and towards the city of Columbus; that in pursuance of this contract he took his seat in one of the cars of the company; that the company, in consideration of the money so paid, undertook and promised to transport him safely to the Ohio River; that the company managed their trains so negligently and carelessly that two trains, running in opposite directions, came in collision near Mannington, in the State of Virginia, whereby the plaintiff received the injuries complained of.

The company pleaded two pleas in abatement.

(1) That the company was not an inhabitant of the District of Columbia when the writ was served. (2) That the company was not found in the District of Columbia when the writ was served.

To the first plea Harris replied that the company was an inhabitant of the District of Columbia by virtue of certain acts of Congress, the dates and titles of which are set forth, and that they had accepted the provisions of those acts and constructed their roads under them, availing themselves of the privileges thus conferred and doing business under them in the District of Columbia. To the second plea he replied that the company was found within the District of Columbia when the writ was served, and was within the jurisdiction of the court by virtue of the acts of Congress mentioned in the first replication.

The company demurred to these replications. The demurrers were overruled. The company thereupon filed the general issue of not guilty. The cause was tried by a jury and a verdict found for the plaintiff, upon which judgment was entered.

Upon the trial the counsel for the company prayed the court to instruct the jury that upon the evidence before them the plaintiff was not entitled to recover. The court refused to give this instruction, and the company excepted. Other exceptions appear by the record to have been taken, but they were not embodied in a bill of exceptions and we can-

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not therefore consider them. The errors insisted upon here, at the first argument of the case, were:

The overruling of the demurrers to the replications to the pleas in abatement.

The refusal of the court to give the instruction above set forth.

And that the declaration is fatally defective, wherefore the judgment should have been arrested and must now be reversed.

When the case was first considered by this court in conference, it was found that while all the judges were of opinion that the judgment should be affirmed, there was a difference of opinion upon the question whether the acts of Congress and the statutes of Virginia relating to the company created a new and distinct corporation in the District of Columbia and in the State of Virginia respectively, or whether they were only enabling acts in respect to the corporation under the name of the "Baltimore and Ohio Railroad Company," as originally created by the State of Maryland. Subsequently the question was ordered to stand for reargument, and it has been reargued by the counsel on both sides. As the solution of this question must determine, to a large extent, the grounds upon which the judgment of the court is to be placed, it is necessary carefully to consider the subject.

The Baltimore and Ohio Railroad Company was incorporated by an act of the legislature of Maryland, passed on the 28th of February, 1827. On the 8th of March following, the legislature of Virginia passed an act whereby, after reciting the Maryland act, it was declared "that the same rights and privileges shall be, and are hereby, granted to the aforesaid company within the territory of Virginia, and the said company shall be subject to the same pains, penalties, and obligations as are imposed by said act, and the same rights, privileges, and immunities which are reserved to the State of Maryland or to the citizens thereof are hereby reserved to the State of Virginia and her citizens."

Several other statutes relating to the company were subsequently passed in Virginia, but they do not materially

affect the question under consideration, and need not be more particularly adverted to. By an act of the legislature of Maryland, of the 22d of February, 1831, the company was authorized to build a lateral road to the line of the District of Columbia. On the 2d of March, 1831, Congress passed an act which, after reciting, by a preamble, the original act of incorporation, enacted "that the Baltimore and Ohio Railroad Company, incorporated by the said act of the General Assembly of the State of Maryland, shall be, and they are hereby, authorized to extend into and within the District of Columbia a lateral railroad." . . . "And the said Baltimore and Ohio Railroad Company are hereby authorized to exercise the same powers, rights, and privileges, and shall be subject to the same restrictions in the construction and extension of the said lateral road into and within the said District as they may exercise or be subject to under or by virtue of the said act of incorporation in the extension and construction of any railroad within the State of Maryland, and shall be entitled to the same rights, benefits, and immunities in the use of said road and in regard thereto as are provided in the said charter, except the right to construct any lateral road or roads in said District from said lateral road." A number of local regulations follow, which are not material to be considered. A supplementary act of the legislature of Maryland, passed March 14th, 1832, provided that the stock issued by the company to complete this lateral road "shall, united, form the capital upon which the net profits derived from the use of said road shall be apportioned," &c.

The act of Congress of February 26th, 1834, and of March 3d, 1835, are confined to matters of detail, and may be laid out of view.

When the case was reargued as directed by this court, the counsel for the company admitted that the acts of Congress in question were only enabling acts, and that they did not create a new corporation, but they insisted that the acts of Virginia were of a different character, and that they worked that result.

As regards the point under consideration we find no substantial difference. In both the original Maryland act of incorporation is referred to, but neither expressly or by implication create a new corporation. The company was chartered to construct a road in Virginia as well as in Maryland. The latter could not be done without the consent of Virginia. That consent was given upon the terms which she thought proper to prescribe. With a few exceptions, not material to the question before us, they were the same as to powers, privileges, obligations, restrictions, and liabilities as those contained in the original charter. The permission was broad and comprehensive in its scope, but it was a license and nothing more. It was given to the Maryland corporation as such, and that body was the same in all its elements and in its identity afterwards as before. In its name, locality, capital stock, the election and power of its officers, in the mode of declaring dividends, and doing all its business, its unity was unchanged. Only the sphere of its operations was enlarged.

In what it does in Virginia the same principle is involved as in the transactions of the Georgia corporation in Alabama, which came under the consideration of this court in *The Bank of Augusta* v. *Earle*.* The distinction is that here the assent of the foreign authority is express, while there it was implied. A corporation is in law, for civil purposes, deemed a person. It may sue and be sued, grant and receive, and do all other acts not *ultra vires* which a natural person could do. The chief point of difference between the natural and the artificial person is that the former may do whatever is not forbidden by law; the latter can do only what is authorized by its charter. It cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place. One of these conditions may be that it shall consent to be sued there. If it do business there it will be presumed to have assented and will be bound accordingly.† For the

* 13 Peters, 558.

† Lafayette Ins. Co. *v.* French, 18 Howard, 405.

purposes of Federal jurisdiction it is regarded as if it were a citizen of the State where it was created, and no averment or proof as to the citizenship of its members elsewhere will be permitted. There is a presumption of law which is conclusive.*

We see no reason why several States cannot, by competent legislation, unite in creating the same corporation or in combining several pre-existing corporations into a single one. The Philadelphia, Wilmington, and Baltimore Railroad Company is one of the latter description. In the case of that company against Maryland,† Chief Justice Taney, in delivering the opinion of this court, said: "The plaintiff in error is a corporation composed of several railroad companies, which had been previously chartered by the States of Maryland, Delaware, and Pennsylvania, and which, by corresponding laws of the respective States, were united together and form one corporation, under the name and style of The Philadelphia, Wilmington, and Baltimore Railroad Company. The road of this corporation extends from Philadelphia to Baltimore." He gives the history of the legislation by which this result was produced. No question was raised on the subject, but the opinion assumes the valid existence of the corporation thus created. The case was brought into this court under the 25th section of the Judiciary Act of 1789. The jurisdictional effect of the existence of such a corporation, as regards the Federal courts, is the same as that of a copartnership of individual citizens residing in different States. Nor do we see any reason why one State may not make a corporation of another State, as there organized and conducted, a corporation of its own, *quc ad hoc* any property within its territorial jurisdiction. That this may be done was distinctly held in *The Ohio and Mississippi Railroad Co.* v. *Wheeler*.‡ It is well settled that corporations of one State may exercise their faculties in an-

* Louisville, Cincinnati & Charleston Railroad Co. *v.* Letson, 2 Howard, 497; Marshall *v.* The Baltimore & Ohio Railroad Co., 16 Id. 329; Ohio & Mississippi Railroad Co. *v.* Wheeler, 1 Black, 297.

† 10 Howard, 392.

‡ 1 Black, 297.

other, so far, and on such terms, and to such extent as may be permitted by the latter.* We hold that the case before us is within this latter category. The question is always one of legislative intent, and not of legislative power or legal possibility. So far as there is anything in the language of the court in the case of *The Ohio and Mississippi Railroad Co.* v. *Wheeler*, in conflict with what has been here said, it is intended to be restrained and qualified by this opinion. We will add, however, that as the case appears in the report, we think the judgment of the court was correctly given. It was the case of an Indiana railroad company licensed by Ohio, suing a citizen of Indiana in the Federal court of that State.

In *The Baltimore and Ohio Railroad Co.* v. *Gallahue's Administrator*, 12 Grattan,† it was held by the Court of Appeals of Virginia that the company was suable in that State. In this we concur. We think this condition is clearly implied in the license, and that the company, by constructing its road there, assented to it. The authority of that case was recognized by the Court of Appeals of West Virginia, in *Goshorn* v. *The Supervisors*,‡ and in *The Baltimore and Ohio Railroad Co.* v. *The Supervisors et al.*§ Here the question is whether the company was suable in the District of Columbia. In the case reported in Grattan, it was said: "It would be a startling proposition if in all such cases citizens of Virginia and others should be denied all remedy in her courts, for causes of action arising under contracts and acts entered into or done within her territory, and should be turned over to the courts and laws of a sister State to seek redress." The same considerations apply to the case before us. When this suit was commenced, if the theory maintained by the counsel for the plaintiff in error be correct, however large or small the cause of action, and whether it were a proper one for legal or equitable cognizance, there could be no legal redress short of the seat of the company in another

* Blackstone Manufacturing Co. *v.* Inhabitants, &c., 13 Gray, 489; Bank of Augusta *v.* Earle, 13 Peters, 588.

† Page 658. ‡ 1 West Virginia, 308. § 3 Id. 319.

State. In many instances the cost of the remedy would have largely exceeded the value of its fruits. In suits local in their character, both at law and in equity, there could be no relief. The result would be, to a large extent, immunity from all legal responsibility. It is not to be supposed that Congress intended that the important powers and privileges granted should be followed by such results.

But turning our attention from this view of the subject and looking at the statute alone, and reading it by its own light, we entertain no doubt that it made the company liable to suit, where this suit was brought in all respects as if it had been an independent corporation of the same locality.

We will now consider, specifically, the several objections to the judgment, relied upon by the plaintiffs in error.

The pleas in abatement were bad. The demurrers reached back to the first error in the pleadings, and judgment was properly given against the party who committed it. If the replications were bad, bad replications were sufficient answers to bad pleas. But it is said the declaration was bad, and that the demurrers brought the defect in that pleading under review. The principle has no application where the defect is one of form and not of substance.*

The alleged defect in the declaration will be considered in connection with the error assigned relating to that subject. But if the court decided erroneously, the company waived the error by pleading over in bar. If it were desired to bring up the judgment upon the pleadings for examination by this court the company should have stood by the demurrers. In the proper order of pleading which is obligatory a plea in bar waives all pleas, and the right to plead, in abatement.†

The bill of exceptions which brought upon the record the refusal of the court to instruct the jury that the plaintiff was not entitled to recover, exhibits, among others, the following facts: Harris contracted, paid his money, and received his

* Aurora City *v.* West, 7 Wallace, 82.

† Young *v.* Martin, 8 Wallace, 354; Aurora City *v.* West, 7 Id. 92; Clear water *v.* Meredith, 1 Id. 42; 1 Chitty's Pleading, 440, 441.

tickets at the city of Washington. The tickets consisted of three coupons—one for his passage from Baltimore to Columbus, Ohio; another for his passage from Washington Junction to Baltimore, and the third for his passage from Washington City to Washington Junction. It is necessary to consider only the two last mentioned. They are both headed "Baltimore and Ohio Railroad," and signed "L. M. Cole, general ticket agent." Above the coupon first mentioned is this memorandum: "*Responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone.*" Each coupon has printed on its face the words "Conditioned as above." The coupon last mentioned gave Harris the right of passage over the lateral branch both in the District of Columbia and in Maryland. The second coupon gave him the same right in respect to the main stem both in Maryland and in Virginia.

The instruction asked for assumed erroneously that there were two corporations under the same name, one of them in Virginia, and that the latter was liable and alone liable to the plaintiff. The attempted limitation of responsibility by the memoranda at the head and on the face of the coupons proceeded upon the same erroneous assumption as to the duality of the corporate ownership of the roads.

These views are sufficiently answered by what has been already said upon the subject. But if we concurred with the counsel for the plaintiff in error we should then hold that the agent who issued the coupons was the agent of both corporations; that the contract was a joint one; and that it involved a joint liability, unless the knowledge of the memoranda on the coupons and the assent of the plaintiff were clearly brought home to him.* In all such cases the burden of proof rests upon the carrier.† The bill of exceptions does

* Bissell *v.* Michigan S. & Northern Indiana Railroad Co., 22 N. Y., 258; Champion *v.* Bostwick, 18 Wendell, 175; Cary *v.* Cleveland & Toledo Railroad Co., 29 Barbour, 35; Quimby *v.* Vanderbilt, 17 N. Y. 306; Najac *v.* Boston & Lowell Railroad Co., 7 Allen, 329; The Great Western Railway Co. *v.* Blake, 7 Hurlstone & Norman, 987.

† New Jersey Steam Nav. Co. *v.* The Merchants' Bank, 6 Howard, 384; Brown *v.* Eastern Railroad Co., 11 Cushing, 97; Bean *v.* Green et al., 8

not show that any testimony was given upon that subject. The court was asked to assume that the limitation on the face of coupons was itself conclusive, and to instruct the jury accordingly. But having held the unity of the corporation, of the proprietorship of the roads, and of the contract, it is needless further to consider the case in this aspect. The instruction asked for was properly refused.

The jurisdiction of the court was not governed by the 11th section of the Judiciary Act of 1789. It did not depend upon the citizenship of the parties. It was controlled by acts of Congress local to the district. A citizen of the district cannot sue in the Circuit Courts of a State.* If a corporation appear and defend in a foreign State it is bound by the judgment.† If the declaration were insufficient, the additional averments in the replications admitted by the demurrer to be true, cured the defect.‡

JUDGMENT AFFIRMED.

FRENCH v. SHOEMAKER.

1. Where the whole law of a case before a Circuit Court is settled by a decree, and nothing remains to be done, unless a new application shall be made at the foot of the decree, the decree is a final one, so far as respects a right of appeal.
2. Where there is nothing on the record to show to the court that the indemnity given by an appeal bond is insufficient, the presumption is that it is sufficient.
3. Where a party is perpetually enjoined and restrained by a decree of a Circuit Court, from *any proceeding whatever*, not in accordance with certain contracts which a complainant had applied to that court to make him, by injunction, observe, that court—though an appeal here has been taken within ten days, and an appeal bond with sufficient indemnity given,—may yet properly order the defendant to desist from a second

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Fairfield, 422; Dorr *v.* The New Jersey Steam Nav. Co., 4 Sandford, 136; S. C., 1 Kernan, 485.

* Hepburn *v.* Ellzey, 2 Cranch, 445.

† Angel & Ames on Corporations, § 404, 405; Flanders *v.* Ætna Ins. Co., 8 Mason, 158; Cook *v.* The Champlain Transportation Co., 1 Denio, 98.

‡ Lafayette Insurance Co. *v.* French, 18 Howard, 405.

Statement of the case.

suit in another court of the United States, to set aside the contract, just as above mentioned, passed on. And this although in such second suit new parties are introduced, whom the Circuit Court had held were not necessary parties to the proceeding there. Such an order is not a misconstruction by the Circuit Court of its own decree.

THESE were two motions by the opposite parties, in an appeal from a decree of the Circuit Court of the United States for the District of Virginia.

1. A motion on behalf of the appellee to dismiss the appeal for want of jurisdiction, on the ground of the decree's being interlocutory and not final.

2. A motion on behalf of the appellant for a supersedeas, or for any suitable order prohibiting the court from proceedings on the decree while the appeal was pending.

The case was thus:

In the year 1854, two persons, James S. French and Walter Lenox, subscribed for the whole stock of the *Washington and Alexandria* Railroad Company, then recently incorporated by the State of Virginia; French taking three-fourths and Lenox one-fourth, *and French being made President of the company.* The road was built. French and Lenox, however, spent very little money of their own in its construction, but raised large sums by borrowing. When, therefore, the road was built the company was seriously embarrassed. Two deeds of trust had been executed in 1855, and in 1857 another deed was made to Lenox, as trustee, to secure bonds, issued to raise money for the purposes of the road.

The civil war broke out when the road was in this condition, and French and Lenox went South, and were disabled by the condition of the country and by the government's taking military possession of the road from asserting their title to the property.

During their absence, a proceeding was instituted in the Alexandria County Court for the removal of Lenox as trustee in the deed of trust to him, and this resulted in an order for such removal, and for the substitution of one Stewart as trustee in his place. The new trustee proceeded in alleged conformity to the deed of trust to sell the railroad.

Under the sale thus made, a new company was organized, which assumed the name of the Washington, Alexandria, *and Georgetown* Railroad Company; and the government having relinquished the road in 1865, this company took possession of it at once; and not long afterwards entered into a contract with the Adams Express Company in relation to the conveyance of express freight, and the furnishing by the latter of means to work the road. This contract did not prove satisfactory, and by consent of both parties, a lease for ten years was made to two persons, named Stevens and Phelps, in May, 1866; and in the following June, another contract for means of operation and for the conveyance of express freight was made for ten years with the Adams Express Company.

Litigation soon arose upon this lease and upon these contracts. One Davison, asserting himself to be a stockholder of the Washington, Alexandria, and Georgetown Railroad Company, filed his bill in the Alexandria County Court in November, 1866, alleging that the lease was made without authority, and in fraud of the rights of the stockholders, and praying that it might be set aside and annulled. The Adams Express Company filed its bill about the same time, in the Circuit Court of the United States for the District of Virginia, praying for the enforcement of its contract with the company, and with the lessees; and under that proceeding an order was made by the Circuit Court for the appointment of receivers of the road, who took possession.

The Adams Express Company was not a party to the suit in the State court, nor was the Washington and Alexandria Railroad Company a party to the suit in the Federal court.

The Washington and Alexandria Railroad Company describing itself as *that company by James S. French, its President*, had already in March, 1866 (the government having with the suppression of the rebellion, given up, as already said, its possession, and French and Lenox having returned from the South), filed its bill in the Alexandria County Court asserting its title to the road, charging fraud in the whole proceeding for the organization of the Washington, Alex-

andria, and Georgetown Railroad Company, and praying that it might be declared void, and that a decree might be made establishing its own original title to the road as unimpaired by that proceeding.

In this condition of conflicting claims, and with these and other suits pending, two instruments were executed with a view to adjust things between all the parties at issue; and who were the said French and Lenox, Stevens and Phelps, and one *Shoemaker*, representing the Adams Express Company. Two other persons, viz., Brent and Smith, also had an interest.

The transaction vested in Shoemaker the interest of French in the Washington and Alexandria Railroad Company as security to himself and the Adams Express Company for the repayment of the $5000 then advanced, and the sums to be thereafter advanced in payment of the liabilities of the company, and of the lessees incurred on account of the road, and as security to all the parties for the performance of the covenants contained in the agreement, and especially for the reorganization of the company upon the rendering of a decree by the said Alexandria County Court establishing its title to the road, and for the distribution of the stock of the company among the parties in the stipulated proportions. These instruments, which made what might be called a sort of settlement contract, were intended as an adjustment of controversies relating to the Washington and Alexandria Railroad Company, so far as the parties to it were concerned, and as an arrangement for means to liquidate its just liabilities, and put it into successful and profitable operation. The decree, on the rendering of which the contract was to be carried into effect, was rendered in the said Alexandria County Court on the 28th of August, 1868. It declared the sale by the trustee, Stuart, and the organization of the new company fraudulent, null, and void; and ordered that on execution of a bond in a sum specified, to account to creditors for the receipts of the road, it should be "restored" by the officers of the so-called new company "to the possession of the Alexandria and Washington Railroad Company, its

duly constituted officers and agents." At the time of this decree the road was in possession of the receivers appointed by the Federal court at the suit of Adams Express Company.

In this state of things thus far completed, Shoemaker filed a bill in the court below, the Circuit Court for Virginia, against French; and French then filed a cross-bill against him. The original bill, after stating the rendering of the decree contemplated by the settlement contract, as just above mentioned, stating also the alleged equities arising from the contract, and the action of the parties to it, except French, charged that notwithstanding French's conveyance, and notwithstanding that a meeting had been held of all the parties to the contract, to reorganize the road under the contract (he having been present), French, under color of the order of restoration, had executed a pretended bond in the sum specified in the order, as the bond required by the decree, and that he had ordered the clerk of the Circuit Court to issue a writ of possession ordering the restoration of the road and property of the company, and under color of this fraudulent and illegal proceeding had attempted to take possession of the road, notwithstanding that it was at the time in possession of the receivers of the Circuit Court at the suit of the Adams Express Company, represented by the complainant; charging further, that French was so reckless of his obligation to him, the complainant, Shoemaker, and so determined to prevent the execution of the reorganization of the company, that unless enjoined he would damage the interest of the complainant and the others irreparably. The bill prayed that French be enjoined from attempting to do any act as President of the said Alexandria and Washington Railroad Company, and from intermeddling with the road and property of the company, or with the parties to the agreement, or with the complainant in carrying out its provisions, or from holding any meeting for the reorganization of the company, or from taking any proceedings at law or in equity for that purpose, except by proceedings in the suit in which the bill was filed in the Circuit Court of the United States for Virginia, or by attending the meetings for the

purpose of such reorganization, and voting or using the interest he may have under the settlement, if he have any, for the quiet and proper object of the said meetings; *and that his said interest be sold by a commissioner of the court, for the payment of said sum of* $5000, *according to the practice of the court;* and that the complainant, in his own behalf, and as trustee of said parties to said agreement, have such other and further relief as his case and their interest might require.

The answer of French admitted the execution of the contract, and that he was then and for some time afterwards satisfied with it; but proceeded to allege circumstances of hardship and imposition under which he was induced to become a party to it, and various other matters supposed to show a want of equity in the complainant.

The matters set up in the answer were again set up in the cross-bill of French, together with other matter of complaint, as grounds for his prayer that the settlement contract might be annulled, and the parties to it be restrained from all attempts to enforce any pretended rights under it. *The point too was taken in the cross-bill, that Stevens and Phelps were necessary parties to the original bill.*

The answer of the original complainant to this bill denied every substantial allegation of fact on which relief against the contract was claimed.

The decree was thus made, Chase, C. J., presiding:

"This cause coming on to be heard upon the bill, answer, and replication, and upon the cross-bill, answer, and replication, and upon the proofs, and being maturely considered, the court is of opinion that the *equity of the case is with the complainant in the original bill*, and thereupon do order, adjudge, and decree that James S. French, the defendant in the original bill, be perpetually enjoined and restrained from any use of the name or title of the president of the Washington and Alexandria Railroad Company under any election to that office heretofore held, and from any action by himself or any attorney or agent to interfere with any proceeding for the reorganization of the said company under the contracts mentioned in said bill, and dated on the 6th of December, 1867, and *from any proceeding whatever not in accord-*

ance with the said contracts, without prejudice, however, to the right of the said French to the stock assigned to him by said contract, or to assert any claim he may have against said company reorganized under said contract, or against the said Shoemaker, or against the Adams Express Company, not in contravention of the said contract, or to pursue by proper proceedings in law or equity any claim he may have in respect to the distribution of stock made in and by said contract, founded upon the failure of consideration or other cause.

"It is further ordered, adjudged, and decreed, that the said defendant, French, pay the costs in this cause, and leave is given to either party to apply at the foot of this decree for such further order as may be necessary to its due execution, or as may be required in *relation to any matter not finally determined by it.*"

From this decree an appeal to this court was immediately and within ten days asked for by French, and allowed by the Chief Justice, "upon the defendant's giving bond with good and sufficient security in the sum of $500." The bond, &c., was given.

In this state of things the bill and cross-bill in the equity suit, on which the decree has just above been given, having been, as the reader will have observed, a proceeding *between French and Shoemaker alone*, and the objection to the bill for want of proper parties taken and overruled, French began a suit in the Supreme Court of the District of Columbia against all the parties to the settlement contract *except Shoemaker*, for the purpose of setting aside the agreement. His bill being demurred to because Shoemaker was not a party, and the demurrer being sustained, Shoemaker was added.

Hereupon, on the application of Shoemaker to the Circuit Court of Virginia, that court ordered French to dismiss his bill in the District, and to stop proceedings under pain of imprisonment. He dismissed his bill.

It was in this state of things that the two motions mentioned at the opening of the report (on page 87), came before this court.

I. ON THE FIRST MOTION, to wit, that of Shoemaker, the appellee, to dismiss the appeal, it was argued:

Argument in support of the second motion.

In support of the motion, that the decree was not final, because it had not touched the prayer for foreclosure of the mortgage for $5000, one important object of the bill.

Neither had it dismissed the cross-bill. Yet in *Ayres* v. *Carver*,* a decree was held not final on dismissal of a cross-bill the original bill being left. This was but a converse of that case.

That the decree was not meant to be final was shown by the language of the decree, which anticipated further action of the court in matters not finally disposed of.

Contra, as respected this motion, it was said that the subject not disposed of, to wit, the mortgage for $5000, was distinct from that which formed the substance of the decree, and that, in fact, the bill was multifarious in joining these two separate claims. The decree completely disposed of one of them, and was final as to that. That was enough.†

To what was said about the cross-bill not being dismissed, it was replied, that it had been in effect dismissed when on a cause declared to have been heard on bill *and* cross-bill, the equity was declared to have been with the complainant in the original bill.

The leave reserved was to apply on the foot of the decree, and plainly was meant for formal orders only. The Chief Justice, who made the decree with this reservation, allowed an appeal immediately; a proof that he did consider that he had made a final decree.

II. AS TO THE SECOND MOTION, for a supersedeas, or *for any suitable order prohibiting the court below* from proceeding, &c., it was argued—the parties reserving their position of parties moving—*in favor of the appellant*,

1. That while the merits of this case could not be fully considered on a motion, it was necessary to refer to the main points in the case in order to act on the motion. The agreement was not between French and Shoemaker alone, but

* 17 Howard, 591.

† Thomson *v.* Dean, 7 Wallace, 342, citing Forgay *v.* Conrad, 6 Howard, 201.

was signed by five other persons, to wit: Lenox, Stevens, Phelps, Smith, and Brent. These persons were so interested in the contracts that they were necessary parties to the suit. Now the objection for want of parties had been distinctly made in the cross-bill, on the hearing in the Circuit Court below. The decree nevertheless went the full length of setting up the contracts, and enjoined French "from any proceedings whatever not in accordance with" them. It was in effect an injunction against the Alexandria and Washington Railroad Company, which was no party to the record. And the effect of the order subsequently made, to stop proceedings in the court of the District, was to prevent the appellant from pursuing his remedy against the parties named, and to make the decree conclusive in their favor, although they were not parties to the proceeding in which it was rendered.

2. By the appeal taken and bond filed within ten days, the decree was suspended and the case removed to this court. No further proceedings as to that decree could be taken in the court below while the appeal was pending here. For any violation of the decree, the appellant was answerable to this court and not to the Circuit Court.

But, independently of the supersedeas thus claimed, this court had the right, under the 14th section of the Judiciary Act, "to issue any writ necessary to render its appellate jurisdiction effectual."*

The order of the Circuit Court placed a construction on the decree previously made which was unreasonable. It was in fact equivalent to a new decree, inasmuch as it extended its operation not only beyond the parties to the cause, but beyond the terms of the decree itself. If a court could do this, pending an appeal; if it had the power to construe the decree and enforce it by process of contempt in doubtful cases, then it was evident that the inferior court might evade the appellate jurisdiction, and use the decree for purposes which this court would not sanction. This

* Ex parte Milwaukee Railroad Co., 5 Wallace, 189.

court should either prohibit such proceedings altogether or should examine them when they were alleged to have taken place, in order to prevent wrong and oppression, such as appeared in this case.

Contra. The appeal cannot operate as a supersedeas because of the insufficiency of the bond. The bond is in the penalty of $500. A writ of error or an appeal is not a supersedeas unless bond be given in a sum sufficient to secure the whole amount of the judgment or decree, in case of affirmance.

But if there is a supersedeas this will not prevent the court below preventing a plain contempt of its decrees. Such a contempt was made by the suit in the Supreme Court of the District.

The argument of the other side is in fact an argument on merits, which are not now open to discussion.

Mr. F. P. Stanton, for the appellant; Messrs. R. T. Merrick and G. W. Brent, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Accurate conclusions in motions like the present, involving important questions of practice, are essential to the correct administration of justice in all judicial tribunals exercising appellate powers, but they are especially so in this court, whether the case is brought here from a State court or a Circuit Court, as the jurisdiction of the court is special and must in every case be tested by the Constitution and the laws of Congress.

Considerable importance is attached in this case to the motion for a supersedeas as well as to the motion to dismiss the appeal, but the court, in view of the circumstances, will first examine the motion to dismiss, as it is in its nature preliminary, and if granted will render it unnecessary to examine the other motion.

On the sixteenth of November, 1868, the appellee filed a bill of complaint against the appellant in the Circuit Court of the United States for the District of Virginia, setting up

two written agreements therein described, and to which special reference is made as exhibited in the record. They are both of the same date. Without entering much into details, suffice it to say that one purports to be an assignment by the appellant to the appellee of all his right, title, interest, claim, and demand whatsoever in and to the property, stock, road, road-bed, franchise, and charter of the Alexandria and Washington Railroad Company, for two specific purposes. (1) To secure the payment to the appellee of the sum of five thousand dollars advanced by the appellee to the appellant. (2) To carry into effect the purposes and objects set forth in the other written agreement. Both agreements are signed by the appellant, and upon the back of the one given to secure the payment of the money advanced is the following agreement and consent: "We, the undersigned, do hereby agree and consent to the terms and conditions of the within assignment," which expressly recites that it was executed to accomplish the two purposes already described. Reference to the record will show that the assignment is signed by the appellant and that the indorsement is signed by all the other parties supposed by him to have an interest in the assigned property.

Special reference is made in the instrument of assignment to the purposes and objects set forth in the other written agreement, in which it is stipulated in substance and effect as follows: (1) That the appellant and Walter Lenox will convey all their right, title, and interest in that railroad company to a new corporation, to be formed as therein specified, or to devote all of that interest to the common benefit of the parties to the instrument, in the proportions therein specified, in case the old company should be revived. (2) That they agree to assign to the new company, when the parties shall actually organize the same, all their interest as lessees of the Washington, Alexandria, and Georgetown Railroad, or to hold the same for the exclusive use of the parties to the agreement, according to their respective interests. (3) That the appellee, for himself and the Adams Express Company, covenants to aid the new company, with

money and credits, to pay, settle, or compromise certain specified liabilities as set forth in the agreement. Certain other important conditions are also inserted in the instrument, but they are not material in this investigation.

Process was duly issued and served, and the appellant appeared and filed an answer setting up various defences to the merits of the claim made by the appellee. Subsequent to the filing of the answer the appellee filed the general replication, and the cause being at issue proofs were taken by both parties. Before the final hearing, however, the appellant filed a cross-bill, in which he insisted upon the defences set up in the answer, and also alleged that the other parties to the agreements were necessary parties to the bill of complaint. Due answer was made by the appellee to the cross-bill, and the appellant filed to the same the general replication.

Such being the state of the pleadings, the cause, on the twenty-first of June last, came on for final hearing "upon the bill, answer, and replication, and upon the cross-bill, answer, and replication, and upon the proofs," and the statement in the decree is that "the court is of the opinion that the equity of the case is with the complainant," and that the court "thereupon do order, adjudge, and decree that James S. French, the defendant in the original bill, be perpetually enjoined and restrained from any use of the name or title of the president of the Washington and Alexandria Railroad Company, under any election to that office heretofore held, and from any action by himself or any attorney or agent to interfere with any proceeding for the reorganization of the said company under the contract mentioned in said bill, &c., and from any proceeding whatever not in accordance with the said contracts, without prejudice," as therein recited. Omitting the qualifications stated in the recitals, the decree continues as follows: "It is further ordered, adjudged, and decreed that the said defendant, French, pay the costs in this cause."

Final decrees in suits in equity passed in a Circuit Court,

where the matter in dispute exceeds the sum or value of two thousand dollars exclusive of costs, may be re-examined in this court, but the act of Congress does not define what is meant by the phrase "final decree." Objection is made that the decree is not final because it does not in terms dismiss the cross-bill, but the court is of the opinion that the statement contained in the decree, that the equity of the case is with the complainant, by necessary implication disposes of the cross-bill as effectually as it does of the answer filed by the appellant to the original bill of complaint. Leave, it is true, is given to either party to apply, at the foot of the decree, for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it, but it is quite apparent that that reservation was superadded to the decree as a precaution and not because the court did not regard the whole issue between the parties as determined by the decree. Such was doubtless the view of the Chief Justice who passed the decree, as the application for the appeal was made to him at the same term and was immediately granted without objection.

Several cases might be referred to where it is held that a decree of foreclosure and sale of mortgaged premises is a final decree, and that the defendant is entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order, upon the ground that the decree of foreclosure and sale is final as to the merits, and that the ulterior proceedings are but a mode of executing the original decree.*

Unquestionably the whole law of the case before the court was settled by the Chief Justice in that decree, and as nothing remains to be done, unless a new application shall be made at the foot of the decree, the court is of the opinion that the decree is a final one, as it has conclusively settled all the legal rights of the parties involved in the pleadings.†

* Whiting *v.* Bank of the United States, 13 Peters, 15; Bronson *v.* Railroad, 2 Black, 524.

† Forgay *v.* Conrad, 6 Howard, 202; Thomson *v.* Dean, 7 Wallace, 342; Curtiss's Commentaries, § 188; Beebe *v.* Russell, 19 Howard, 283.

2. Beyond all doubt the appeal of the respondent in this case was allowed within ten days from the date of the decree, and the record shows that the bond to prosecute the writ to effect and answer all damages and costs if he fail to make his plea good was filed and duly approved within the same period, but it is denied by the appellee that the appeal operates as a supersedeas, because it is insisted that the bond given in the case is not in a sum sufficient to constitute indemnity for the whole amount of the decree.

Where the judgment or decree is for the recovery of money, not otherwise secured, the indemnity must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal.*

But in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, indemnity is only required in an amount sufficient to secure the sum recovered for the use or detention of the property and the other incidental items, as in cases where the judgment or decree is for money. What is necessary is that it be sufficient, and when it is desired to make the appeal a supersedeas, that it be filed within ten days from the rendering of the decree, and the question of sufficiency must be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal that question as well as every other in the cause becomes cognizable here. It is therefore matter of discretion with the court to increase or diminish the amount of the bond and to require additional sureties or otherwise as justice may require.†

All that is required in a case where the writ of error is not a supersedeas is that the bond shall be in an amount sufficient to answer the costs in case the judgment or decree is affirmed. Nothing appears in the record to show that the indemnity given is insufficient, and inasmuch as nothing ap-

* Catlett *v.* Brodie, 9 Wheaton, 553; Stafford *v.* Union Bank, 16 Howard, 135; Same *v.* Same, 17 Id. 275.

† Rubber Co. *v.* Goodyear, 6 Wallace, 156; Rule 32; The Slaughter-house Cases, 10 Wallace, 273; 1 Stat. at Large, 404.

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pears to the contrary the court is of the opinion that it must be presumed that the amount is sufficient.

Appeals and writs of error are constituted a supersedeas in certain cases by virtue of the twenty-third section of the Judiciary Act, when the conditions there prescribed are fulfilled. Where those conditions are complied with the act of Congress operates to suspend the jurisdiction of the subordinate court and stay execution pending the writ of error or appeal, and until the case is determined or remanded.*

Power to issue a supersedeas to a decree in a subordinate court does not exist in this court where the appeal was not taken and the proper bond given within ten days from the date of the order, except where an appeal was duly taken within ten days, and the aggrieved party is obliged to take a second appeal in consequence of the clerk below having neglected to send up the record in season, or where the granting of such a writ becomes necessary to the exercise of the appellate jurisdiction of the court, as where the subordinate court improperly rejected the sureties to the bond because they were not residents of the district.†

Appellate power in the controversy under consideration is conferred upon this court, and it is clear that this court may issue a supersedeas in such a case whenever it becomes necessary to the exercise of its appropriate jurisdiction.‡

Attention will now be called to the grounds of the motion for a supersedeas, as shown in the affidavit of the appellant. He states that he filed a bill in equity in the Supreme Court of this district against Oscar A. Stevens, George W. Brent, W. Jackson Phelps, Richard T. Merrick, J. Dean Smith, and Walter Lenox; that the respondents demurred to the bill on the ground that the appellee before the court was a necessary party respondent in the case, and that the court

* Hogan *v.* Ross, 11 Howard, 295.

† Hogan *v.* Ross, 11 Howard, 296; Ex parte Milwaukee Railroad Co., 5 Wallace, 188; Stockton et al. *v.* Bishop, 2 Howard, 74; Hardeman *v.* Anderson, 4 Id. 640; Wallen *v.* Williams, 7 Cranch, 279; Saltmarsh *v.* Tuthill, 12 Howard, 389.

‡ 1 Stat. at Large, 81; Stockton et al. *v.* Bishop, 2 Howard, 75.

where the bill was pending sustained the demurrer. Wherefore the appellant here amended his bill, and made the appellee a party respondent.

Consequent upon those proceedings, as the affiant states, the Circuit Court for the District of Virginia laid a rule on him requiring him to appear in that court, on a day named in the rule, to show cause why he should not be fined and attached for the acts set forth in the petition, and charged therein to be in violation of the aforesaid order and decree of the court below in this case; that he appeared and showed cause as required, but that the court there being of opinion that he had violated the decree in the case before the court by filing his bill in equity in the Supreme Court of this district, ordered that he forthwith dismiss the same and cease all proceedings under the same on pain of imprisonment, and that he, having no alternative but to go to jail or to submit to the order of the court, chose the latter, and dismissed his bill of complaint. His views are that the Circuit Court erred in passing that order, and that that court gave an erroneous construction to the decree entered by the Chief Justice in the case, making it more comprehensive than its language will warrant, and he moves this court to issue a supersedeas or other suitable order to correct those errors.

Suppose the theory of the appellant is correct that the circuit judge in construing the decree gave it a scope beyond its legitimate meaning, very grave doubts are entertained whether this court, under the present motion, could afford the appellant any remedy, as the facts supposed would not show that anything had been done to defeat or impair the appellate jurisdiction of this court. Acts void in themselves may be done by the Circuit Court outside of the jurisdiction of the Circuit Court which this court cannot re-examine. Authority does not exist in this court to issue a supersedeas, except in cases where it is necessary to the exercise of its appellate jurisdiction, but the court is not inclined to rest its decision in this case upon that ground, as we are all of the opinion that the circuit judge did not err in his construction of the order and decree enjoining the appellant in that de-

cree. He is perpetually enjoined and restrained from any use of the name or title of the president of the company under any election to that office heretofore held, and from any action, by himself or any attorney or agent, to interfere with any proceeding for the reorganization of the company under the contracts, or *from any proceeding whatever not in accordance with the said contracts.* More comprehensive language could hardly be employed, and argument can hardly make it plainer or add anything to its force or effect.

BOTH MOTIONS DENIED.

FOWLER *v.* RATHBONES.

1. Where a ship and cargo are exposed at a particular place to a common peril of sinking, and becoming submerged in deep water, and the expense of raising and saving them from that place would be greater than if stranded in shoal water, and the master, to save them from such increased expenses, runs the ship on flats near by and strands her in shoal water, and thereby increases the peril to the ship and diminishes the damages and expenses of saving her and the cargo, then there is a "voluntary stranding" within the meaning of the law, and a case entitling the owners of the vessel to recover, as general average, their just proportion of such damages and expenses.
2. Where no water enters the ship which reaches and damages the cargo, except what comes through holes cut in the bows by the ice previously to such a case of stranding, then the owners of the cargo are not entitled to be allowed anything for the damages to their cargo by water, by way of general average, or by way of reduction of the shipowner's claim.
3. In such a case of stranding the shipowners are entitled to recover in general average only those expenses which were caused by stranding the ship, not including any occasioned by damage to the ship through the swelling of the cargo (linseed, which water swells) caused by water which entered through the holes in the bows; but if the ship was also injured by such stranding and by lying on an uneven bottom, her owners are entitled to recover the expenses for repairing *such* injuries, by way of general average, and it is for the jury to determine from the evidence what such repairs amount to.
4. Erroneous findings of the jury—assuming them to be erroneous—as to what injury the ship did suffer by the stranding and what by swelling

Statement of the case.

of the cargo, or such findings on any other matter of fact, are not subject to review here.

5. Where the owners of the cargo enter, after such a case of stranding as above described, into "an average bond" whereby they agree to pay as consignees of cargo, what should be found to be due from them on their share of the cargo, for general average losses and expenses arising out of the transaction, provided such losses and expenses should be stated and apportioned in accordance with the established usage and laws of New York in similar cases, by certain average adjusters named, then if in respect to the contributory value of freight, the adjustment, as made up by the average adjusters, is according to the usage and custom of New York, and no more has been allowed for damages to the ship than was attributable to the stranding, in that case the shipowners are entitled to the amount stated in the average adjustment to be due from the owners of the cargo as their general average contribution, with interest from the date of the adjustment.

ERROR to the Circuit Court for the Southern District of New York.

This was an action of assumpsit, brought in the court below by the owners of the ship Oneiza, to recover from the defendants, as consignees and owners of cargo transported aboard of that vessel on a voyage from Calcutta to New York, a sum alleged to be due to the plaintiffs by way of a general average for losses and expenses incurred in consequence of an alleged voluntary stranding of the ship.

The facts, which appeared from the protest and the testimony of witnesses, were, in the main, undisputed.

The ship arrived off Sandy Hook January 16th, 1867, and anchored that night inside of the Hook. There was so much ice in the bay that she could not proceed until the 21st, when she was towed up, in the afternoon, as far as the quarantine ground and anchored there. The water was full of floating ice. The next morning it was discovered that the ship was settling by the head, and by 7 o'clock A.M. she had six feet of water in her; the leak being caused by holes broken in both of her bows by the ice. Attempts were made to free her from water by her pumps. They were, however, ineffectual; the water being about forty-two feet where she was anchored, and the Staten Island flats where the water was shoaler being near, the master caused the ship to be towed

a distance of three hundred yards into such water, on the flats, until she grounded on the bottom at about 8 o'clock A.M. The bottom at the place where she had been anchored was soft. What sort of bottom was at the place where she grounded—whether uneven or soft—was not clear. The evidence was not full or perhaps quite consistent, but it was submitted to the jury. At the time the ship grounded she had ten feet of water in her. If she had sunk where she had been anchored, she would have been totally submerged. A wrecking vessel reached her about noon. The tide was then an hour ebb, and the water was about the same height inside of her and outside. A diver was sent down and the holes were stopped. A pump was then started about 4 o'clock P.M. The water had reached to within two feet of her upper deck. Some of her cargo was not wet. The cargo consisted of linseed in bags, gunny cloth, and saltpetre. She was pumped out by 9 o'clock P.M. After that she was kept free of water, and no more water reached her cargo. About half of her cargo was taken off by lighters. The ship was then taken to the city and the rest discharged. The ship could have been raised if she had sunk where she was anchored. The question of saving the vessel and cargo at either place was only a question of the expense of raising them. The wrecking bill was over $12,000, and would have been $30,000, if she had sunk where she was anchored. The defendants, on the 23d of January, 1867, signed "an average bond," whereby they agreed to pay as consignees of cargo, what should be found to be due from them, on their share of the cargo, for general average losses and expenses arising out of the transaction, provided such losses and expenses should be stated and apportioned by Johnson & Higgins, average adjusters, in accordance with the established usage and laws of the State of New York in similar cases. An adjustment was made by those persons, and they ascertained the balance due from the defendants to be $11,380.78, July 20th, 1867. The adjusters made no allowance to the defendants for the damages sustained by their cargo from the water which entered the ship, on the ground that such

damage was caused by water which entered through the holes made in the bows of the vessel by the ice, and, therefore, by a peril of the sea, and was not caused by the stranding, and was not a general average loss. The effect of the water upon the linseed in bags, as evidence showed, was greatly to swell it, and the ship was found to have been much strained vertically. The swelling of the linseed and the lying on the bottom at the place of stranding, together, started up the deck and strained and broke the beams and the straps over the beams.

The adjusters did not allow as a general average loss anything for any damage sustained by the ship from the swelling of the linseed, on the ground that such swelling was caused by water which entered through the holes in the bows from a peril of the sea, and, therefore, was not caused by the stranding; but they did allow, as a general average loss, the damage caused to the ship by laying on in what they inferred to have been an uneven bottom when she was stranded; inferring this from injuries of a certain kind, which the keel and keelson of the ship were found to have suffered, though some of the direct testimony went to prove that the bottom, like that of the place where the vessel had been anchored, was soft. The adjusters stated to the jury the ground on which the adjustment on this point was made. "We could not tell absolutely," they said, "what damage was caused by lying on the bottom, and what from swelling of the cargo, but we decided it as well as we could;" and the same witness described particularly the damages. The defendants called no witnesses to disparage the conclusions of the adjusters. The salvage expenses were put into general average. According to custom, one-half of the gross freight for the whole voyage was taken as the net freight to be contributed for.

The counsel for the defendants prayed the court to charge the jury as follows:

"*Fourth.* That if they found that the stranding or taking of the bottom was not a different one from what was originally im-

pending in consequence of the damage received from the action of the ice at the time the master determined to run or tow the ship into shallower water, but was a merely incidental and unsubstantial modification of such original stranding or taking of the bottom,—then the expenses incurred for repairing the damage to the ship, arising from her lying upon the bottom, were not the proper subject of a general average.

"*Fifth.* That, unless at the time the master came to the determination to run her upon the flats, there was a substantial and valuable chance that the ship might be kept from sinking where she was anchored, which chance the master voluntarily abandoned, the injuries sustained by said ship in consequence of lying upon the bottom are not a subject for general average.

"*Sixth.* That if the ship was, at the time the master came to his determination to run her upon the bottom in shallower water, so exposed to the injuries which she sustained from going upon and lying upon the bottom, that such injuries could not by any possibility or in any event be prevented, such injuries are not to be made good by a general average contribution.

"*Eighth.* That there is no evidence from which the jury can determine what particular repairs were rendered necessary by the ship lying on the bottom, and what were rendered necessary by the swelling of the cargo; and that as it appears that both these causes concurred in producing the injuries to the ship, one-half of such injuries should be deemed to have been occasioned by the one cause, and one-half of the other, as the nearest practicable approximation to justice.

"*Ninth.* That inasmuch as it appeared that all the freight on the cargo had been collected, and the disaster happening at the very entrance of the port of destination, such freight should contribute in general average upon its full value, after deducting such expenses, if any, as were necessarily incurred in order to earn it; and the jury should, in making up their verdict, so estimate the contributory value of freight."

But the court refused thus to charge, and charged.

"1*st.* That if the jury found that the ship and cargo were exposed to a common peril of sinking and becoming submerged in deep water, and that the expenses of raising and saving them from such place would have been greater than if stranded in

shoal water, and that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats, and so stranded her in shoal water, and thereby increased the peril to the ship and diminished the damages and expenses of saving the ship and cargo—then, that there was a voluntary stranding within the meaning of the law, and that the plaintiffs are entitled to recover in general average their just proportion of all damages and expenses occasioned thereby.

"2*d*. That if they found that no water entered the ship which reached and damaged the cargo, except what came through the holes cut in the bows by the ice—then that the defendants were not entitled to be allowed anything for the damages to their cargo by water, by way of general average, or by way of reduction of the plaintiffs' claim, because such damages were not caused by or the result of the act of stranding the ship, but were caused by a peril of the sea which had overtaken the cargo before it was determined to strand the ship.

"3*d*. That the plaintiffs were entitled to recover in general average only those expenses which were caused by stranding the ship, not including any occasioned by damage to the ship through the swelling of the cargo caused by water which entered through the holes in the bows; and therefore, if the jury found that the ship was injured by such stranding and by lying on an uneven bottom, that the plaintiffs were entitled to recover the expenses for repairing such injuries, by way of general average; and that it was for the jury to determine from the evidence what such repairs amounted to.

"4*th*. That if, in respect to the contributory value of freight, they found that the adjustment, as made up by Johnson & Higgins, the average adjusters, was according to the usage and custom of the port of New York, and that no more had been allowed for damages to the ship than was attributable to the stranding—then that the plaintiffs were entitled to the amount stated in the adjustment to be due from the defendants to the plaintiffs as their general average contribution, with interest from the date of the said adjustment."

To all these instructions the defendants excepted.

The jury having found a verdict for the plaintiffs for $12,071.73, and judgment having been entered accordingly, the case was now here on error.

Argument for the owners of the cargo.

Mr. J. C. Carter, for the plaintiff in error:

I. There is no dispute as to certain principal facts. They are these:

1st. That at the time the determination was taken to put the ship on the flats, she was not simply exposed to a peril which seemed inevitable, but that the stroke had already fallen upon her; that she was already smitten with a deathblow proceeding directly from the action of the elements; that she was not simply in danger of sinking, but was actually sinking from the direct effect of the accidental injury, and that there was no power to save her from it.

2d. That she continued sinking all the time after she started for the flats until she took the bottom upon them, having six feet of water in her when she started and ten when she struck the flats.

3d. That she did not expect to encounter, and did not in fact encounter, any new peril in going upon the flats; that she was sinking to the bottom when she started; that she expected to sink and did sink upon the flats.

Upon these facts the conclusion follows, that the actual sinking or stranding was substantially the same sinking or stranding which was in progress under the direct action of the elements at the time of the voluntary resolution to run her upon the flats. It was therefore an accidental and not a voluntary sinking or stranding. All that could be done was to employ the time she should occupy in sinking to the best advantage. All that was done was to move her while she was sinking, a space of some three hundred yards, to mitigate and abridge some of the disastrous results of a deathblow already received. It was the master's duty, in the plainest and clearest sense of the term, to do the thing he did. The instinct of self-preservation would have permitted him to take no other course.

The distinctions are decisive between the case at bar and those cases which have heretofore been held to be cases for a general contribution, where a vessel staunch and strong, and capable of contending with the winds and waves, and yet unsmitten by any deathblow from an accidental peril,

finds herself upon a lee shore and in apparently inevitable danger of being cast upon it; but still with a chance of escape, desperate though it be, and then concludes to abandon this chance and seek the most favorable spot on which to strand herself. In those cases the peril which was impending, however inevitable it might seem, had not in fact arrived. There was no accidental cause from the actual operation of which the injuries were received. They *seemed* indeed inevitable; but that they were absolutely certain could not be affirmed. There was nothing therefore to the direct action of which the damage could be with certainty attributed but the voluntary act.

The ordinary duty of the shipowner represented by the master is to navigate the ship, not to run her ashore. A claim for a general contribution cannot be founded upon any act of the master in the course of this ordinary duty. Shippers of goods have the right to all this. The presence of an overwhelming peril may make it best for the interests of all, treated as a unit, to depart from mere navigation and strand the ship. This is something beyond what any one of the interests has the right to require of the ship, and is therefore outside of the ordinary duty of the master. The true foundation of the doctrine of a general contribution in cases of voluntary stranding lies in these considerations. But when, as in the case at bar, the actual operation of an accidental cause has, of itself, already put an end to the business of navigating the ship, all the master's ordinary duties are not at an end. It is still his duty to do all in his power to save what he may of the interests intrusted to his charge; and it cannot be pretended—when his ship is sinking and it is in his power to mitigate the consequences of such sinking by working his ship into shallower water—that it is not his duty to do so.

If these positions are true, the charge on the main point of the case—that is to say, the first instruction—was erroneous. It was based upon a direct denial of them. It made the question of liability for a general contribution turn entirely upon these three points:

Argument for the owners of the cargo.

1st. Whether the master ran the ship upon the flats for the purpose of diminishing the damages and expenses of raising and saving ship and cargo?

2d. Whether in so doing the peril to the ship was increased?

3d. Whether by so doing the damages and expenses of saving and raising the ship and cargo were diminished?

Now these inquiries might each be answered in the affirmative and yet the actual stranding be only an unsubstantial modification of the stranding or submersion originally impending. The point was distinctly made by the request to charge that the grounds of difference between the actual and the impending disaster should be substantial, but this element was disregarded by the judge. The error thus committed was this, that if a loss has been occasioned by the action of two concurring causes, one of which is a particular average cause and the other of which is a general average cause, the loss is to be taken as a general average, without any inquiry as to the respective degrees of efficiency with which these two causes may have operated, it being enough if the general average cause contributed in any degree to the loss. It is impossible to vindicate such a proposition.

But even if the proposition of the court below had, as a general principle of law, been sound, there was no evidence in the case warranting the submission of it to the jury. The court recognized the necessity of the condition that the peril to the ship should have been increased by the master's voluntary action, and made that a turning-point with the jury. But the only suggestion of any increase of peril was the claim by the plaintiffs below that the bottom where the ship actually took the ground was different from the bottom where she lay at anchor, it being uneven in the former place. Now the only evidence of this was conjecture. The lying upon a bottom of any sort and the swelling of the cargo were sufficient to account for all the injuries to the vessel, except that produced by the ice. The cargo was mainly flaxseed. It was proved that the effect of water upon this

article was to swell it. The ship, upon examination, was found to have been subjected to a vertical strain, pressing her decks and beams upwards with such force as to break the iron straps securing the beams to the stanchions. This must have been the effect of the swelling of the seed.

If the claim for a general average has any foundation, the damage to the cargo, or some part of such damage, must be contributed for. Nor would there be any serious difficulty in making the discrimination. When the master came to his determination to run the ship on the flats there were only six feet of water in her; after she had settled on the flats there were from twenty-two to twenty-six. It is ascertainable how much and what of her cargo was above, and how much and what was below the water in her when she left the spot where she was anchored.

The freight should be made to contribute at its full value. The rule adopted by the adjusters of taking it at one-half its value, when the whole was earned and received, is too unjust to prevail, unless it has some better warrant than custom. The custom alleged is well enough in the cases of voyages partly performed; but it is a rule touching customs that they must be reasonable. In cases like the present there seems to be no good reason why the freight should not be made to contribute at its full value. Especially should it be the case when, as here, the entire expense of bringing the cargo to the place of discharge was carried into the general average account.

Messrs. E. H. Owens and S. P. Nash, contra:

The instruction, chiefly complained of—the first—was in accordance with the law as well settled in the Federal courts.*

It is sufficient to make the act of sacrifice voluntary, that it is adopted as a matter of judgment, that upon deliberation

* Columbian Insurance Company *v.* Ashby, 13 Peters, 331; Barnard *v.* Adams, 10 Howard, 270; The Star of Hope, 9 Wallace, 203; Sturgess *v.* Cary, 2 Curtis, 59; Caze *v.* Reilly, 3 Washington, 298; Sims *v.* Gurney, 4 Binney, 513.

the will decides. It is none the less voluntary, that no other way of escape seems open. The idea of sacrifice in the law of general average is not that the property shall be doomed to certain loss, for the goods thrown overboard may have a fair chance of being recovered, or the vessel, which it is determined to run ashore, of being saved. It is the selection of one particular interest, of either vessel or cargo, to take a special, though it may be no greater, and be even a less, risk for the benefit of the whole, that makes the special loss or damage consequent upon the act vicarious. It is true, in this case, that but for the stranding the vessel would have gone down with the cargo, and true also that by stranding her the master may possibly have not subjected the vessel to any greater peril than she was in before. But the fact that he changed the peril from one to ship and cargo in common, to a peril to the ship alone, constituted a sacrifice in the legal sense. If any damage was in fact caused to the vessel by stranding, it is no answer to her claim for contribution to say that she would have been equally damaged by sinking. That the act of stranding was a benefit to the cargo is undisputed, and that it was also a benefit to the ship, only makes her claim less in amount than it would have been had she been lost by the act of stranding. She could only claim and has only been allowed the damages caused specially by the stranding, which was the voluntary and vicarious act, which saved the cargo from a heavier damage and expense.

The other exceptions relate to the sufficiency of the evidence, and are not available on writ of error. The seventh and eighth are of this sort.

But the rule is, that if there is evidence proper to be submitted to the jury it should be submitted. If the jury give too much weight to it the remedy is by motion for a new trial, which is not reviewable by writ of error.* The evidence showed that a careful discrimination by experts was made between the repairs. This might have been shown

* Schuchardt *v.* Allens, 1 Wallace, 359, 371.

to be weak had the defendants below called any witnesses to disparage it, but as they did not, the court properly left it to the jury.

Whether the ship lay on an uneven bottom or not was a question auxiliary merely to the determination of the question, whether certain damages were caused to the hull of the ship by the stranding. The testimony showed that experts finding the fastenings about the keel and keelson broken, and the vessel strained, attributed this to the vessel's lying on an uneven bottom. No objection was made to the giving of this evidence, and being in the case it was properly submitted to the jury.

There was no ground for asking to have the damages caused to the ship by the swelling of the cargo, and by straining, equally divided. There is no law for such a division, and no evidence was given to show its propriety.

The charge that if the jury found from the evidence that no water entered the ship which reached and damaged the cargo, except what came through the holes made by the ice, then that the cargo would not be entitled to any contribution for its damage, was manifestly correct. It was a question of fact how the damage to the cargo was caused. It seemed clear, from the evidence, that no water came to it except through the holes made by the ice before the stranding, and the defendants below cannot complain that the jury were left at liberty to find that some damage was done otherwise.

The jury, under instructions, found that the adjustment was made up according to "the usage and custom of the port of New York," which was proved to be to estimate for net freight and one-half the gross amount. The contract of the defendants below was to pay, if the adjustment should be made in accordance with such usage. No evidence was given contradicting that of the plaintiffs below as to the usage. The charge was, therefore, correct, and the ninth request properly refused. The general rule is, it is true, that it is the net freight which contributes. But how to ascertain the net freight is sometimes a difficult question, and

the rule of taking one-half the gross freight is not only customary in New York, and was, therefore, made the rule by the contract sued upon, but the rule has also been sanctioned by the court so as to have become a rule of law in that State.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Losses in a sea risk which give a claim to general average are usually divided into two great classes: (1) Those which arise from a sacrifice of part of the ship, or part of the cargo, purposely made to save the whole adventure from perishing. (2) Such as arise out of extraordinary expenses incurred, by one of the parties, in the course of the voyage, for the joint benefit of the ship and cargo.

Where two or more parties are engaged in the same sea risk, and one of them, in a moment of imminent peril, makes a sacrifice to avoid the impending danger, or incurs extraordinary expenses to promote the safety of all the associated interests, common justice requires that the sacrifice so made, or the extraordinary expenses so incurred, shall be assessed upon all the interests which were so exposed to the impending peril, and which were saved, by those means, from the threatened danger, in proportion to the share of each in the joint adventure.†

1. Bound on a voyage from Calcutta to New York, the ship Oneiza, with a valuable cargo of linseed, gunny cloth, and other merchandise on board, on the sixteenth of January, 1867, arrived off the latter port in a heavy gale, and in the evening of that day came to anchor inside the lower bay, being unable to proceed to the upper harbor in consequence of ice. Securely anchored, she remained there until the twenty-first of the same month, surrounded by ice and unable to proceed to her port of destination, when those in charge of her procured two steamtugs and caused her to be towed up through the Narrows into the inner harbor, and at seven o'clock in the evening of that day she came to anchor

* Leavenworth *v.* Delafield, 1 Caines, 574.

† The Star of Hope, 9 Wallace, 228.

near the quarantine ground, abreast of Staten Island, in ten fathoms of water, where she remained during the night.

Throughout the night the watch were ordered to sound the pumps every hour, and the record shows that they found no more water in the ship than is usual under the circumstances, until the steamtugs made fast to her for the purpose of towing her up to the harbor, when it was ascertained that she had twenty-six inches of water in the well, and it was observed, within half an hour from that time, that the head of the ship was settling. Report of that fact was made to the master and he immediately directed that the pumps should be tried, and it was soon found that the ship had six feet of water in the hold, and that she was in imminent danger of sinking.

Efforts were made to keep her free, but it was found to be impossible to do so by her own pumps, or by any other means at command. Holes had been cut in the hull by the ice, and the master, finding that he could not stop the leaks, decided to run the ship ashore, as the best means of saving life and property and as the only means of preventing the ship from sinking in deep water. Directions to that effect were accordingly given to those in charge of the steamtugs, and with their assistance the ship was stranded on Staten Island flats, and it appears that when she grounded she had ten feet of water in her hold, the tide still rising, and that at high tide the water in the hold increased in depth to twenty feet.

Prompt assistance was procured and the ship was lightened by discharging part of her cargo into lighters furnished by the wrecking company, and on the first day of February following they succeeded in making the ship float, and she was immediately towed to her port of destination and the residue of her cargo was discharged.

2. Much of the cargo was saved, and the owners of the ship insisted that the owners of the cargo were bound to contribute for the sacrifices made by the ship and the expenses incurred by her owners in saving the associated interests from the dangers of the impending peril. Investiga-

tions became necessary before the parties could adjust the claim, and with that view the owners, shippers, and consignees of the cargo executed to the agent of the ship an average bond in which they designated the persons to be employed as adjusters, and covenanted and agreed to pay their respective shares of such proportion of the losses and expenses incurred as constitute, by the usage of the port, a general average, provided such losses and expenses were stated and apportioned by the average adjusters therein specified in accordance with the established usage and laws of that State in similar cases.

Pursuant to the terms of that bond the persons therein named were designated as the average adjusters, and they, after having heard the parties, charged to the cargo belonging to the defendants the sum of eleven thousand three hundred and eighty dollars and seventy-eight cents as a general average contribution in favor of the owners of the ship.

Unquestionably they proceeded upon the ground that the stranding of the ship was voluntary, but the defendants denied that the fact was so and refused to pay the amount. Whereupon the plaintiffs brought an action of assumpsit against them in the Circuit Court to recover the amount as adjusted, and the jury, under the instructions of the court, found a verdict in their favor for the whole amount charged by the adjusters to the owners of the cargo, with interest from the date of the adjustment. Exceptions were filed by the defendants to the refusals of the court to instruct the jury as requested, and also to the instructions given by the court to the jury, and the defendants sued out the writ of error and removed the cause into this court.

3. Complaint is made by the defendants that the question whether the evidence introduced in the case showed such a state of facts as entitled the owners of the vessel to claim a general average contribution from them, as the owners of the cargo, was not submitted to the jury under proper instructions.

Injuries, it is conceded by the defendants, had been re-

ceived by the ship before the master determined to run her upon the flats, and it is equally clear that those injuries, or some of them, were plainly attributable to the direct action of the ice, as contended by the defendants. Certain portions of her sheathing about the bows had been torn off and several holes had been cut through her planking—two or more on her port bow and one on her starboard bow—which caused the ship to leak. Doubtless these injuries preceded the stranding of the ship, but she received many more and such as were of a more serious character, by that act or as a necessary consequence of it, as is fully proved by the survey and the other evidence exhibited in the record.

Courts, as well as text writers, at the present day, agree that where the ship is voluntarily run ashore to avoid capture, foundering, or shipwreck, and she is afterwards recovered so as to be able to perform her voyage, the loss resulting from the stranding is to be made good by general average contribution, as such a claim is clearly within the rule that whatever is sacrificed for the common benefit of the associated interests shall be made good by all the interests exposed to the common peril which were saved from the common danger by the sacrifice.*

Authorities may be cited where it is held that if the ship is not saved an action for the claims cannot be maintained, but it is settled law in this court that the case is one for general average, although the ship was totally lost, if the stranding was designed for the common benefit and was voluntary, and it appears that the act of stranding resulted in saving the cargo.†

Repairs rendered necessary to the vessel by the ordinary perils of navigation, to enable her to prosecute her voyage to her port of destination, it is admitted, must be borne by the owners of the vessel, but the question whether the sacrifice made by the ship in a case where the ship, cargo, and

* McAndrews *v.* Thatcher, 3 Wallace, 365; Barnard *v.* Adams, 10 Howard, 270; 2 Arnold on Insurance, 784; 2 Parsons on Insurance, 241, 263; 2 Phillips on Insurance, 5th ed. 1313; Nelson *v.* Belmont, 21 N. Y. 38.

† Star of Hope, 9 Wallace, 232; Columbian Insurance Co., 13 Peters, 331

all on board were in imminent peril, and the ship was voluntarily stranded to save the whole adventure, constitutes a valid claim for a general average contribution, is not an open one in this court, if the cargo is saved by the sacrifice, and it is equally well settled that extraordinary expenses incurred in getting the ship off, if the effort is successful, fall within the same rule. Necessary repairs to complete the voyage are not within the rule as applied in this court, except to the extent that such repairs are required to replace such parts of the ship as were sacrificed to save the associated interests.

Viewed in that light, the claim of the owners of the ship rests upon the same foundation of justice and reason as that of the owner of the cargo, in a case where part of the cargo is thrown overboard to save the ship, cargo, and all on board. Decided cases may be referred to where the rule established by this court is questioned, but the rule, it is submitted, is both just and reasonable if it be correctly understood and properly applied.*

4. Special reference must be made to the charge of the court, as it is insisted that several of the instructions given to the jury are erroneous.

Speaking to the principal question in the case, the judge told the jury that if they found that the ship and cargo were exposed to a common peril of sinking, and becoming submerged in deep water, and that the expense of raising and saving the ship and cargo from that place would have been greater than if stranded in shoal water, and that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats and stranded her in shoal water, and thereby increased the peril to the ship and diminished the damages and expenses of saving the ship and cargo, then there was a voluntary stranding within the meaning of the commercial law, and the plaintiffs were entitled to recover, as general average, their just proportion of such damages and expenses.

Tested by the principles already explained it is quite ob-

* Walthew *v.* Mavrojani, Law Rep., 5 Exch. 119; Moran *v.* Jones, 7 Ellis & Blackburne, 532.

vious that the instruction is correct, and that the defendants have no just ground of complaint. They think otherwise, however, and insist that the ship was actually sinking at her anchorage from the direct effect of the accidental injuries she had received by the ice, and that her condition was such that there was no power to save her within the meaning of the law of general average.

Suppose that her condition was such that she would have sunk if she had remained where she was, still it is clear that her buoyancy was not overcome, as it appears that she still floated, that her position was changed, and that she was successfully stranded in much shoaler water, and the jury have found that the stranding was voluntary, and that the effect was to increase the peril to the ship and to diminish the damages and expenses of saving the ship and cargo.

Assume that the facts were as the jury have found them to be, and it is clear that the case is one for general average contribution, as appears by the repeated decisions of this court. Such being the finding of the jury the defendants are without any remedy in this court. Their remedy, if any, was by a motion for a new trial in the court below.

Minute description of the circumstances attending the disaster is given in the protest, and there was other evidence in the case upon the subject sufficient to have made it the duty of the court to submit the whole question to the jury in the form in which it was submitted in the instruction under consideration.

Facts found by a jury cannot be re-examined in this court, and of course it must be assumed, in the further examination of the case, that the ship and cargo, as the ship lay at her anchorage, were exposed to a common peril of sinking in deep water; that the expenses of raising and saving them, if the ship had sunk there, would have been greater than if stranded in shoal water; that the master, to save the ship and cargo from such increased expenses, ran the ship on the flats, and stranded her in shoal water, and that the effect of that act was to increase the peril of the ship and to diminish the damages and expenses of saving the ship and cargo.

5. Evidently this view of the finding of the jury disposes of the main question in the case and leaves nothing open for decision except the question whether the instructions in respect to the extent of the liability and the principles of the adjustment were correct.

Extensive damage was done to the ship, but the defendants insist that it was not wholly done by the stranding, that it was partly caused by the swelling of the flaxseed, consequent upon its being wet, that the effect of the water upon the article was to swell it, causing a vertical strain upon the ship, pressing her decks and beams upwards and separating the beams from the stanchions. They accordingly requested the court to instruct the jury that there was no evidence in the case from which the jury could determine what repairs were rendered necessary by the stranding, and that inasmuch as it appeared that both of those causes concurred in producing the injuries to the ship they should assume that one-half was occasioned by each, which the court very properly declined to give, as there was not sufficient evidence in the case to warrant the jury in finding that the estimate made by the adjusters was incorrect.

Whether the cargo was damaged by the stranding or by the antecedent peril of the sea was certainly a question of fact for the jury, and upon that subject the jury were told that if they found that no water entered the ship, which reached and damaged the cargo, except what came through the holes cut in the bows by the ice, then the defendants were not entitled to be allowed anything as general average for the damage to their cargo by water, as in that state of the case the damage to the cargo was the result of the prior peril and not of the act of stranding. Such damages, it is conceded, are not the subject of general average, and as the jury found for the plaintiff further examination of that exception is unnecessary.

Objection was also taken by the defendants to the adjustment submitted by the persons designated in the average bond, and upon that subject the jury were told that if they found that the adjustment in respect to the contributive

value of the freight, as made out by the adjusters, was according to the usage and custom of the port, and if they found that no more had been allowed for damages to the ship than was attributable to the stranding, then the plaintiffs were entitled to their verdict for the amount stated in the average adjustment, with interest from its date.

Framed as that instruction was in precise conformity with the stipulations of the average bond it is impossible to regard it as erroneous, which is a sufficient answer to the exception.

Suffice it to say, without giving a separate examination to each one of the numerous exceptions, that we are all of the opinion that there is no error in the record.

JUDGMENT AFFIRMED.

NOONAN *v.* BRADLEY, ADMINISTRATOR.

The court,—admitting that an administrator of a decedent appointed in one State (that of his decedent's residence), cannot, in the absence of statute, maintain an action in another State, to enforce an obligation there, given to his decedent,—yet refused to set aside a decree given by it nine terms ago in favor of such an administrator, who, after an appeal taken and perfected to this court by his decedent, in a suit by *him* to enforce an obligation in a State where he was not domiciled, had been substituted by order of court as appellee in the suit; the decedent dying and the substitution having been made in the absence of all ancillary administration, and without opposition by the debtor or by any one.

ON motion. The facts were these:

Lee, domiciled in New York, sold and conveyed in 1855 to Noonan, domiciled in Wisconsin, a tract of land in the latter State, taking his bond and mortgage for the purchase-money. But there being at the time a question as to the validity of Lee's title, he agreed that if the title failed he would not enforce the bond.

Noonan having made default in his payment, Lee filed a bill in the Federal court for Wisconsin praying for a sale of the mortgaged premises, the payment of the mortgage debt,

and for general relief. That court, on an issue made as to whether the title had failed or not, adjudged that it had not failed; and giving judgment in favor of Lee ordered a sale of the mortgaged premises, and if the mortgaged property did not satisfy the debt, that Noonan should pay the deficiency. From that decree Noonan appealed to this court, the appeal being the case known as *Noonan* v. *Lee*, and reported in 2d Black, 500. While that appeal was pending in this court, Lee died, and one Bradley having received from the proper authority in New York, letters of administration on his estate, made suggestion to this court of Lee's death, and asked to be made party on the record. The court granted the request, and ordered "that the said administrator be and hereby is made appellee in the case." The appeal coming on to be heard after this substitution of Bradley, the administrator, as the appellee, the decree was at the December Term, 1862, affirmed, except in so far as it ordered Noonan to pay any deficiency. On that minor point it was reversed on grounds of practice.

From the time of the substitution of Bradley on the record, *he* stood, of course, as the appellee in the case, and all the subsequent proceedings in it from that date were made accordingly.

After this substitution and this decree, this same Bradley, as administrator, sued Noonan personally on his bond, in the Circuit Court for Wisconsin. One Ogden had, however, *after* the date of the substitution and decree but *before* Bradley's suit on the bond, been appointed by the proper authority in Wisconsin, administrator in that State. And this appointment of an ancillary administrator, and his investiture accordingly as such administrator, with all Lee's assets in Wisconsin —among which, as of course, was the debt due by Noonan, domiciled there—Noonan now pleaded in bar to Bradley's suit, against him personally. The Circuit Court gave judgment for Bradley, the New York administrator, but on the matter coming here at December Term, 1869, in *Noonan* v. *Bradley, administrator*, reported in 9th Wallace, 394, on appeal from that judgment this court reversed the judgment; de-

Arguments for and against the motion.

claring very fully that Bradley, an administrator, appointed in New York, could not by virtue of his appointment there, enforce in Wisconsin an obligation due to his intestate by a resident of the latter State; there being in that State an existing administrator, with letters granted by *its* authority.

In consequence of this decision, *Messrs. N. J. Emmons and J. S. Brown, in behalf of Ogden*, administrator, as aforesaid, appointed in Wisconsin, now moved the court to set aside all the proceedings in the case of *Noonan* v. *Lee* (the case reported in 2d Black) subsequent to the suggestion of Lee's death, and for an order directing the clerk of this court, to certify to the court below, that the appeal of Noonan had abated, because Bradley, appointed administrator by a court of New York, was not the legal representative of the deceased as to the already mentioned bond and mortgage, and that Ogden was; and because the appellant, Noonan, did not take measures to compel the appearance of the said true representative, Ogden.

This motion the counsel argued followed as a corollary from the decision of this court in *Noonan* v. *Bradley, administrator*, in 9th Wallace, 394, for that the mortgage under which Bradley had finally had a decree, was assets in Wisconsin, and assets therefore to which, as was elaborately shown in the opinion given in the case just mentioned, Bradley, appointed by a foreign jurisdiction, could have no right whatsoever. It may, perhaps, be added that after the decision of this court in *Noonan* v. *Lee*, that Lee's title had not failed, Wisconsin courts decided that it had.

Mr. M. H. Carpenter, contra, after remarking that such a motion as the one made was without precedent, argued that it ought not to be granted, because,

I. The substitution of Bradley as administrator, was rightly enough made in the then condition of the case of *Noonan* v. *Lee*, inasmuch—

1st. No administration had been granted in Wisconsin when the substitution was made, and no opposition had been

made by Noonan or any creditor or representative of Lee, at the time of the application to substitute Bradley.

2d. The appeal had been perfected by Lee in his lifetime, and Bradley had done nothing but come and support the decree below.

II. Even if the substitution had not been made with strict regularity at the time, the decree should not be set aside now. The decree had been made at December Term, 1862, near ten years ago. And it was perfectly settled that the court would not review its final judgments after the term at which they were given.

Mr. Justice CLIFFORD delivered the opinion of the court.

Particular reference to the nature of the controversy and the prior adjudications in respect to the same are indispensable in order that the motion and the effect of it, if granted, may be properly understood.

Noonan, on the first day of October, 1855, purchased of Lee certain real estate, situated in Wisconsin, by deed of warranty, and gave his bond for the purchase-money conditioned to pay four thousand dollars in four equal annual instalments, with interest, and gave a mortgage on the premises to secure the payments as specified in the bond, and the mortgage also contained a stipulation that upon any default on the part of the mortgagor in making the payments, including the interest and taxes as well as the principal, the whole of the mortgage debt, with interest, should, at the option of the mortgagee, become due and should be collectible on demand.

At the time the conveyances were executed the premises were in the possession of one John J. Orton, holding the same adversely to the grantor, in consequence of which the grantee required from the grantor an agreement to the effect that if the title failed the bond should not be enforced, and that if any incumbrances existed on the premises the amount of the same should be deducted from the stipulated consideration.

On the fourth of March, 1859, Lee filed a bill in equity in

Restatement of the case in the opinion.

the District Court of the United States for that district, exercising Circuit Court powers, setting forth that the grantee and mortgagor had not paid either principal or interest of the mortgage debt; that he, the complainant, had notified the party that he claimed that the whole debt had become due, and praying for a sale of the mortgaged premises, the payment of the mortgaged debt, and for general relief.

Such proceedings were had in the cause that the court rendered a final decree in the same, the court finding that the sum of five thousand two hundred and sixty-seven dollars and twenty cents was due to the grantor and mortgagee of the said premises, and the decree also directed the sale of the premises, the payment of the mortgage debt, and that the surplus, if any, should be brought into court; that, if the moneys arising from the sale were insufficient to pay the mortgage debt, interest, and costs, the marshal, in his report of the sale, should specify the amount of the deficiency, and that the respondent should pay the deficiency with interest, "and that the complainant may have execution therefor."

From that decree the respondent appealed to this court, and at the December Term, 1862, the appeal was duly entered here on the calendar. When the cause was reached the parties were heard, and this court decided that the complainant, upon the proofs exhibited, was entitled to a decree for the whole amount of the mortgage debt by virtue of the special stipulation in the mortgage, although one of the instalments, according to the terms of the bond, was not due when the bill was filed. Pursuant to that decision the court affirmed that part of the decree, but the court also decided that in the absence of a rule of the court conferring such authority the court below could not enter a decree in such a case, that the complainant should have execution for the balance found to be due to him over and above the proceeds of the sale, and reversed that part of the decree.*

Pending the appeal, however, and before the parties were heard in this court, to wit, on the seventh of February, 1862,

* Noonan v. Lee, 2 Black, 501; Rule 94.

the death of the respondent, John B. Lee, was suggested, and on motion leave was granted that the appearance of Alfred F. R. Bradley might be entered as administrator of the estate of the deceased, and he was admitted as appellee in the case. Doubts arising as to the validity of the title acquired by Noonan from his grantor, he commenced an action of ejectment in the State court against John J. Orton, the party in possession at the date of the conveyances, and gave notice to his grantor that he might appear and defend the title to the premises. Lee accordingly employed counsel, but the decision of the State court, rendered in January, 1863, was that the party in possession was seized in fee of the premises.

Both parties concede that Lee, when he died, was domiciled in New York, and that Bradley was duly appointed administrator by the proper tribunal in that State. When Lee died he also had effects of value in Wisconsin, and in February, 1865, the party who filed the motion, Thomas L. Ogden, was duly appointed administrator of those effects by the proper tribunal having jurisdiction of the matter in that State. On the sixth day of September, 1866, Bradley as administrator of the estate of John B. Lee, deceased, commenced an action of debt against Josiah A. Noonan, counting on the before-mentioned bond given by the latter to the decedent, for the purchase-money of the said real estate, as more fully set forth in the record.*

Three defences were set up by the defendant to the suit: (1) That the plaintiff was not and never had been administrator of the estate of the deceased. (2) That the deceased, at the time of his death, had effects in that State, among which was the bond in suit, and that the defendant was duly appointed administrator of those effects, and that the letters issued to the plaintiff, as applied to the cause of action in the declaration mentioned, were void and of no effect. (3) That the title to the premises had failed, the plea setting up the judgment in the ejectment suit rendered in the State court.

* Noonan *v.* Bradley, 9 Wallace, 399.

To the several pleas the plaintiff demurred, and judgment was rendered against the defendant for the sum of seven thousand five hundred and eighty-nine dollars and seventy-five cents, and the defendant appealed to this court, where the judgment of the Circuit Court was reversed, the court holding that an administrator appointed in one State cannot, by virtue of such an appointment, maintain an action in another State, in the absence of a statute of the latter State giving effect to that appointment, to enforce an obligation due his intestate.

Based on the conclusion announced in that case the proposition of the party submitting the motion is that all the proceedings in the case first mentioned, subsequent to the time when the death of the respondent in that suit was suggested, were irregular, that the administrator appointed by the tribunal of the jurisdiction where the intestate had his domicile at his decease was improperly admitted as appellee, and that the final decree in the case should be set aside and that a decree or order should be entered that the suit abated at the death of the appellee in the appeal, and that the clerk here should be directed to transmit a certificate to that effect to the court below.

Apart from the novel character of the motion and the grave doubts which arise whether the proposed certificate, even if the party is entitled to a remedy, is an appropriate process to be sent from an appellate to a subordinate tribunal, the court is of the opinion that the relief sought in the case cannot be granted, and that the motion must be denied upon three grounds, either of which is a complete and satisfactory answer to the application. They are as follows:

1. That the administrator of the domicile where the intestate resided at his decease was properly admitted as the appellee in the case, because, at that time, no ancillary administration had been granted in the State of Wisconsin.

Admitted as he was, without objection from the appellant, it may well be doubted whether the appellant ir this case,

inasmuch as his appointment bears date subsequent to those proceedings, can be permitted to intervene, in the absence of fraud, for the purpose of setting aside what had passed *in rem judicatam* before he was appointed, but the court is not inclined to rest its decision upon that ground, as the statute of the State authorizes foreign executors and administrators to sue in the courts of the State, in cases where no executor or administrator of the estate of the decedent has been appointed in the State.*

Responsive to that it may be suggested that the right so conceded is subject to the condition that such representative party has filed in the Probate Court an authenticated copy of his appointment, but it is a sufficient answer to that suggestion in this case to say that nothing appears in the record to show that the condition, if it be one, was not fulfilled, and the court is of the opinion that a compliance, under the circumstances of this case, must be presumed, as the record shows that this court passed an order that the appearance of the administrator be entered and "that the said administrator be and he hereby is made the appellee in this case."

2. Grant that an administrator appointed in one State cannot, by virtue of such an appointment, maintain an action in another State unless so authorized by statute, still it does not follow that the proceedings in this case were irregular, as the suit was commenced by the appellee in his lifetime and was prosecuted by him in the court below to a final decree, and from that decree the respondent appealed to this court. All these proceedings took place while the intestate was in full life, and it appears that the appeal was pending in this court at the time that his death was suggested, and that the administrator appointed in the jurisdiction of the decedent's domicile was admitted as the appellee by the order of the court, as before explained. He did not commence the suit, and as he was the only administrator appointed, the court is of the opinion that he was a competent party to appear and support the decree.

* Sessions Acts, 1860, 24.

3. Suppose, however, that neither of those propositions is correct, still the court is of the opinion that the motion must be denied, as this court, subsequent to the term when a judgment or decree is rendered, possesses no power to review its own final judgments or decrees. Where the merits of a case are decided in the Circuit Court and the decree on appeal is reversed in this court and the mandate of the court is sent down directing the court below to execute the decree, it is well-settled law that it is too late to call in question the jurisdiction of the subordinate court.* Repeated decisions of this court have established the rule that a final judgment or decree of this court is conclusive upon the parties, and that it cannot be re-examined at a subsequent term, as there is no act of Congress which confers any such authority.† Second appeals or writs of error are allowed, but the rule is universal that they bring up only the proceedings subsequent to the mandate, and do not authorize an inquiry into the merits of the original judgment or decree. Rehearings are never granted where a final decree has been entered and the mandate sent down, unless the application is made at the same term, except in cases of fraud.‡ Appellate power is exercised over the proceedings of subordinate courts and not on those of the appellate court, and the express decision of this court in several cases is that the "court has no power to review its decisions, whether in a case at law or in equity, and that a final decree in equity is as conclusive as a judgment at law.§ Other cases to the same effect might be referred to, but it does not seem to be necessary, as the views of the court from its organization to the present time appear to have been uniform and consistent, as is sufficiently exemplified by the cases to which reference is made.

MOTION DENIED.

* Skillern's Executors *v.* May's Executors, 6 Cranch, 267.

† Martin *v.* Hunter's Lessee, 1 Wheaton, 355.

‡ Browder *v.* McArthur, 7 Wheaton, 58; The Santa Maria, 10 Wheaton, 442.

§ Washington Bridge Co. *v.* Stewart et al., 3 Howard, 424; Ex parte Sibbald, 12 Peters, 492; Peck *v.* Sanderson, 18 Howard, 42.

MAIL COMPANY *v.* FLANDERS.

1. The Circuit Court of the United States has no jurisdiction under the act of March 12th, 1863, commonly known as the Abandoned and Captured Property Act, where both parties are citizens of the same State.
2. Although when a court has no jurisdiction it is in general irregular to make any order, except to dismiss the suit, that rule does not apply to the action of the court in setting aside such orders as had been made improperly before the want of jurisdiction was discovered, and restoring things to the state in which they were before the improper orders were made.

APPEAL from the *Circuit Court* for the Eastern District of Louisiana; the case being this:

The act of March 12th, 1863,* known as the Abandoned or Captured Property Act, directed that property abandoned or captured within the region lately in insurrection, should be turned over to agents of the Federal treasury, and by them sold at auction, and the proceeds paid into the treasury of the United States, &c. The act goes on to say:

"Any person claiming to have been the owner of any such abandoned or captured property may prefer his claim to the proceeds thereof *in the Court of Claims;* and on proof to the satisfaction of said court (1) of his ownership of said property, (2) of his right to the proceeds thereof, and (3) that he has never given any aid or comfort to the present rebellion, receive the residue of such proceeds."

No special jurisdiction in the matter was given by this statute to the Circuit Courts, which if they had jurisdiction at all after the above-quoted provision from the statute, had it only under the Judiciary Act of 1789, which gives them (§ 11) jurisdiction where "the suit is between a citizen of the State where the suit is brought and a citizen of another State."

With these statutes in force, the New Orleans Mail Company, *a corporation of Louisiana*, filed a bill in the nature of

* 12 Stat. at Large, 820.

Statement of the case.

a bill in equity, in the court below, against B. F. Flanders, a treasury agent, and one Fernandez, an auctioneer, *both defendants, as appeared on the face of the pleadings, being citizens of Louisiana*, setting forth that Flanders, pretending to proceed under the said Captured and Abandoned Property Act, had seized two steamboats, the one named Laurel Hill, the other Iberville, and that Fernandez, as auctioneer, was now about to sell them; and praying an injunction against the sale; praying also a writ of sequestration to the marshal, commanding him to keep the boats until the further order of the court. A preliminary injunction and a writ of sequestration were granted accordingly.

The defendant, Flanders, filed an "answer and plea to the jurisdiction," setting up that the steamers were *captured property;* that as such they had been delivered by the military authorities to him, as special agent of the treasury, under the act of Congress; and that he held the boats, and had advertised their sale, in his official capacity. He denied that the Circuit Court had any jurisdiction of the case made in the petition, on the ground that, by the act of March 12th, 1863, the Captured and Abandoned Property Act, the entire jurisdiction of that case was vested in the Court of Claims. He therefore prayed that the petition be dismissed.

The court entered a judgment thus:

"For reasons *orally assigned*, it is ordered that the injunction herein sued out be made perpetual so far as the steamer Iberville is concerned, and that said steamer be restored to the plaintiffs.

"But as regards the steamer Laurel Hill, *considering that the court is without jurisdiction*, it is further ordered that the injunction and sequestration be set aside and *dismissed* with costs, and that said steamer be turned over to B. F. Flanders, agent of the treasury department, as captured property."

As this judgment was rendered "for reasons orally assigned," the grounds of this discrimination between the cases of the two vessels did not appear, nor the ground on which the court supposed it had any jurisdiction whatever

of the suit against the Iberville more than against the other.

From the judgment, in respect to the Laurel Hill, the mail company took this appeal. Of course, as the other vessel was restored to them by the judgment of the court, they had no ground of complaint against the decree in respect to *her*, and the other side not appealing, there could be no question as to the judgment given in respect to that vessel.

The case was submitted; *Mr. Evarts declining to press the case for the appellant*, as being a plain one against him.

Mr. Hoar, for the United States, represented here by the appellees.

Mr. Justice CLIFFORD delivered the opinion of the court.

Authority was conferred upon the Secretary of the Treasury, by the act of the twelfth of March, 1863, to appoint special agents to receive and collect abandoned or captured property in any State or Territory designated as in insurrection, by the proclamation of the President issued on the first day of July in the preceding year. Such property, so received or collected, may be appropriated to public use on due appraisement and certificate thereof, or may be forwarded for sale within the loyal States as the public interest may require; and the further provision is that all sales of the property shall be at auction to the highest bidder, and that the proceeds thereof shall be paid into the treasury.*

Officers or privates in the army, and officers, sailors, or marines in the navy, are required by the sixth section of the act to turn over to an agent appointed under that act, all property taken or received from persons in such insurrectionary districts, or which they have under their control; and the same section also provides that the agent receiving such property shall give a receipt for the same to the person from whom it was received.†

Two steamboats, to wit, the Laurel Hill and the Iberville, were captured by our military and naval forces at New Or-

* 12 Stat. at Large, 820. † Ib. 821.

leans, in the month of May, 1862, shortly after our military occupation of the city became complete. Carefully examined the proofs show that the Laurel Hill was captured on the eighth of May of that year, in Bayou Jacquot, a small bayou connected with Bayou Plaquemines, situated in the parish of Iberville, on the right bank of the river Mississippi, one hundred miles above the city of New Orleans, and at that time within the military lines of the Confederate army. Our military occupation of the city became complete on the sixth of May of that year, and the proofs show the Iberville was captured on the twenty-second of the same month while lying at Greenville, which is situated on the left bank of the river, four and a half miles above the city, but below Camp Parapet, and was at that time within our military lines.

Captured under the circumstances explained, the two steamboats remained in the custody or subject to the control of our military authorities until the twenty-first day of December, 1865, when the proper officer in charge of the same turned the captured steamers over to the respondent, B. F. Flanders, as the agent of the Treasury Department appointed under the first section of the before-mentioned act of Congress. Pursuant to authority conferred by the second section of the act, the respondent, Flanders, employed the other respondent as an auctioneer to sell the steamboats, and the latter, by virtue of his employment, advertised the same for sale at public auction.

Based on these facts the complainants and appellants, on the ninth of January, 1866, filed their bill of complaint in the Circuit Court of the United States, and alleged that they were the lawful owners of the respective steamboats; that the respondents had no right, interest, or claim in the same, and that a sale of the same as proposed would be a violation of their rights as such owners. They brought the suit to prevent the sale of the steamboats as proposed in the advertisement, and they accordingly prayed for an injunction to that effect, and they also prayed for a writ of sequestration, to be directed to the marshal, commanding him to take the steamboats into his possession and to safely keep the same

until the further order of the court. Accompanying the bill of complainant was an affidavit of merits, and the record shows that both writs were granted as prayed, the complainants giving bond to the respondents to pay all such damages as should be adjudged against them if the processes were wrongly obtained.

Service having been made, the respondent, Flanders, appeared and filed an answer. He alleged that the steamers were captured by our military and naval forces, as before explained, and that he held the same as special agent of the Treasury Department. Besides pleading to the merits as aforesaid, he denied the jurisdiction of the court, and also prayed that the injunction might be dissolved and that the bill of complaint might be dismissed. Testimony was taken, but further reference to it is unnecessary, as all the facts proved which are material in this investigation have already been stated. None of the other proceedings in the suit are of any importance in the present state of the controversy, except the final decree, which was to the effect as follows: (1) That the injunction in respect to the steamer Iberville be made perpetual, and that the steamer be restored to the complainants. (2) That the orders granting the writs of injunction and sequestration in respect to the steamer Laurel Hill be set aside, with costs, and that the steamer be restored to the respondent, Flanders, as the special agent of the Treasury Department.

Probably the decision in the matter of the steamer Iberville was placed upon the ground that the steamer was captured within our military lines subsequent to the publication of the proclamation issued by the commanding general at the headquarters of the army, announcing that "all the rights of property, of whatever kind, will be held inviolate, subject only to the laws of the United States."*

Much difficulty, to say the least, would have arisen in sustaining that part of the decree if the respondents had ap-

* The Venice, 2 Wallace, 276; The Circassian, 2 Id. 150.

pealed to this court, as the presiding justice held that the Circuit Court had no jurisdiction of the case, but inasmuch as that part of the decree was in favor of the appellants, and the respondents did not appeal, the error, if it be one, cannot be corrected. Correction of the error is not sought by the appellants, and it is well-settled law that no one but an appellant can be heard in an appellate court for the reversal of a decree rendered in the subordinate court.* Appellees may be heard in support of the decree, but not for reversal, as it is the privilege of both parties to appeal if they see fit and comply with the conditions prescribed by law.†

Captured as the steamer Laurel Hill was, within the military lines of the Confederate army, the proclamation of our commanding general, before referred to, afforded no support to that part of the claim of the complainants, but the presiding justice being of the opinion that the Circuit Court had no jurisdiction of the case, did not examine the merits of the controversy. Both parties, as appears on the face of the pleadings, are citizens of the same State, and upon that ground this court is of the opinion that the bill of complaint was properly dismissed for want of jurisdiction.‡

Where the Circuit Court is without jurisdiction it is in general irregular to make any order in the cause except to dismiss the suit, but that rule does not apply to the action of the court in setting aside such orders as had been improperly made before the want of jurisdiction was discovered. Prior to that the court, on motion of the complainants, had granted an injunction and issued a writ of sequestration, on which latter writ the marshal had taken possession of the steamer and held it subject to the order of the court. Evidently those writs were improvidently issued, and the

* The Mary Ford, 3 Dallas, 198.

† The William Bagaley, 5 Wallace, 412; Chittenden *v.* Brewster, 2 Id 196; Harrison *v.* Nixon, 9 Peters, 484; Stratton *v.* Jarvis, 8 Id. 4; Buckingham *v.* McLean, 13 Howard, 150; Canter *v.* Am. Ins. Co., 3 Peters, 318.

‡ 1 Stat. at Large, 78; Sullivan *v.* Fulton Steamboat Co., 6 Wheaton, 450; Piquignot *v.* Pennsylvania Railroad Co., 16 Howard, 104; Hornthall *v.* Collector, 9 Wallace, 560.

court having come to that conclusion set them aside and ordered the steamer restored to the custody in which it was when the writ of sequestration was served.

DECREE AFFIRMED.*

THE EUTAW.

When a case is within the jurisdiction of the court, and there has been no defect in removing it from the subordinate court to this, the court will not dismiss the case on motion made out of the regular call of the docket.

MOTION to dismiss an appeal; the case being thus:

In March, 1867, Harris, Howell & Co. libelled the steamer Eutaw, in the District Court at New York, for repairs, supplies, advances, and labor and services to the vessel, at Wilmington, N. C. The answer denied generally the allegations of the libel. A reference was made by consent to a master to ascertain and report the amount due; "the same proof of the payment and propriety of payment of bills to be made as if before the court." The master, after admissions or proofs heard, found $4140.94; one item of this sum being $1000 for "commissions at 2½ per cent.," and this item being allowed on an allegation of a custom of maritime countries, and of which, as prevalent at Wilmington, specific proofs were given or attempted, in the shape of affidavits from commission merchants of that place, and otherwise in more formal shape. This item, unlike most of the charges, was apparently *not admitted*, though it was not attempted specifically to be *dis*-proved, it being left to be judged of on the record and the law. The respondents not excepting, so far as the record seemed to show, to this item of $1000, or to any other item found in the report, nor moving any correction nor objecting to confirmation, the report was confirmed in May, 1868, by the District Court. From that decree the respond-

* This decree was made at the last term.

ents appealed in about two years afterwards (March 19th, 1870), to the Circuit Court, assigning error in a general allegation, "that the said decree is erroneous inasmuch as the said libellants were not entitled to the damages claimed in the premises;" and in the prayer for an appeal stating that on the appeal the appellant "intended to make new allegations and introduce the same and new and further proofs." In the Circuit Court, no new allegations being made of record, nor further proofs introduced, the case was argued and taken into advisement. As was said in the briefs of one side, and not contradicted in those of the other, the court on one hearing (before Nelson, J.), set aside the report or decree, though afterwards, on reargument (before Woodruff, J.), affirmed it. Nothing of this difference of view between the judges appeared on the record.

From this decree, made March 19th, 1870, the case was brought here by appeal two months afterwards and now stood No. 403, a number quite far on upon the list, and making the case, if left to be heard in ordinary course, not likely to be reached for a considerable time.

The 23d rule of this court declares:

"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 shall be awarded at the rate of 10 *per centum per annum* on the amount of the judgment, and the said damages shall be calculated from the date of the *judgment* in the court below until the money is paid."

Mr. C. Donohoe, in support of his motion to dismiss:

No exception was taken to the proceedings or proof before the commissioner and none before the court against the report. No definite defence is set up in the answer. In order to allow an appeal or hearing on it, the appealing party should point out specifically what the defence is, and what he objects to.*

To adopt any other rule would be to allow a party to let

* Commander-in-Chief, 1 Wallace, 43

a decree go against him, in fact stand by and tacitly admit the claim, and then, when he had misled the court and counsel, attempt on some defect of evidence, or, in fact, on evidence not returned or accidentally omitted, to raise points not raised before. The court will not even hear by consent points not raised on the record.*

The appeal being evidently for delay, and there being no point really taken on the record, the case should be affirmed for want of a point to argue, or dismissed with costs. The ten per cent. damages given by the 22d rule for such appeals, while in part a punishment to the appellant, do not pay the appellee in what he suffers by them. He has to pay counsel and be out of his money. Such appeals, on the contrary, are disastrous to business men.

Mr. T. M. Wheeler, contra:

The reference required "the same proof of payment, and propriety of payment of bills to be made, as if made before the court."

It is not necessary to take an exception to the report of the commissioner.†

The appeal to the Circuit Court does point out an error, "in saying that the decree of the District Court is erroneous, inasmuch as the libellants were not entitled to the damages claimed in the premises." The error will appear from an examination of the record.

The court will not, on this motion, examine the merits of the case. That there is good ground for appeal is evident from the fact that two judges of the Circuit Court differed in opinion. The record will show that some of the payments were not legally proved, and that payment of some of the bills was not proper, and that therein the report did not conform to the order of reference. The item for commission on the cargo, amounting to $1000, is among the class of which we speak. It was not properly proved and is not

* Bradstreet *v.* Potter, 16 Peters, 317.

† Murray *v.* Charming Betsy, 2 Cranch, 64; Himely *v.* Rose, 5 Id 313.

a legal charge. On this point the appellant has a right to be heard by this court. It would not now be proper to make an argument nor would the court hear it on this motion.

Reply. Nothing should be on the calendar that does not contain points to argue. It misleads parties lower on the calendar and will render uncertain the date of argument of cases having merits; for no one but the appellant, in cases like the present one, can tell whether it is intended to argue them or not when called. The class will increase when once tolerated, and the thing will end in the calendar of this tribunal being put, like the calendars of some of our State courts now are, beyond the control of the court.

The only reason the case was before two judges below was, that neither before the first nor the second judges did the appellant in the circuit submit any points or make any argument; he simply submitted his record, as he did in the district, and left the court, as he does here, to find an excuse for non-payment.

Mr. Justice CLIFFORD delivered the opinion of the court.

Cases regularly on the calendar, whether brought here by writ of error or appeal, if within the jurisdiction of the court are required to be heard when reached in the regular call of the docket, and they cannot be heard before they are reached except when they are advanced by the order of the court.

Where the case is one not within the jurisdiction of the court the writ of error or appeal may be dismissed on motion, and certain defects in removing the cause from the subordinate court into this court entitle the party who prevailed in the court below to the same remedy.

Motions to dismiss are non-enumerated motions, and they may be filed by leave of court in any case on the calendar before the case is reached in the regular call of the docket, and they are entitled to preference on Friday in each week during the sitting of the court, as provided in the twenty-

seventh rule, but they do not give either party any right to be heard upon the merits of the controversy.

On the ninth of March, 1867, the appellees filed the libel in the District Court against the appellants, as the owners of the steamer Eutaw, her engine, tackle, apparel, &c., in a cause of action founded upon contract civil and maritime. By the second article of the libel it is alleged that the steamer belonged to the port of New York, that she was engaged in the coasting trade, that in the months of November and December prior to the filing of the libel she was in the port of Wilmington, North Carolina, and that she was in need of supplies, repairs, advances, and necessaries for her voyage; that the master of the steamer applied to the libellants to make such repairs and to furnish such supplies and advances, and that they, the libellants, complied with the request, and that there is due to them for such repairs, supplies, and advances, the sum of four thousand dollars. They also alleged that the repairs, supplies, and advances were necessary and proper to render the steamer seaworthy and fit to perform her intended voyage, and that the same were furnished on the credit of the steamer as well as of the master and owners.

Process was served and the first-named respondent appeared and filed an answer, in his own behalf and in behalf of the other respondent with whom he was impleaded, denying all the allegations of the libel. Subsequent to the filing of the answer an order was passed referring the cause to a master to ascertain and report the amount due to the libellants. Testimony was taken on both sides and the parties were heard and the master reported that there was due to the libellants the sum of four thousand one hundred and forty dollars and ninety-four cents for the repairs, supplies, and advances made and furnished, as alleged in the libel. No exceptions were taken by either party to the report of the master, and on the ninth of May, 1868, the District Court confirmed the report and entered a final decree in favor of the libellants for that amount.

Dissatisfied with the decree, the respondent appealed to the Circuit Court, where the parties were again heard upon the same testimony. Apparently they were heard without any new reference of the cause and upon the general allegation of the appellant that the decree was erroneous and that the libellants were not entitled to the damages claimed in the libel and decree. Different conclusions, however, were formed by the circuit judge, as he adjudged that the decree of the District Court should be affirmed with costs, and it is from that decree that the original respondent appealed to this court.

Referring to the record, it appears that the decree in the Circuit Court was entered on the nineteenth of March, 1870, and the appeal was taken to this court on the nineteenth of May following. Such an appeal is not a supersedeas, but it cannot be dismissed, because no question is raised or presented in the record for the decision of this court.

Appeals are subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error, and it is well-settled law that it is no sufficient cause to dismiss a writ of error that the record does not present any question of law for the revision of this court, as the writ of error when sued out under the twenty-second section of the Judiciary Act brings up the whole record, and it is the right of the plaintiff in error to be heard and have an opportunity to show, if he can, that there is error in any part of the record.*

When a cause is brought here upon a writ of error sued out under that section, and all the proceedings are regular and correct, the judgment of the Circuit Court must be affirmed, but the cause cannot be dismissed although there is no question presented in the record for revision.†

Apply that rule to the case before the court and it is clear that the motion must be denied, and it is equally

* Minor et al. *v.* Tillotson, 1 Howard, 288; 2 Stat. at Large, 244.

† Taylor *v.* Morton, 2 Black, 484; Suydam *v.* Williamson, 20 Howard 440.

clear that appeals in that respect are subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error. Appeals of the kind are usually regarded as brought for delay, and it may become necessary to amend the second article of the twenty-third rule so that ten per cent. damages shall be allowed in addition to the interest provided for in the first article of that rule.

MOTION DENIED.

BIGLER *v.* WALLER.

On a bill filed in the Circuit Court for Virginia, against A. and B., the administrators of both were substituted on the record as defendants; A. and B. themselves having died after the bill was filed, and suggestion of their deaths being made. In this state the cause was heard and judgment given for the defendants. The complainant appealed to this court, the appeal bond and the citation referring, however, throughout, to A. and B. as defendants in the case, and not referring in any way to their suggested deaths and the substitution of their administrators. J. A. I., signing himself "counsel *for the defendants in this cause in the Circuit Court* of the United States for Virginia," acknowledged service of the citation.

On motion in this court to dismiss, the court acknowledging the obvious irregularity of both bond and citation, yet *held*,

1. That the acceptance by the counsel, J. A. I., in the circumstantial language above quoted, was a waiver of the irregularity in the citation.
2. That the irregularity, as respected the bond, did not necessarily exact a dismissal, which was accordingly ordered, only unless the appellant filed a sufficient appeal bond, in the usual form, within ten days, in the same sum as that required on the allowanee of the appeal.

MOTION to dismiss for want of jurisdiction an appeal from the Circuit Court for the District of Virginia; the case being thus:

James Bigler filed a bill in the court below against William Waller and Robert Saunders. Pending the suit, Saunders died, and his death being suggested, a scire facias to revive the cause was issued, and returned executed on one Harrell,

his administrator. The death of the defendant, Waller, was also afterwards suggested, and one W. G. Waller, administrator on his estate, moved for leave to appear and defend the suit. The court, accordingly, on the 3d of June, 1870, ordered that the suit should proceed against the said Harrell, and the said W. G. Waller, administrators, as already mentioned. In this state of the cause it was heard, and a decree given that Bigler, the complainant, pay to the said W. G. Waller, administrator of William Waller, a sum of money specified, and to the several defendants their costs. From that decree Bigler took an appeal to this court; the appeal being taken in assumed conformity to the second section of the Judiciary Act, which gives an appeal from the Circuit Court to this court, "the citation being signed by a judge, &c., and the *adverse party* having at least thirty days' notice." And which further says:

"And every justice or judge signing a citation, &c., shall take *good and sufficient security* that the plaintiff in error shall prosecute his writ."

By the already mentioned Judiciary or other acts of Congress, the appeal, if taken within a time limited (security being given in like manner), operates as a supersedeas. Prefixed to the appeal bond which Bigler, the appellant, gave in this case, were these words:

"SUPREME COURT OF THE UNITED STATES.

James Bigler
v.
William Waller and Robert Saunders.

Bond on appeal."

The bond itself purported to be "given to the above-named *William Waller and Robert Saunders* in the sum of $20,000," and was with a condition, reciting that "the above-named James Bigler had prosecuted an appeal to the Supreme Court of the United States to reverse *the decree rendered in the above entitled suit by the Supreme Court of the United States.*" The

condition of the bond was, that "the above-named James Bigler shall prosecute his said appeal to effect, and answer *all damages and costs* if he shall fail to make good his plea."

The citation was directed "*to William Waller and Robert Saunders*," and imported that they were to appear pursuant to an appeal, "wherein *James Bigler is plaintiff and you are defendants.*" On the citation was this indorsement:

"I hereby acknowledge service of the within citation.

"JAMES ALFRED JONES,

"Counsel for the defendants in this cause in the Circuit Court of the United States for the District of Virginia."

In this court the appearance had been special.

Mr. Conway Robinson, in support of the motion:

1. There has been no proper citation to the "adverse party." It was directed "to William Waller and Robert Saunders," and therefore was without effect;* for both of the parties cited were dead, and appeared by the record to be dead before the decree. Nor has there been any waiver; the indorsement by Mr. Jones, who had been counsel for those who were *defendants in the Circuit Court*, not being intended as waiver, nor amounting to such; and there being no waiver by the counsel in the Supreme Court, where the appearance was, but a *special* one.

2. Neither had "good and sufficient security" been taken, for the instrument was void by the common law, since both the persons named as obligees were dead, and appeared by the record to be dead before the decree.

After *Catlett* v. *Brodie*,† it was in one case said that "the mode of taking the security, and the time of perfecting it, are matters of discretion to be regulated by the court granting the appeal."‡ But subsequently where it appeared "that no appeal bond was taken or approved by the judge signing the citation," the appeal was dismissed.§ Other cases sup-

* Palmer *v.* Donner, 7 Wallace, 541.

† 9 Wheaton, 553. ‡ Dos Hermanos, 10 Wheaton, 311.

§ Boyce, &c., *v.* Grundy, 6 Peters, 777.

port this conclusion, where the appeal operates as a supersedeas.* In 1853, the court referring to the language above quoted from the Dos Hermanos said:†

"This cannot apply to a case where the appeal operates as a supersedeas. It must be brought strictly within the provisions of the law."

3. Even if the appeal be not dismissed, it should not be allowed to operate as a supersedeas when there has not been taken "good and sufficient security" by a *proper* bond.‡ Such terms should be imposed on the appellant as under the circumstances appear proper. There should at least be an order for the dismissal of the appeal, unless within such time as the court may prescribe there be given a proper bond with good and sufficient security.

Mr. W. F. Mattingly, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

The record shows that the appellant, on the fourteenth of June, 1866, instituted a suit in equity in the Circuit Court against William Waller and Robert Saunders, for the cause of action set forth in the bill of complaint. Among other things he alleged that he entered into an agreement in writing with William Waller for the purchase of certain real estate lying in the county of York and State of Virginia; that the said respondent, on the 10th of May, 1853, executed to the complainant a deed of the said real estate, and that the complainant, on the same day, made the cash payment as stipulated in the agreement, and gave to the respondent, at the same time, his obligation to pay the balance of the purchase-money at the times therein specified; that on the twenty-second of June, in the same year, the complainant

* Stafford et al. *v.* Union Bank, 16 Howard, 140.

† Adams, &c., *v.* Law, 16 Howard, 148.

‡ Catlett *v.* Brodie, 9 Wheaton, 553; Stafford, &c., *v.* Union Bank, 16 Howard, 140; Adams, &c., *v.* Law, Id. 148.

executed to the other respondent a trust deed of the premises to secure the balance of the consideration which he agreed to pay for the real estate, as stipulated in that obligation; that he went into possession, made valuable improvements, and continued to make the stipulated payments until April, 1861, when the war broke out, and he was compelled to leave the State; that after he left the State, Waller authorized the other respondent, as such trustee, to make sale of the real estate, and the complainant alleges that the trustee effected the sale without publishing the notice required by the terms of the deed of trust, and that he satisfied the said obligation out of the proceeds of the sale, and has failed to account to the complainant for the balance of the proceeds; that Waller became the purchaser of the real estate at that sale; that he immediately took possession of the same, together with certain personal property of great value belonging to the complainant; that he sold the same and converted the proceeds to his own use, and applied the same to the payment of the balance due on the said obligation; that he also rented the real estate and received large sums of money as rents; that he, the complainant, subsequently succeeded, through the aid of our military authorities, in recovering possession of the real estate, but that he found it in a ruinous condition; that since that time, to wit, on the eleventh of November, 1865, Waller instituted a suit against him on the said obligation in the Supreme Court of the City and County of New York, to recover what he claims to be due thereon; that subsequently the other respondent posted up, in the county where the real estate is situated, a notice "that he would, at the request of said Waller, in a few weeks, sell said real estate."

Based on these and other similar allegations the charge is made that Waller may induce the trustee so to act in regard to the sale of the premises as to cheat and defraud the complainant; therefore he prays that the trustee may be enjoined from selling the said real estate, and that the said Waller may be enjoined from assigning his interest in the said obligation until the suit in the Supreme Court of the City and

Restatement of the case in the opinion.

County of New York is determined, and for an account, and that the respondents may be required to deliver up all deeds and papers in their possession concerning said sale.

Suffice it to say, without entering into details, that such proceedings were had that a decree was entered that the appellant should pay to William G. Waller, administrator of William Waller, deceased, the sum of seventeen thousand three hundred and seventy-seven dollars in coin, and costs, to the defendants.

Dissatisfied with that decree the complainant appealed to this court, which is the case involved in the motion.

Pending the suit here the appellees have appeared specially and filed a motion to dismiss the appeal upon two grounds: (1) Because the citation is addressed to the original parties, one or both of whom deceased before the final decree. (2) Because the bond given to prosecute the appeal is executed to a deceased respondent and not to the administrator in whose favor the decree was entered.

Undoubtedly the citation is irregular, as it should be addressed to the actual parties to the suit at the time the appeal was allowed and prosecuted. Where a party dies before the appeal is allowed and prosecuted the suit should be revived in the subordinate court, and the citation, as matter of course, should be addressed to the proper party in the record at that time.

Notice is required by law, and where none is given and the failure to comply with the requirement is not waived, the appeal or writ of error must be dismissed, but the defect may be waived in various ways, as by consent or appearance or the fraud of the other party. Service of the citation may be made upon the attorney of record of the proper party.*

Unquestionably the attorney of record may also waive service, and acknowledge notice on the citation, as in that behalf he represents the party.†

On the citation in this case is the following indorsement:

* Bacon et al. *v.* Hart, 1 Black, 38.

† Grosvenor *v.* Danforth, 16 Massachusetts, 74; Adams *v.* Robinson, 1 Pickering, 461.

"I hereby acknowledge service of the within citation. James Alfred Jones, counsel for the defendants in this cause in the Circuit Court of the United States for the District of Virginia."

Viewed in any reasonable light it seems to the court that the attorney knew that the appeal was allowed by the court and was prosecuted by the appellant, which is the only purpose intended to be effected by the citation. Having been counsel in the cause the party signing that certificate must have known that the suit had been revived, as that proceeding took place before the final decree was entered. Such a service would be sufficient beyond all doubt if there had been no error in the form of the citation, and as that objection is merely a formal one we are all of the opinion that it must be considered as waived by the circumstantial language of the certificate signed without objection by the attorney of record in the Circuit Court.

2. Appeals from decrees of the Circuit Court to this court are allowed where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and the provision is that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error.*

Good and sufficient security must be taken by every justice or judge who signs the citation, that the plaintiff in error shall prosecute his writ to effect and answer all damages and costs if he fail to make his plea good; and in order that the writ of error may operate as a supersedeas and stay execution the writ must be served by a copy thereof being lodged for the adverse party, in the clerk's office where the record remains, within ten days, Sundays exclusive, after the judgment was rendered or the decree was passed.† Such a service is not required in an appeal, but the requirement is that the appeal must be taken and allowed, in cases where it is required to be allowed, within the same period of time, and

* 2 Stat. at Large 244.

† 1 Stat. at Large, 85.

in both cases, that is whether the cause is removed by writ of error or by appeal, the plaintiff in error or the appellant must give the required security within the ten days, Sundays exclusive, in order that the writ of error or appeal may operate as a supersedeas. "What is necessary is that the security be sufficient, and when it is desired to make the appeal a supersedeas the security must be given within ten days from the rendering of the decree."* Unless taken within the ten days an appeal cannot be made to operate as a supersedeas, but a party appealing within that time may not desire that the appeal shall have that effect, and in that event all that can be required of him is that he shall give good and sufficient security for costs, including "just damages for delay."†

Argument to show that the bond in this case is irregular and defective is unnecessary, as it is clear that it should be given to the opposite party or parties in the suit, but it does not follow, by any means, that the appeal must be dismissed. On the contrary, it is the constant practice of the court to allow such defects to be obviated by granting leave to the appellant or plaintiff in error to file a new bond within a reasonable time, to be fixed by the court, in view of all the circumstances when the application is made.‡

Even if the appeal is not dismissed it is suggested by the appellees that it should not be allowed to continue to operate as a supersedeas, because the appeal bond or the required "good and sufficient security" was not given within the ten days from the date of the decree, but it is a sufficient answer to that suggestion at this time to say that no such question is before the court. Such a question may arise hereafter, but the decision of the court at present is that the motion to dismiss must be granted unless the appellant file a sufficient appeal bond in the usual form within ten days in the same sum as that required by the Chief Justice who allowed the appeal.

* Rubber Company *v.* Goodyear, 6 Wallace, 156; Catlett *v.* Brodie, 9 Wheaton, 553.

† Rule 32; 1 Stat. at Large, 404.

‡ The Dos Hermanos, 10 Wheaton, 306; Brobst *v.* Brobst, 2 Wallace, 96.

Leave is granted to the appellees to file such a bond, but the court does not decide what the effect will be nor that it is or is not competent for this court in such a case to grant a supersedeas, as no such application is before the court.

BAKER *v.* MORTON.

1. A deed procured through fear of loss of life, produced by threats of the grantee, may be avoided for duress.
2. A judgment being but a general lien and the creditor under it obtaining no incumbrance but on such estate as his debtor really had, the equity of such creditor gives way before the superior right of an owner in the land who had conveyed it to the debtor only by duress and who never parted with possession.
3. *Brown* v. *Pierce*, 7 Wallace, 205, identical with this case in principle and almost identical with it also in fact and circumstance, affirmed.

APPEAL from the Circuit Court for the District of Nebraska; the case was this:

In the spring of 1857 there existed, near Omaha, in the then Territory of Nebraska, an organization known as the Omaha Claim Club. The object and purpose of the club was to nullify the land laws of the United States, to the end that the members of the club, who were engaged in land speculations, might hold and control the public lands in the vicinity of Omaha to the exclusion of actual settlers. The club numbered from 100 to 200 men. It made laws and promulgated decrees to suit its purposes, and enforced their observance with revolvers, guns, bayonets, ropes, and other appliances. It was regularly officered. The sheriff of the county, secretary of the Territory, mayor of the city, and register and receiver of the land office, all held high positions in the club. It had stated meetings, and when any supposed exigency should arrive the band would assemble at an hour's notice and be ready for business. It drove actual settlers from their claims, burned down their cabins, and marched

the settlers, surrounded by armed men, to the land office of the United States, and compelled them to withdraw their applications for land. If the subject was obstinate, he was taken to the Missouri River, and, with a rope around his neck, thrown in and pulled out, and thrown in again, and the operation repeated as often as might be necessary in order "to bring the subject to his senses, so he would agree to abide the law of the land." The character and objects of the club, while it lasted, were notorious.

In this state of things Baker, in the spring of 1857, settled upon and improved a quarter of a section of land near Omaha; erected a house and continued to occupy it until August 10th, 1857, when he entered the land under the provisions of the pre-emption laws of the United States. Having acquired title, and being thus in possession, one Pierce, at that time a member of this club and a man of influence in it, though then and subsequently a citizen of New York, claimed the land by virtue of its laws and regulations, and taking several members of the club with him, went to Baker's house and demanded a deed of the land. Baker, on the 10th of August, 1857, executed to him such a deed; Pierce, however, suffering Baker to remain in possession either of this or of an adjoining tract (which he had got in the same way that he did this), under some sort of lease. Pierce being thus invested with a paper title, Morton, a respectable banker of New York, where, as already said, Pierce resided, lent him money, and the debt not being paid sued him and got judgment.

In this state of things Baker, in September, 1860, still residing in Nebraska, filed a bill in the Territorial court of that Territory against Pierce as grantee, and Morton as claiming an interest, to set aside the deed as obtained by duress and without consideration. It set forth the respective residences of himself in Nebraska, and of Pierce and Morton in New York; the demand for the deed by Pierce, and execution of it by Baker to him. It alleged that when Pierce and his company demanded the deed, they threatened to take Baker's life by hanging or drowning him if he did

not comply with the demand; that the club had posted handbills calling the members together to take action against Baker; and that he made the deed knowing all this, and *in actual fear of his life, or of great bodily harm;* that he received no consideration whatever for the deed.

Pierce did not appear to the bill, which was taken *pro confesso* against him, and decree rendered accordingly.

Morton answered, alleging that he had no knowledge as to the circumstances under which the deed had been procured and that he could not answer to the charge, on belief or otherwise; but upon information he denied the same and alleged that the deed was freely and voluntarily made, and that Pierce was the true and lawful owner of the premises, free from all claim.

The cause was heard on pleading and proofs in the District Court for Nebraska Territory, by the then Chief Justice, who rendered a decree dismissing the bill. It was then carried by appeal to the Supreme Court of the Territory, where it was pending when Nebraska was admitted into the Union. Thereupon, owing to the citizenship of the parties—the complainant in the State of Nebraska, and the defendants in New York—and according to the usual rule by which cases that by reason of the character of the parties, belong most naturally to the Federal courts are transferred into those courts, and those which cannot be taken into *them* are transferred to the State courts, this case was removed into the Circuit Court of the United States. Here it was heard again and a decree given dismissing the bill. The complainant appealed to this court.

The reader who has read and remembers the case of *Brown* v. *Pierce*, which came before this court two terms ago and is reported in 7th Wallace, 205, will have seen, of course, that the case is identical in principle and scarcely at all variant in fact from that one.

The facts alleged by the bill being considered by the court, here as there, fully proved by the evidence, the only questions which remained were:

1. Whether a deed executed without any consideration

and only because the party making it is put in fear of his life, or of great bodily harm, may be avoided?

2. Whether the case made was one for relief as against Morton, whose good faith in lending his money was not to be questioned.

Messrs. Redeck and Briggs, for the appellant; Mr. Woolworth, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Territorial courts are created by an act of Congress, and they usually possess jurisdiction of controversies of a civil nature, without regard to the inquiry whether the controversies, if they had arisen in a State, would have been cognizable in the tribunals of the State or in the Federal courts.*

By the organic act creating the Territory of Nebraska the judicial power of the Territory was vested in a Supreme Court and certain district courts, and the provision was that the jurisdiction of those courts should be as prescribed and limited by law.†

Whenever a Territory is admitted into the Union as a State the cases pending in the Territorial courts of a Federal character or jurisdiction are transferred to the proper Federal court, but all such as are not cognizable in the Federal courts are transferred to the tribunals of the new State. Pending cases, where the Federal and State courts have concurrent jurisdiction, may be transferred either to the State or Federal courts by either party possessing that option under the existing laws.

On the seventh of September, 1860, the appellant filed his bill of complaint in one of the district courts of the Territory against Roswell G. Pierce and the appellee, in which he alleged that he, the appellant, under the laws of the United States, settled, improved, and entered as a pre-emptor the southwest quarter of section eight, township fifteen north,

* 1 Stat. at Large, 77; 9 Id. 209; Benner *v.* Porter, 9 Howard, 235.

† 10 Stat. at Large, 280.

range thirteen east, in the county of Douglas; that the first-named respondent claimed to own the tract so settled, improved, and entered as a pre-emption right by the complainant; that the said respondent made claim to the same, not by virtue of any law of the United States, but by virtue of the rules and regulations of what was known at the time as the Omaha Claim Club, an organization composed of one or two hundred men, the object of which was to protect every claimant, whether resident or non-resident, in holding three hundred and twenty acres of land as a claim upon the public lands of the United States; that a few days before he, the complainant, entered the land the said Pierce and his agent and a few other persons, members of the said club, came to the house of the complainant, and that the said Pierce, as the leader of the party, assured the complainant that unless he would agree to deed the tract, in case he pre-empted the same, to the said Pierce, that he, the said Pierce, with the assistance of the said claim club, would take his life by hanging or drowning him, or in such other manner as the agents of the club might think fit and proper to employ; that on the tenth of August, 1857, he entered the tract under the pre-emption laws of the United States, when the said Pierce, his agents, and certain members of that club again came to him and repeated the threats before used, and assured him that unless he immediately conveyed the tract to the said Pierce they would carry their threats into execution, and that he, by means of those threats and through fear that the threats would be carried into effect if he refused to convey the land, on the same day conveyed the tract to the said Pierce by deed in the usual form, which was duly acknowledged.

Based upon these allegations the complainant charges that the conveyance made by him was procured by threats and through fear of death and without consideration. Morton, the appellee, was also made a party to the bill of complaint, because he was a judgment creditor of the other respondent, and claimed an interest in the land by virtue, as he alleged, of a lien created by his judgment. Wherefore the complain-

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ant prayed that the conveyance of the tract he made to the said Pierce may be decreed to be inoperative and void and that the said Pierce may be decreed to reconvey the premises to the complainant.

Service was made by publication, as the respondents were non-residents, and the respondents failing to appear and plead, answer, or demur to the bill of complainant, they were duly defaulted, and a decree was entered that the bill of complaint be taken as confessed.

Testimony was taken and the cause was submitted to the court and the court found that the conveyance was obtained by the said Pierce from the complainant through threats of personal violence made by the said Pierce and his agents, and without consideration, and a decree was entered ordering that the conveyance should be cancelled, and requiring the respondent to reconvey the premises to the complainant, as prayed in the bill of complaint.

Pursuant to a motion, however, subsequently filed by the appellee, it was ordered by the court that the decree as to him should be vacated, and that he have leave to appear and make defence. He accordingly filed an answer, in which he admitted that the complainant entered the land as alleged in the bill of complaint, and that he, the complainant, had been in the possession of the same from that time to the present, but alleged that the complainant occupied the same as tenant of the other respondent. Responsive to the charge made that the deed was procured from the complainant by threats, the appellee alleged that he had no knowledge upon the subject, that he could not answer to the charge as to his belief or otherwise, but upon information he denied the same and alleged the fact to be that the deed was the free and voluntary act of the complainant, and that the other respondent was the true and lawful owner in fee of the premises, divested of all the claims set forth in the bill of complaint; that he, the appellee, loaned to the other respondent the sum of five thousand dollars, and that the borrower failing to make payment as stipulated he brought suit against him and recovered judgment for the amount, of which two thou-

sand five hundred dollars remained due and unpaid, and that his judgment was a lien on the land described in the pleadings. Wherefore he insisted that his judgment ought in equity to be held a better claim on the land than the claim made by the complainant.

Defects exist in the record, arising from the loss of some portion of the minutes and files of the clerk, but it is conceded that the usual replication was filed, and the record shows that proofs having been taken by both parties the cause was heard and the District Court of the Territory entered a decree dismissing the bill of complaint and awarded costs to the respondent. From which decree the complainant appealed to the Supreme Court of the Territory.

Pending the appeal in the Supreme Court of the Territory, to wit, on the ninth of February, 1867, Nebraska was admitted into the Union upon an equal footing with the original States.*

Undetermined as the appeal was at that date, and it appearing in due form that the parties were citizens of different States, the cause was transferred to the Circuit Court of the United States for the District of Nebraska, and the parties having been again heard the Circuit Court determined that the deed made by the complainant to the other respondent was not made while he, the complainant, was in duress, and that the appellee, by reason of his judgment, has a better equity in the premises than the complainant, and entered a decree dismissing the bill of complaint. Whereupon the complainant appealed to this court, and now insists that the decree of the Circuit Court ought to be reversed.

Much examination of the evidence or of the law applicable in the decision of the case is unnecessary, as the facts are substantially the same as in a case between the same parties which was recently heard and determined by the court after mature deliberation.†

By the bill of complaint a complete title is set up by the

* 14 Stat. at Large, 392.

† Brown v. Pierce, 7 Wallace, 214.

complainant to the land under the pre-emption laws of the United States, and the answer admits that he held such a title at the date of the deed he made to the other respondent. Argument upon that topic, therefore, is unnecessary, and the complainant charges that he was induced to execute the deed by threats and from fear of death or great bodily harm, and the respondent concedes that he is not able to deny that allegation from any personal knowledge upon the subject, and he even goes further and says that he cannot answer concerning the same, because he has no information or belief upon the subject. Such an answer does not make it necessary for the complainant to introduce more than one witness to overcome the defence, but the court is not inclined to place the decision upon any technical ground, as the proofs in the case show to the entire satisfaction of the court that all the matters alleged in the bill of complaint are true, and that the same are fully established, even if the allegations of the answer be regarded as denials made by a respondent in respect to matters within his own knowledge. Some conflict undoubtedly exists in the proofs, but the weight of the evidence is so decidedly with the complainant that the court feels no hesitation in saying that the allegations of the bill of complaint are fully proved.

Complete incipient title was acquired by the complainant under the pre-emption laws of the United States, and on the same day the defaulted respondent, through threats to take his life if he refused, compelled him to convey the same to that party, and the settled law of this court is that such acts amount to legal duress, and that a deed, or other written obligation or contract, procured by such means, is inoperative and void, and that rule is applied in all jurisdictions where the principles of the common law prevail.*

Actual violence is not necessary to constitute duress even at common law, as understood in the parent country, because consent is the very essence of a contract, and if there be compulsion there is no consent, and it is well-settled law

* Brown v. Pierce, 7 Wallace, 214.

that moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is sufficient to destroy free agency, without which there can be no contract, as in that state of the case there is no consent.*

Where a party enters into a contract for fear of loss of life, or for fear of loss of limb, or fear of mayhem, or for fear of imprisonment, the contract is as clearly void as when it was procured by duress of imprisonment, which is where there is an arrest for an improper purpose without just cause, or where there is an arrest for a just cause but without lawful authority, or for a just cause but for an unlawful purpose, and the rule is that in either of those events the party arrested, if he was thereby induced to enter into a contract, may avoid it as one procured by duress.

2. Judgments were not liens at common law, but Congress, in adopting the modes of process prevailing in the States at the time the judicial system of the United States was organized, made judgments recovered in the Federal courts liens in all cases where they were so by the laws of the States, and a later act of Congress has provided that judgments shall cease to have that operation in the same manner and at the same periods in the respective Federal districts as like processes do when issued from the State courts.†

Such a lien confers a right to levy on the land to the exclusion of other adverse interests acquired subsequently to the judgment, but the lien constitutes no property or right in the land itself, as it is merely a general lien securing a preference over subsequently acquired interests in the property.‡

* Chitty on Contracts, 192; 2 Greenleaf on Evidence, 283; 2 Institutes, 482; 2 Rolle's Abridgement, 124; Richardson *v.* Duncan, 3 New Hampshire, 508; Watkins *v.* Baird, 6 Massachusetts, 511.

† Williams *v.* Benedict et al., 8 Howard, 111; Riggs *v.* Johnson Co., 6 Wallace, 166.

‡ Conard *v.* Atlantic Ins. Co., 1 Peters, 443; Massingill *v.* Downs, 7 Howard, 767; Buchan *v.* Sumner, 2 Barbour's Ch. 165; Ells *v.* Tousley, 1 Paige 280; White *v.* Carpenter, 2 Id. 217.

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For these reasons we are of opinion that the Circuit Court erred in entering a decree for the appellee.

DECREE REVERSED with costs, and the cause remanded with directions to enter a decree for the appellant,

IN CONFORMITY WITH THE OPINION OF THIS COURT.

MILLER ET AL. *v.* THE STATE.

Although a suit be nominally by a State as the plaintiff, yet where the real plaintiffs are individuals—as *ex gr.* in a *quo warranto*, where the State is plaintiff *ex relatione*—the court will not advance, even by consent of counsel on both sides, a case under the act of June 30th, 1870.

MOTION to advance a cause, &c.

Seven persons, asserting themselves to be the true directors of the Rochester and Genesee Railroad Company, a corporation created by the State of New York, brought suit in one of the courts of that State in the nature of a *quo warranto*—using the name of The People of the State of New York as plaintiff with their own names as relators—against one Miller and several others, who also asserted themselves to be directors, charging that these last had unlawfully usurped the office of directors, from which they, the relators, had been unlawfully ousted.

The case being transferred from the special term of the court to which it was brought to the general term, the names of the seven relators were dropped, and the matter proceeded in the name of "The People of the State of New York" alone. Judgment being finally given in the case thus entitled, by the Court of Appeals in New York, the case came here from that court on error; and now, standing low down on the docket, a motion was made by *Mr. T. Bacon, for the plaintiff in error*, *Mr. J. C. Cochrane in behalf of the other side*, favoring the same, and having himself made a

similar motion, to advance the cause and hear it at such time as the court should direct.

The motion was made under the act of 30th June, 1870, which provides:

"That in all suits . . . now pending or which may hereafter be brought in any of the courts of the United States, whether original suits in the courts of the United States, or brought into said courts by appeal or writ of error, . . . wherein a State is a party, . . . or where the execution of the revenue laws of any State may be enjoined or stayed by judicial order or process . . . it shall be the duty of any court in which such case may be pending, on sufficient reason shown, to give to such cause the preference and priority over all other civil causes pending in such court between private parties.

"And the State or party claiming under the State the execution of whose revenue laws is enjoined or suspended shall have a right to have such cause heard at any time after such cause is docketed in such court, in preference to any other civil cause pending in such court between private parties."

It was stated at the bar, in support of the motion under this statute, that in addition to the suit being by the State of New York, and so within the statute on that ground, the State named was interested in a fiscal point of view in the successful operation of the road, now greatly interfered with and almost arrested by the quarrels between the different bodies asserting themselves to be its true board of directors; that the revenue laws of the State and her receipts from the road were in fact suspended until the road was put into quiet and successful operation; that is to say, were suspended by the judicial order or process granting a writ of error in the case, until the disposition of which in some way the road could not be put into the sort of operation spoken of.

Mr. Justice CLIFFORD delivered the opinion of the court.

The motion is that the cause be advanced, and that it be heard at such time as the court shall direct, in preference to civil causes between private parties.

Founded as the motion is, upon the act of Congress of the

thirtieth of June, 1870, it becomes necessary to inquire and determine whether the case is within the terms of that act, as if it is the motion should be granted, and the cause set for hearing as there directed.

Provision is there made to the effect that in all suits and actions now pending, or which may hereafter be brought, in a Federal court, whether the suit is original or brought into said courts by appeal or writ of error or by removal from a State court, wherein a State is a party, or where the execution of the revenue laws of any State may be enjoined or stayed by judicial order or process, it shall be the duty of any court in which such case may be pending, on sufficient reason shown, to give such cause the preference and priority over all other civil causes pending in such court between private parties.

Reliance, however, is placed, in support of the motion, upon the next clause of the act, which provides that the State, or the party claiming under the laws of the State, the execution of whose revenue laws is enjoined or suspended, shall have a right to have such cause heard at any time after such cause is docketed in such court in preference to any other civil cause pending in such court between private parties, as provided in the last phrase of the preceding clause.*

No objection to the motion is made by the defendants. Instead of that they have filed one to the same effect, but such motions are not granted as of course, even when both parties concur, as such an order, if improperly made, would prejudice the rights of other parties on the calendar, and in view of that consideration it becomes necessary to determine whether the case is one where the parties, or either of them, are entitled to such preference, and to enable us to determine that point we have examined the record, and are satisfied that the motion must be denied.

The action was one in the nature of a *quo warranto* to try the title of the defendants, as directors of the Rochester and Genesee Valley Railroad, a corporation created by the laws

* 16 Stat. at Large, 176.

of the State of New York, and doing business in that State, and the real controversy is between two sets of directors as to which set is entitled to manage and control the affairs of the corporation.

Both parties assume in argument that the suit is in the name of the State, or the people of the State alone, and it is upon that ground that it is claimed that the motion ought to be granted; and if the fact was so it may be conceded that the cause ought to be advanced. Such, however, is not the fact. On the contrary, the suit was brought not only in the name of the People of the State of New York, but also in the name of seven persons claiming to be directors of the railroad company, and that they, as such, are entitled to manage and control its affairs or to participate in such management and control; and they charge that the defendants, without any legal authority, right, or warrant whatsoever, have usurped and entered upon said offices of directors of the said corporation, and that they still unlawfully hold and exercise those rights and franchises. Subsequently, when the cause was transferred to the general term, the names of the seven directors joined as plaintiffs in the court of original jurisdiction were dropped in the title of the case, but the whole proceedings in the case in all the courts of the State where the case was litigated were upon the declaration as originally filed, without any amendment in that behalf. Evidently the suit is one in the name of the State, on the relation of the seven persons who charge that the defendants have unlawfully usurped the offices of directors from which they have been unlawfully ousted, or to which they are justly entitled by a legal election. Suggestion may be made that the State is the only party plaintiff named in the writ of error, but it is the duty of the court in such a case to open the record and ascertain whether the case in point of fact is one where the parties are entitled to be heard in preference to other civil causes between party and party pending on the calendar. Such a case is not within the act of Congress, and the

MOTION IS DENIED.

WARD *v.* STATE OF MARYLAND.

1. A motion to advance cannot, under the act of June 30th, 1870, be made, except in behalf of a State, or by a party claiming under its laws.
2. Under the 30th rule of court a motion to advance is discretionary with the court. An advance under that rule refused; it appearing that the party asking the advance was not in jail.

ON motion to advance this cause, one in error to the Court of Appeals of the State of Maryland.

An act of Congress, passed June 30th, 1870, and quoted also in the preceding case, enacts:

"That in all suits and actions . . . now pending, or which may hereafter be brought, in any of the courts of the United States, whether original suits in courts of the United States or brought into said courts by appeal or writ of error, . . . wherein a State is a party, or where the execution of the revenue laws of any State may be enjoined or stayed by judicial order or process, it shall be the duty of any court in which such case may be pending, on sufficient reason shown, to give such cause the preference and priority over all other civil causes pending in such court between private parties.

"And *the State, or the party claiming under the laws of the State,* the execution of whose revenue laws is enjoined or suspended, shall have a right to have such cause heard at any time after such cause is docketed in such court in preference to any other civil cause pending in such court between private parties."

And the 30th rule of this court prescribes:

"All cases on the calendar, except cases advanced as hereinafter provided, SHALL be heard when reached in the regular call of the docket, and in the order in which they are entered."

"Criminal cases *may* be advanced, by leave of the court, on motion of either party."

With this enactment and this rule in force one Ward had been convicted, in one of the inferior State courts of Maryland, on an indictment for trading without having a license, as required by the laws of that State, and the judgment was

affirmed in the Court of Appeals. It appeared that Ward was not in jail. The case being now here on writ of error this motion was made to advance the hearing of it.

Mr. Justice CLIFFORD delivered the opinion of the court.

Motion to advance the cause filed by the plaintiff in error. Indictment. The parties agreed that the defendant on the day and at the place named in the indictment did sell the articles of merchandise therein named without obtaining a license, as required by the laws of the State. Plea not guilty. Issue tried by court. Finding for the State. He moves the court to advance the cause.

Clearly the motion is not within the act of Congress of the thirtieth of June, 1870, as the motion is not filed by the State, nor by a party claiming under the laws of the State.*

Probably it is made under the thirtieth rule of the court, which provides that criminal cases *may* be advanced by leave of the court on motion of either party. Under that rule the motion is addressed to the discretion of the court, and inasmuch as it appears that the defendant is not in jail, the court fails to see any reason for granting the motion.

MOTION DENIED.

INSURANCE COMPANY *v.* HUCHBERGERS.

Judgment affirmed under Rule 23d, with ten per cent. damages in addition to interest; the court believing that the writ of error had been brought for delay.

ERROR to the Northern District of Illinois.

L. & M. Huchberger brought suit against the Merchants' Insurance Company of Providence, R. I., declaring upon a contract to insure them for one year from September 14th, 1866, against loss by fire on their goods "contained in the brick building No. 173 Lake Street, Chicago." The *narr*

* 16 Stat. at Large, 176

Argument for the defendant in error.

also set out that it was provided in the policy that if the *situation of the property* should during the existence of the policy be *changed by the assured*, the policy should be void; and also it should be void, unless countersigned by the agents of said Merchants' Insurance Company.

After the averment of interest in the property insured, the *narr* continued:

"And the said plaintiffs aver that afterwards, to wit, on the 2d of March, A. D. 1867, the said property in the said policy of insurance mentioned was burnt, and destroyed by fire. *And that the situation* of the property *has not been*, during the existence of the said policy, *altered or changed* by the said plaintiffs."

The company pleaded the general issue; and a trial having been had on the evidence a verdict was given for the plaintiffs. The defendants then moved an arrest of judgment on the grounds:

1. That the *narr* did not aver that the goods were burned at the particular place mentioned in the contract, to wit, "the brick building, No. 173 Lake Street, Chicago."

2. That the countersigning of the policy by the agents of the insurance company, was a condition precedent, and ought to have been averred in the *narr*.

This motion being overruled and judgment given for the plaintiff, the company brought the case here on the sufficiency of the *narr*.

No counsel appeared personally for the insurance company, the plaintiff in error. A brief was, however, filed by *Mr. O. B. Sansum in its behalf*, arguing that the contract was to insure goods in a particular place only, while for aught that appeared they had been burned elsewhere. Neither, as the brief argued, was the policy to be of effect unless countersigned, yet there was no averment that it had been. Accordingly no title to sue had been shown, and for this want of title shown, judgment should have been arrested.

Mr. Lyman Trumbull, contra:

1st. The inference from the allegations which are made is

clearly enough that the goods were burned in the building where they were insured; but if it were not so, the declaration in this respect is as specific as the policy. If the one does not allege where the goods were burned, neither does the other limit the liability to a burning at any particular place.

2d. As to the objection of a want of averment of a countersigning, the declaration alleges that the insurance company "made and executed to the plaintiffs a certain policy of insurance in writing, whereby, &c." This was sufficient. If not executed so as to bind the company, the policy was not the instrument declared on, and the plaintiffs must have failed in their proof. After verdict, the court will presume that every material fact inferable from what is alleged was proved on the trial.

The writs of error have obviously been prosecuted for delay. We ask damages, as provided by the 23d Rule of court, which declares that:

"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 *ten per cent.*, in addition to interest, shall be awarded on the amount of the judgment."

The CHIEF JUSTICE: The court is of opinion that this writ of error can have been taken out only for delay. We affirm the judgment below with ten per cent.

DAMAGES IN ADDITION TO INTEREST.

NOTE.—Two other judgments, given under like circumstances, were affirmed with the same penalty.

Statement of the case.

THE STEAMER SYRACUSE.

1. A steamer having a very large tow, and approaching a place where, from the number of vessels in the water, and the force of counter currents, navigation with such a tow is apt to be dangerous, but with a small one is less so—a place, for example, like that near the Battery, New York, where the East River and the Hudson meet—is bound to proceed with great care, and if within two or three miles of the place, though not nearer, she can divide her tow, she is bound to divide it.
2. Though a libel in admiralty alleging an admitted collision may not allege the specific sort of negligence by which the collision was brought about, but on the contrary allege facts not shown, yet where the true cause of the collision is disclosed by the respondent's witnesses, so that the respondent cannot allege surprise, this court, if it can see that the omission to state the true cause was without any design, will not allow it to work injury to the libellant; and though the libellant ought in such a case to have amended his libel below, will extract the real case from the whole record, and decide accordingly.

APPEAL from the Circuit Court for the Southern District of New York.

This appeal originated in a libel in the Admiralty by the owner of the canal-boat Eldridge, against the steamer Syracuse, to recover the damages occasioned to her by her running into a vessel at anchor in the harbor of New York, the canal-boat being at the time in tow of the Syracuse.

The canal-boat was taken in tow at Albany, to be towed to New York; the Syracuse having at the time a tow of forty boats; a tow, however, testified to have been "an ordinary tow for the Syracuse, which on one occasion had taken fifty-two boats." The Eldridge, which had applied for towage after the tow was pretty much made up, was toward the rear end of it, and liable of course to be well swung round in any sweep of the steamer.

Approaching New York, and getting within a mile or so of the Battery, that part of the harbor was seen to be somewhat unusually full of vessels, but to the view of the captain there *seemed* to be one passage or "gangway," through which the tow could be taken. Another steamer, the Cayuga, with a similar tow had, as he supposed, though, perhaps, incor-

rectly, passed through it safely not long before. The Syracuse accordingly went on. The tide at the time was ebb, setting south in the North River, but above Governor's Island setting sharply to the west and southwest, as it came out of the East River.

The peculiarity of the position lay of course in this, that the tow coming down the North River, had the tide with her, but as she turned into the East River had to meet an ebb tide coming from the East River nearly at right angles, while many vessels were lying at anchor all around. Of necessity the rear end of a long tow would be swept well round.

As soon as the Syracuse passed the last vessel on her port side, she turned up into the East River. It was desirable tc head up the East River as speedily as possible in order to check the effects of the East River tide upon the boats. She had previously taken on two small steamtugs as helpers, and in addition to the starboarding of her own wheel the helper on the port side was stopped, while the other one was kept in motion, to assist the turn. But notwithstanding all efforts, the boats at the end of the hawser were swept over by the East River tide, which struck them on their sides, and were carried towards a brig which lay at anchor on the starboard side, and which also took a sheer towards them. The canal-boat struck the brig's stem and shortly after sunk.

The libel charged that the collision was occasioned by the carelessness and negligence of those in charge of the steamboat in not giving the brig lying at anchor a wide berth, which, as the libel alleged, she might have done, there being plenty of room between the Battery and the brig for the Syracuse to have passed with her tow.

The libel also charged that the collision was caused by the negligence, want of skill and of prudent management *generally* on the part of the steamboat. But it did not charge negligence in not stopping before reaching the Battery, and dividing the tow.

The answer did not in any respect deny the allegations of the libel above set forth as to the steamboats *having abun-*

dance of room to make the passage round the Battery. The grounds upon which it sought to exculpate the steamer were:

1st. That by special agreement between the canal-boat and the steamboat, the former was being towed *at her own risk.*

2d. By the negligence of those in charge of the canal-boat to cast off lines, or use their helm, or do anything to prevent the collision.

3d. That the collision was *inevitable*, having been caused by an *unusually* strong ebb tide, which swept the canal-boat against the bows of the brig lying at anchor as the towboat was rounding the Battery with her tow.

The canal-boat was shown to have committed no fault. This was admitted in the argument here. The receipt for the towage—a printed form—was for towing her "at the risk of her master and owner;" but it seemed that the canal-boat had been made fast, the tow put in motion, and the towage charge paid before this receipt was delivered. What the contract was, was therefore a matter disputed.

As to the tide setting in from the East River, although the captain of the steamer testified that it was *unusually* strong, nothing unusual about it was otherwise well proved. Nothing out of the usual and regular order of nature was attempted to be shown, nor any preceding violence of the winds, which sometimes forces the waters from the sea into the inlets when they retire with greater force on the ebb. Neither had it occurred, apparently, to those in charge of the steamer, until the place of the disaster was nearly reached, that the tide was stronger than the usually strong tide at that place. The almanac, for December 1st, 1861, showed that it was a low course of tides at that time, the moon not becoming full until December 17th.

It appeared, by cross-examination of the master of the steamer, that there was always considerable danger in taking a tow so large as the one which he had on this occasion round the Battery, when there was a strong ebb tide from the East River, if the place was crowded by numerous vessels at anchor, as it commonly was. That on this occasion,

however, he thought he saw a clear gangway, and felt no alarm until he had got too far into it to stop with so large a tow, though he could have stopped with a small tow; that he could have stopped with the tow he had, above Thirteenth Street, about two miles above, where there is room and the tide has a different set; and could have there held or divided his tow; that in the night-time he had for caution stopped there and left his tow until morning; that such stoppage was made not unfrequently in the night-time, and could be made as well in the daytime as the night; that he had seen persons stop there, and, when the tow was large, divide their tow; though he had never divided his own tow.

The pilot on cross-examination testified that above Thirteenth Street they could have stopped the tow, but not lower down; that he did not see that the water about the Battery was crowded with vessels until he got lower down, say within a mile or so of the Battery; that at Thirteenth Street it did not appear to be more crowded than usual, nor, at that point, but what they might go through the same as usual; that there are generally a good many vessels off the Battery, and that he never went through a gangway there but that he saw "more or less danger."

The District Court condemned the steamer, and the Circuit Court having affirmed the decree, her owners brought the case here.

Mr. R. D. Benedict, for the appellant:

I. The boat was towed, "at the risk of her master and owners," that is to say, under a contract on the part of the libellant that he would bear the risks of the navigation, provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill. Any other construction of the rights of the parties would deprive that clause of the contract of meaning and make it a snare.

II. The libellant's case is made in this court to rest chiefly on the fact that the tow was not divided on arriving at Thirteenth Street and sent round piecemeal.

The answer is brief:

1st. The libel makes no charge of negligence antecedent to the coming to the Battery. It is variance to let in proof of an allegation not made, and a surprise on us to bring forward such an allegation now.

2d. There was no call for such extraordinary proceeding. No human being could tell on arriving at Thirteenth Street, full two miles above, that there was not room to pass through the vessels at anchor below in safety; and unless that could be told, the steamer was in no wise called upon to do so extraordinary a thing as to divide the tow. It needed but a few feet more width of channel to have saved all danger. To hold that the human eye is called upon to estimate, within a few feet, the width of such a passage at the distance of two miles, and to hold that a failure in the correctness of such an estimate is a failure to use ordinary care, would be unreasonable. If the officers of the Syracuse formed the best judgment which was possible to be attained, there was no negligence on their part in acting upon that judgment.

Mr. J. C. Carter, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to consider the evidence relating to the alleged contract of towage, because, if it be true, as the appellant says, that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if, through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected, and disaster occurs, the towing boat must be visited with the consequences. It is admitted in the argument, and proved by the evidence, that the canal-boat was not to blame, and the inquiry, therefore, is, was the steamer equally without fault?

It frequently happens in cases of collision that the master of the vessel could not have prevented the accident at the moment it occurred, but this will not excuse him, if, by timely measures of precaution, the danger could have been avoided. Testing the present case by this rule there is no difficulty in determining by whose fault this collision occurred. It may be true, that the master of the Syracuse, after he got his boat off the Battery with her tow, in making the turn to go up the East River, was unable to keep the canal-boat from striking against the brig, but the question arises, ought he to have encountered this peril?

Manifestly not, under the proof furnished by the officers of the Syracuse themselves. In the state of case disclosed by the master and pilot, is it not plain that ordinary prudence required the master to stop where he was able to hold his tow, long enough to ascertain the state of things at the Battery? The master tells us that in the night-time, as a measure of precaution, he had stopped some distance above that place, and left his tow there until morning. If this precaution was necessary at night, why not in daylight; as the ebb tide was very strong, and the danger, therefore, imminent? It is no valid excuse for proceeding down the river, that, when off Thirteenth Street, it was impossible to know the width of the gangway through which the vessels must pass to get into the East River, because it was easy to tell, even at that distance, that the river at the Battery was full of vessels, and, therefore, in the state of the tide, dangerous to navigate with such a fleet of boats. In view of the magnitude of the tow, the admitted danger of handling it in a strong ebb tide where there is a large amount of shipping, and the ability to stop where the tow could be managed, it was, to use the mildest term, negligence to make the attempt to pass the Battery into the East River. As the master could have stopped anywhere above Thirteenth Street, it was his duty, under the circumstances, to have done so, and either to have divided his tow, or remain there until the tide had slacked. If companies engaged in the business of towing, will, through greed of gain, undertake to transport from

Albany to New York, more canal-boats in one tow than can be safely handled in the waters of New York, they must see that the large amount of property intrusted to their care is not placed in jeopardy, through the want of preliminary caution and foresight on the part of the officers of their steamers.

It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant, if the court can see there was no design on his part in omitting to state them.* There is no doctrine of mere technical variance in the admiralty, and subject to the rule above stated, it is the duty of the court to extract the real case from the whole record, and decide accordingly. It is very clear that the libellant had no design in view in omitting to state the failure to stop as a fault, and equally clear, that the proof on that subject, coming, as it did, from the opposite party, could not have operated to surprise them.

JUDGMENT AFFIRMED.

HANDLIN v. WICKLIFFE.

The appointment by Brigadier-General Shepley, during the late rebellion, of W. W. Handlin as judge of the Third District Court of New Orleans, then occupied by the government troops and under a military governor appointed by the President, was an appointment purely military, authorized only by the necessities of military occupation, and subject to revocation whenever, in the judgment of the military governor, revocation should become necessary or expedient.

It was accordingly revocable by Governor Hahn in his capacity of military governor (which he was by appointment of the President), in case the adoption of the constitution (which some asserted was adopted), during the war under military orders, and the election of Hahn as governor, did not affect the military occupation; and in case it did, and

* The Quickstep, 9 Wallace, 670; The Clement, 2 Curtis, 365.

bring a civil constitution of the State into full operation, independent of military control, then the authority derived from the appointment of Brigadier-General Shepley ceased of necessity, and the office became vacant.

ERROR to the Supreme Court of Louisiana; the case being thus:

During the late civil war, when the State of Louisiana was occupied by the troops of the United States, Brigadier-General G. F. Shepley, who had been appointed military governor of the State, commissioned W. W. Handlin as judge of the Third District Court of New Orleans. Handlin took the prescribed oath and entered upon the duties of his office. Subsequently, while the war was yet flagrant, a constitution was adopted for the State, under military orders, by a portion of its citizens, and Michael Hahn was elected governor, and was also appointed military governor in place of Shepley by the President. Handlin, who remained judge after the election and appointment of Hahn, was removed from office by him on account, as it appeared, of a decision to the effect that slavery still existed in the parish of New Orleans, which had been exempted by President Lincoln from the operation of the Proclamation of Emancipation. Asserting that, notwithstanding this removal, he remained of right in office and was entitled to its salary, Handlin, after the final suppression of the rebellion and reconstruction of the State, sued out a writ of mandamus in one of the inferior State courts of Louisiana against Wickliffe, the auditor of public accounts of the State, to compel payment. The judgment of the court was against him and the mandamus was dismissed. An appeal having been taken to the Supreme Court of the State and the judgment affirmed, Handlin now brought the case here by writ of error.

Messrs. W. W. Handlin, C. Cushing, and J. T. Drew, for the plaintiff in error; Mr. T. J. Durant, contra.

The CHIEF JUSTICE delivered the opinion of the court.

It is too clear for argument that the appointment of the relator as judge was purely military, authorized only by the

Statement of the case.

necessities of military occupation, and was subject to revocation whenever, in the judgment of the military governor, revocation should become necessary or expedient. The adoption of the constitution during the war, under military orders, and the election of Hahn as governor, did not affect the military occupation, in the judgment of the national authorities, for Hahn was appointed military governor by the President. If the situation was not changed, Hahn, as military governor, had the same right as his predecessor to revoke the appointment of judge. If it was changed and the civil constitution of the State was in full operation, independent of military control, the authority derived from the appointment by the military governor designated by the President ceased of necessity. The office became vacant, and Hahn had whatever authority the State constitution conferred to enforce the vacancy by removal, and to fill it by a new appointment. We are unable to approve the reasons assigned for removal, but we cannot doubt the power. The judgment of the Supreme Court of Louisiana is therefore

AFFIRMED.

UNITED STATES v. CRUSELL.

1. A continuance granted on an appeal from the Court of Claims, there having been a motion made there by the appellant, and yet undisposed of, for a new trial on the ground of after-acquired evidence. But the court declares that it must not be understood as giving any sanction to the idea that indefinite postponement of final hearing and determination can be obtained by repeated motions for continuance here.
2. The court below, not this court, must determine whether the application for a new trial is seasonably made.

THIS was an application by *Mr. Bristow, the Solicitor-General, and Mr. Hill, the Assistant Attorney-General, in behalf of the government*, for the continuance of an appeal from the Court of Claims, founded upon the fact that evidence had been newly discovered on which a motion in behalf of the United States had been made for a new trial, under the act

of June 25, 1868. By that act the Court of Claims is authorized "at any time, while any suit or claim is pending before, or on appeal from, said court, or within two years next after the final disposition of any such suit or claim," to grant a new trial on motion of the United States.

The motion was opposed by *Mr. J. Hughes*, for the appellee,

1st. On account of the fact which he stated, that the record and minutes of the Court of Claims showed, to wit, that more than two years had elapsed after judgment in the Court of Claims was given before a new trial was asked for.

2d. Because if a party, by the mere filing of a motion for a new trial in the court below, after appeal taken here, could get a continuance, an appellee might be delayed in this court indefinitely. The case would be different, he admitted, if a new trial had been actually granted; for then indeed a dismissal of the appeal might be asked.

The CHIEF JUSTICE delivered the opinion of the court.

In the case of the *United States* v. *Ayres** this court denied a motion to dismiss an appeal from a judgment of the Court of Claims when the motion was made upon the sole ground that a motion for a new trial had been made by the United States, and was pending in that court, but afterwards dismissed the same appeal when a new trial had been granted. We are satisfied with the rulings then announced, and think that the spirit of them requires us to allow the continuance now asked for. We must not be understood, however, as giving any sanction to the idea that indefinite postponement of final hearing and determination can be obtained by repeated motions for continuance here.

The objection that more than two years had elapsed after judgment in the Court of Claims before the motion for new trial was made should be addressed to that court in opposition to the motion. Its decision, whatever it may be, can be reviewed here.

CONTINUANCE GRANTED.

* 6 Wallace, 608.

UNITED STATES v. ALEXANDER.

Under the act of Congress of 23d of February, 1853, granting to widows of Revolutionary soldiers, who were married subsequently to January, A. D. 1800, "a pension in the *same manner* as those who were married before that date," the widows do not take, like these last, from the date of the act which gives *them* a pension (the act, namely, of 29th July, 1848), but take only from the date of the said act of 23d February, 1853. The terms "in the same manner" refer to the mode in which the pension was to be obtained, and to the rules, regulations, and prescriptions provided by law for the payment of the same.

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

On the 29th July, 1848, Congress enacted:

"That the widows of all officers, non-commissioned officers, musicians, soldiers, mariners, or marines, and Indian spies, who shall have served in the Continental line, State troops, volunteers, militia, or in the naval service, in the Revolutionary War with Great Britain, shall be entitled to a pension, during such widowhood, of an equal amount per annum that their husbands would be entitled to, if living, under existing pension laws, to commence on the 4th day of March, 1848, and to be paid in the same manner that other pensions are paid to widows." . . .

The act proceeded, however, further to declare that "no widow *married after the 1st day of January*, 1800, should be entitled to receive a pension under the act."

A subsequent section enacted that the same rules of evidence, regulations, and prescriptions should apply and govern the Commissioner of Pensions and pension agents as then prevailed under existing pension laws which related to widows of Revolutionary officers and soldiers.

On the 23d of February, 1853, Congress passed another act, thus:

"And be it further enacted, that the widows of all officers, non-commissioned officers, musicians, and privates of the Revolutionary army, *who were married subsequently to January*, A. D.

1800, shall be entitled to a pension *in the same manner* as those who were married before that date."

In this state of the statutes, Mrs. Alexander, widow of a soldier in the Revolutionary War, who was married to him subsequently to the year 1800, and who had received a pension from the date of this act of February 3d, 1853, filed a petition in the Court of Claims to recover what her counsel called "the arrears of her pension;" that is to say, to have it declared that her pension took effect from the passage of the act of 1848. The argument of the claimant's counsel was that the act of 1853 was substantially an amendment of the act of 1848, and intended to repeal the provision it contains, that widows married after January 1st, 1800, should not be entitled to its benefits; that hence the two acts must be read together, and all widows be entitled to a pension commencing on the 4th of March, 1848. This was inferred from the assumption that the act of 1848 must be referred to in order to fix the rate, or amount of the pension granted by the act of 1853, as well as its duration, and that if there be an implied reference for those purposes there must be for the purpose of fixing the commencement of the pension.

Of this view was the Court of Claims, and it accordingly gave a decree for the amount claimed as arrears. The United States appealed, *Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, insisting in her behalf*—

1. That the Court of Claims had no jurisdiction of a claim for a pension.

2. That under a proper construction of the act of 1853, persons who under it were entitled to a pension, were entitled to one but from the date of *that* act.

Mr. J. A. Wills, contra, enforced the argument above presented, as made below.

Mr. Justice STRONG delivered the opinion of the court.

Whether or not the Court of Claims has jurisdiction in a case such as the present, is a question which we do not pro-

pose now to determine, for we are of opinion that if that court had jurisdiction, it erred in giving judgment for the plaintiff. Passing, then, to the merits of the case, it is clear that if the act of 1853 stood alone no widow could be entitled to a pension under it, commencing anterior to its passage. All statutes are to be construed as operating prospectively, unless a contrary intent appears beyond doubt. But it is said the act is to be construed with reference to the prior act of 1848. The argument in support of this view is not without weight, but we think it insufficient to overbalance the reasons there are for holding that the act of 1853 is intended to grant pensions only from the time of its enactment. It does not profess to be an amendment of any former act, and there is no necessary reference to the act of 1848, even for the purpose of fixing the rate or duration of the pensions granted by it. Laws prior to the act of 1848 had determined the rate of pensions granted to widows of Revolutionary soldiers as equal to the pay of the husband, and the pension was of course during widowhood, unless restricted by the statute. Nor was reference to any former act necessary to ascertain when the pension was to commence, for it commenced, of course, with the passage of the act, unless a different intention was either expressed or plainly implied. True, the act of 1853 declared that widows married after January, 1800, shall be entitled to a pension *in the same manner* as those who were married before that date, but the manner may well refer to the mode in which the pension must be obtained by the adjudication of the Commissioner of Pensions and to the rules, regulations, and prescriptions provided by law long before 1848 for the government of the commissioner and pension agents, and for the payment of pensions. Certainly such a direction is not inconsistent with our holding that the act of 1853 was not intended to have a retroactive effect, or to confer a right to a pension commencing prior to its passage.

But, without pursuing this line of remark farther, whatever might be our opinions respecting the construction of the statute, were the matter *res nova*, we cannot regard the

question as an open one. Immediately after the passage of the act, it was construed by the Commissioner of Pensions as granting pensions commencing only from and after its passage, and such construction has ever since been given to it by that bureau. That such was its meaning seems also to have been the understanding of the next succeeding Congress after it was enacted. The act of 1848 gave pensions to widows of soldiers and mariners when they had been married before the first day of January, 1800. The act of 1853 gave pensions to widows of soldiers, but not to widows of mariners. This was followed by an act passed February 28th, 1855, giving pensions to widows of mariners and marines who served in the navy during the Revolutionary War, "in the same manner, and to the same extent," as the widows of soldiers of the army, "under the second section of the act of February 3d, 1853." Here not only the *manner*, but the *extent* of the pension was directed, and widows of mariners were put upon the same footing with widows of soldiers married after January, 1800. Had it been understood that soldiers' widows, married after January, 1800, were entitled to pensions commencing March 4th, 1848, it would have been unnecessary to declare that mariners' widows should have pensions "to the same extent" as under the act of 1853. But measuring the extent by the grant made in 1853, and not by that of 1848, tends to show that Congress regarded the extent, or commencement, of the pension under the act of 1853, as different from that of those granted by the act of 1848. And this is made quite certain by the history of the legislation. The act of 1855, when first proposed, contained the following provision: "And the pensions granted by this act, and those under the said section of the act of February 3d, 1853, shall commence on the fourth day of March, 1848." This provision was intended to change the construction which the Commissioner of Pensions had given to the act of 1853,* but it was stricken out, and the statute was enacted as it now stands. The intention

* 30 Congressional Globe, 92.

of Congress was thus clearly manifested to adopt the construction of the act of 1853, which had been given to it by the Pension Bureau, and we are hardly at liberty now to interpret it differently.

In view of this action of Congress, and the long-standing construction of the act given by the department whose duty it was to act under it, we are of opinion that the plaintiff's intestate was not entitled to a pension commencing anterior to February 3d, 1853. The judgment of the Court of Claims was, therefore, erroneous.

JUDGMENT REVERSED, and the record remanded with instructions to

DISMISS THE PLAINTIFF'S SUIT.

HOFFMAN & Co. *v.* BANK OF MILWAUKEE.

A consignor who had been in the habit of drawing bills of exchange on his consignee with bills of lading attached to the drafts drawn (it being part of the agreement between the parties that such bills should always attend the drafts), drew bills on him with forged bills of lading attached to the drafts, and had the drafts with the forged bills of lading so attached discounted in the ordinary course of business by a bank ignorant of the fraud. The consignee, not knowing of the forgery of the bills of lading, paid the drafts. *Held*, that there was no recourse by the consignee against the bank.

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

Chapin & Miles, a forwarding and commission firm in Milwaukee, were engaged in moving produce to Hoffman & Co., of Philadelphia, for sale there. The course of their business was thus: They first shipped the produce, obtaining a bill of lading therefor, to which they attached a draft drawn by them on their consignee for about the value of the grain, and then negotiated the draft with bill of lading attached, to some bank in Milwaukee, and obtained the money.

It was understood that the draft was drawn upon the credit of the property called for by the bill of lading, and would be paid by the consignee upon receipt of the bill of lading; and—with perhaps a single exception where the bills of lading, not being obtained during bank hours, was sent otherwise than with the draft—the drafts were accompanied by such bills. The Philadelphia firm, however, rarely knew what flour belonged to any particular bill of lading; not being obliged by the railroad clerks at Philadelphia, where they were known, to exhibit any bill of lading in order to get the flour, and their custom being, on getting notice from the railroad office that flour had arrived for them, to pay the charges, give receipts, and send their drayman for it, and bring it away. It was the practice of the Milwaukee firm to advise their Philadelphia correspondents by letter of shipments made and drafts drawn, which advisements were acknowledged with a promise "to honor *the drafts*." When flour was "slow" in going forward they corresponded with the Milwaukee house about it, but did not on that account refuse acceptance or payment of any bill.

Having been thus dealing for about sixteen months, Chapin & Miles drew three drafts on Hoffman & Co., in the ordinary way, and attaching to them bills of lading which they had forged, negotiated, in the ordinary course of business, the drafts, with the forged bills of lading attached, to the City Bank of Milwaukee, getting the money for them. The bank knew nothing of the forgery of the bills of lading. The ordinary correspondence between the two houses took place. That in regard to one draft will exhibit its character.

"MILWAUKEE, February 26th, 1869.

"MESSRS. HOFFMAN & CO., PHILADELPHIA.

"DEAR SIRS: We ship to you to-day 200 bbls. 'Prairie Flour,' and draw at s't for $1100, which please honor. Will draw for $5 only when we can, but must crowd $5½ part of the time.

"Yours, truly,

"CHAPIN & MILES."

Statement of the case.

"PHILADELPHIA, March 2d, 1869.

"MESSRS. CHAPIN & MILES.

"GENTLEMEN: Yours 26th ult. here. Your *draft* $1100, *will be paid*, but we think you should try to keep them down to $5 per barrel. We advise sale of 100 Prairie, at $7, and 54, at $7.25.

"Yours, respectfully,

"HOFFMAN & Co."

No flour was forwarded. The Milwaukee bank forwarded the drafts, however, with the forged bills of lading attached, to their correspondent, the Park Bank in New York, for collection. The Park Bank forwarded the same to its correspondent, the Commonwealth Bank of Philadelphia, for the same purpose, and the latter bank presented the draft and bill of lading to the drawees, Hoffman & Co., who, knowing the drafts to be genuine, and not supposing that the bills of lading were otherwise, paid the drafts to the Philadelphia bank, which remitted the money back to the Park Bank to the credit of the Bank of Milwaukee.

No flour coming forward, Hoffman & Co. discovered that the bills of lading were forged, and Miles & Chapin being insolvent, they sued the Bank of Milwaukee to recover the amount paid, as above stated.

The declaration in the case contained the common counts in assumpsit, with a notice attached to the defendant, "that the action was brought to recover $3100, money paid by the plaintiff, under mistake of fact, upon drafts and bills of lading (of which copies were annexed), the mistake being that the plaintiffs paid the money upon the belief that the said bills of lading were genuine instruments; whereas, in fact, they were forged; the amount of money paid being the amount called for by the drafts, which was paid upon the credit and inducement of the bills of lading."

Neither the name of the defendant, the Milwaukee bank, nor of any of its officers or agents, appeared in or upon the bills of lading in question, and had it not been for extrinsic evidence, it could not have been told from those bills that the bank had had anything to do with them. Nor had the bank

had any dealings or correspondence of any kind with the Philadelphia house, relative to the shipments of flour by Chapin & Miles, or relative to the drafts drawn by them.

On this case the court below directed the jury to find for the bank, defendant in the case, and the plaintiffs brought the case here.

Mr. M. H. Carpenter, for the plaintiff in error:

The case is this: The defendants are owners of certain drafts drawn upon the plaintiffs, which the defendants know the plaintiffs will not pay unless accompanied with bills of lading, which will authorize the plaintiffs to receive the flour, upon the faith and security of which the drafts are drawn. And knowing this, the defendant presents said drafts to the plaintiffs, accompanied by forged bills of lading; and the plaintiffs, believing the bills of lading to be genuine, pay the money to the defendant. Had the plaintiffs known the real facts of the case they would not have accepted and paid the drafts, and could not have been compelled to do so, and the loss would have fallen on the defendants. The plaintiffs paid the drafts to the defendant because they did not know the facts; in other words, under a mistake. The money of the plaintiffs has therefore got into the pocket of the defendant without consideration; both the plaintiffs in paying and the defendant in receiving the money being mutually mistaken about the fact which was the inducement for the plaintiffs to pay the money. Money so paid can be recovered.*

We fully concede the rule that the acceptor of a draft is bound to know the signature of the person drawing or indorsing it. But the rule is confined to the signature of mercantile paper; and this payment was made not on the credit of the draft, but on the credit of the bills of lading. It was part of the agreement between the forwarders and the consignees, that bills of lading should always accompany

* Hudson *v.* Robinson, 4 Maule & Selwyn, 478; Ellis & Morton *v.* Ohio Life and Trust Company, 4 Ohio State, 628.

the drafts; genuine bills, of course, not forged ones. The Milwaukee bank being an indorser of the draft which carried the bill of lading with it, should be held to have guaranteed the genuineness of the bill.

In *Bank of Commerce* v. *Union Bank*,* it was held that the acceptor of a draft which was forged, *not as to the signature of the drawer*, but by an alteration in *the body of the draft*, might recover back the money, as money paid under a mistake. The court distinguishing the case from that of the forgery of the drawer's signature, which the acceptor is presumed to know, say: "The greater negligence in a case of this kind is chargeable on the party who received the bill from the perpetrator of the forgery. So far as respects the genuineness of the bill each indorser receives it on the credit of the previous indorsers," &c.

This language is particularly applicable to the facts of this case; for these forged bills of lading purported to be executed in Milwaukee, where the defendant had its banking office, and where its officers could have informed themselves as to the genuineness of the instruments by a few minutes' walk. The plaintiffs resided and did business in Philadelphia, and received the instruments on the faith of approbation by the defendant.

Mr. J. W. Cary, contra:

We concede that money paid by mistake may, in many cases, be recovered back, but it is settled that money paid by the drawee of a forged bill of exchange to an innocent holder for value, cannot be so recovered, because the drawee is presumed to know his drawer's signature. This exception is "fully conceded" by the other side. Their argument is obliged, therefore, to proceed on an assumption of facts not true; to assume that this payment was not a payment of drafts, but a payment on flour shipped. This is a radical defect of the argument, and pervades it throughout. The assumption is in the face of the facts. These show that Hoffman & Co. paid drafts, relying on their general business

* 3 Comstock, 230; and see Goddard *v.* Bank, 4 Id. 147.

arrangement with Chapin & Miles rather than on a receipt of the very flour mentioned in any specific bill of lading. In this particular case it is specifically "the draft" which they promise to pay.

The bill of lading is not in any way indorsed by the Milwaukee bank. No representation of any sort was made by that bank about anything to Hoffman & Co. The transaction was wholly between Miles & Chapin and Hoffman & Co., and in pursuance of their general agreement. The bills, which were *not* forgeries,—though the case would not be changed if they had been—were discounted in ordinary course, forwarded for collection, and paid on demand. That concludes the thing. That the "collateral" was worthless don't change the case. The bank's title to the drafts being unquestioned, no defence was available to the acceptor after payment of them.

These positions do not rest on argument merely. The case of *Craig* v. *Sibbett & Jones*,* where the judgment of the Supreme Court of Pennsylvania is given, in a luminous opinion by Gibson, C. J., is in point. So too the English case of *Robinson* v. *Reynolds*† covers this. After such precedents there would be an end of the question if the case were not plainly within old rules, which it is.

Mr. Justice CLIFFORD delivered the opinion of the court.

Acceptors of a bill of exchange, by the act of acceptance, admit the genuineness of the signatures of the drawers, and the competency of the drawers to assume that responsibility. Such an act imports an engagement, on the part of the acceptor, to the payee or other lawful holder of the bill, to pay the same, if duly presented, when it becomes due, according to the tenor of the acceptance. He engages to pay the holder, whether payee or indorsee, the full amount of the bill at maturity, and if he does not, the holder has a right of action against him, and he may also have one against the drawer. Drawers of bills of exchange, however, are not

* 15 Pennsylvania, 238. † 2 Adolphus & Ellis, N. S. 196.

Restatement of the case in the opinion.

liable to the holder, under such circumstances, until it appears that the bill was duly presented, and that the acceptor refused or neglected to pay the same according to the tenor of the instrument, as their liability is contingent and subject to those conditions precedent.

Three bills of exchange, as exhibited in the record, were drawn by Chapin, Miles & Co., payable to the order of the defendants, and the record shows that they, the defendants, received and discounted the three bills at the request of the drawers. Attached to each bill of exchange was a bill of lading for two hundred barrels of flour, shipped, as therein represented, by the drawers of the bills of exchange, and consigned to the plaintiffs; and the record also shows that the drawers, in each case, sent a letter of advice to the consignees apprising them of the shipment, and that they would draw on them as such consignees for the respective amounts specified in the several bills of exchange. Prompt reply in each case was communicated by the plaintiffs, acknowledging the receipt of the letter of advice sent by the shippers, and promising to honor the bills of exchange, as therein requested. Evidence was also introduced by the plaintiffs showing that the defendants indorsed the bills of exchange and forwarded the same, with the bills of lading attached, to the National Park Bank of the city of New York, their regular correspondent; that the same were subsequently indorsed by the latter bank, and forwarded to the Commonwealth Bank of Philadelphia for collection; that the Commonwealth Bank presented the bills of exchange, with the bills of lading attached, to the plaintiffs, as the acceptors, and that they paid the respective amounts as they had previously promised to do, and that the Commonwealth Bank remitted the proceeds in each case to the National Park Bank, where the respective amounts were credited to the defendants. Proof was also introduced by the plaintiffs showing that each of the bills of lading was a forgery, and that the plaintiffs, before the commencement of the suit, tendered the same and the bills of exchange to the defend-

ants, and that they demanded of the defendants, at the same time, the respective amounts so paid by them to the Commonwealth Bank. Payment as demanded being refused, the plaintiffs brought an action of assumpsit against the defendants for money had and received, claiming to recover back the several amounts so paid as money paid by mistake, but the verdict and judgment were for the defendants, and the plaintiffs sued out a writ of error, and removed the cause into this court. Testimony was also introduced by the defendants tending to show that the shippers were millers; that they made an arrangement with the plaintiffs to ship flour to them at Philadelphia for sale in that market, the plaintiffs agreeing that they, the shippers, might draw on them for advances on the flour, to be reimbursed out of the proceeds of the sales; that for more than a year they had been in the habit of shipping flour to the plaintiffs under that arrangement and of negotiating drafts on the plaintiffs to the banks in that city, accompanied by bills of lading in form like those given in evidence in this case; that the drafts, with the bills of lading attached, were sent forward by the banks, where the same were discounted, and that the same were paid by the plaintiffs; that the drawers of the drafts in every case notified the plaintiffs of the same, and that the plaintiffs, as in this case, answered the letter of advice and promised to pay the amount. They also proved that the drawers of the drafts in this case informed their cashier that the same would always be drawn upon property, and that the bills of lading would accompany the drafts, and that they had no knowledge or intimation that the bills of lading were not genuine. Instructions were requested by the plaintiffs, that if the jury found that the respective bills of lading were not genuine, that they were entitled to recover the several amounts paid to the Commonwealth Bank, with interest; but the court refused to give the instruction as prayed, and instructed the jury that if they found the facts as shown by the defendants, the plaintiffs could not recover in the case, even though they should find that the several bills of lading were a forgery.

Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration, but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee, in discharge of his legal obligation as such, is not a payment by mistake nor without consideration, unless it be shown that the instrument was fraudulent in its inception, or that the consideration was illegal, or that the facts and circumstances which impeach the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument.*

Such an instrument, as between the payee and the acceptor, imports a sufficient consideration, and in a suit by the former against the latter the defence of prior equities, as between the acceptor and the drawer, is not open unless it be shown that the payee, at the time he became the holder of the instrument, had knowledge of those facts and circumstances.

Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce the plaintiffs to contract any such liability. They received the bills of exchange in the usual course of their business as a bank of discount and paid the full amount of the net proceeds of the same to the drawers, and it is not

* Fitch *v.* Jones, 5 Ellis & Blackburn, 238; Arbouin *v.* Anderson, 1 Adolphus & Ellis, N. S. 498; Smith *v.* Braine, 16 Id., N. S. 244; Hall *v.* Featherstone, 3 Hurlstone & Norman, 287.

even suggested that any act of the defendants, except the indorsement of the bills of exchange in the usual course of their business, operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the true character of the transaction. On the contrary, it distinctly appears that the drawers of the bills of exchange were the regular correspondents of the plaintiffs, and that they became the acceptors of the bills of exchange at the request of the drawers of the same and upon their representations that the flour mentioned in the bills of lading had been shipped to their firm for sale under the arrangement before described.

Beyond doubt the bills of lading gave some credit to the bills of exchange beyond what was created by the pecuniary standing of the parties to the same, but it is clear that they are not a part of those instruments nor are they referred to either in the body of the bills or in the acceptance, and they cannot be regarded in any more favorable light for the plaintiffs than as collateral security accompanying the bills of exchange.

Sent forward, as the bills of lading were, with the bills of exchange, it is beyond question that the property in the same passed to the acceptors when they paid the several amounts therein specified, as the lien, if any, in favor of the defendants was then displaced and the plaintiffs became entitled to the instruments as the muniments of title to the flour shipped to them for sale and as security for the money which they had advanced under the arrangement between them and the drawers of the bills of exchange. Proof, therefore, that the bills of lading were forgeries could not operate to discharge the liability of the plaintiffs, as acceptors, to pay the amounts to the payees or their indorsees, as the payees were innocent holders, having paid value for the same in the usual course of business.*

Different rules apply between the immediate parties to a bill of exchange—as between the drawer and the acceptor, or between the payee and the drawer—as the only consider-

* Leather *v.* Simpson, Law Reports, 11 Equity, 398.

ation as between those parties is that which moves from the plaintiff to the defendant; and the rule is, if that consideration fails, proof of that fact is a good defence to the action. But the rule is otherwise between the remote parties to the bill, as, for example, between the payee and the acceptor, or between the indorsee and the acceptor, as two distinct considerations come in question in every such case where the payee or indorsee became the holder of the bill before it was overdue and without any knowledge of the facts and circumstances which impeach the title as between the immediate parties to the instrument. Those two considerations are as follows: First, that which the defendant received for his liability, and, secondly, that which the plaintiff gave for his title, and the rule is well settled that the action between the remote parties to the bill will not be defeated unless there be an absence or failure of both these considerations.*

Unless both considerations fail in a suit by the payee against the acceptor, it is clear that the action may be maintained, and many decided cases affirm the rule, where the suit is in the name of a remote indorsee against the acceptor, that if any intermediate holder between the defendant and the plaintiff gave value for the bill, such an intervening consideration will sustain the title of the plaintiff.†

Where it was arranged between a drawer and his correspondent that the latter would accept his bills in consideration of produce to be shipped or transported to the acceptor for sale, the Supreme Court of Pennsylvania held,‡ that the acceptor was bound to the payee by his general acceptance of a bill, although it turned out that the bill of lading forwarded at the same time with the bill of exchange was fraudulent, it not being shown that the payee of the bill

* Robinson *v.* Reynolds, 2 Q. B. 202; Same *v.* Same, in error, Ib. 210; Byles on Bills (5th Am. Ed.), 124; Thiedemann *v.* Goldschmidt, 1 De Gex, Fisher & Jones, Ch. App. 10.

† Hunter *v.* Wilson, 4 Exchequer, 489; Boyd *v.* McCann, 10 Maryland, 118; Howell *v.* Crane, 12 Louisiana Annual, 126; Watson *v.* Flanagan, 14 Texas, 354.

‡ Craig *v.* Sibbett et al., 15 Pennsylvania, 240.

was privy to the fraud. Evidence was introduced in that case showing that the payee knew what the terms of the arrangement between the drawer and the payee were, but the court held that mere knowledge of that fact was not sufficient to constitute a defence, as the payee was not a party to the arrangement and was not in any respect a surety for the good faith and fair dealing of the shipper.

Failure of consideration, as between the drawer and acceptor of a bill of exchange, is no defence to an action brought by the payee against the acceptor, if the acceptance was unconditional in its terms, and it appears that the plaintiff paid value for the bill, even though the acceptor was defrauded by the drawer, unless it be shown that the payee had knowledge of the fraudulent acts of the drawer before he paid such value and became the holder of the instrument.*

Testimony to show that the payees were not *bonâ fide* holders of the bills would be admissible in a suit by them against the acceptors, and would constitute, if believed, a good defence, but the evidence in this case does not show that they did anything that is not entirely sanctioned by commercial usage. They discounted these bills and they had a right to present them for acceptance, and having obtained the acceptance they have an undoubted right to apply the proceeds collected from the acceptors to their own indemnity.†

Forgery of the bills of lading would be a good defence to an action on the bills if the defendants in this case had been the drawers, but they were payees and holders for value in the regular course of business, and the case last referred to, which was decided in the Exchequer Chamber, shows that such an acceptance binds the acceptor conclusively as between them and every *bonâ fide* holder for value.

Very many cases decide that the drawee of a bill of exchange is bound to know the handwriting of his corres-

* United States *v.* Bank of Metropolis, 15 Peters, 393.

† Thiedemann *v.* Goldschmidt et al., 1 De Gex, Fisher & Jones, Ch. App. 10; Robinson *v.* Reynolds, 2 Q. B. 211.

pondent, the drawer, and that if he accepts or pays a bill in the hands of a *bonâ fide* holder for value, he is concluded by the act, although the bill turns out to be a forgery. If he has accepted he must pay, and if he has paid he cannot recover the money back, as the money, in such a case, is paid in pursuance of a legal obligation as understood in the commercial law.*

Difficulty sometimes arises in determining whether the plaintiff, in an action on a bill of exchange, is the immediate promisee of the defendant, or whether he is to be regarded as a remote party, but it is settled law that the payee, where he discounts the bill at the request of the drawer, is regarded as a stranger to the acceptor in respect to the consideration for the acceptance; consequently, if the acceptance is absolute in its terms and the bill is received in good faith and for value, it is no answer to an action by him that the defendant received no consideration for his acceptance or that the consideration therefor has failed; and it is immaterial in that behalf whether the bill was accepted while in the hands of the drawer and at his request, or whether it had passed into the hands of the payee before acceptance and was accepted at his request.†

Certain other defences, such as that the payments were voluntarily made, and that the title to the bills at the time the payments were made was in the National Park Bank, were also set up by the defendants, but the court does not find it necessary to examine those matters, as they are of the opinion that the payments, if made to the payees of the bills, as contended by the plaintiffs, were made in pursuance of a legal obligation and that the money cannot be recovered back.

JUDGMENT AFFIRMED.

* Goddard *v.* Merchants' Bank, 4 Comstock, 149; Bank of Commerce *v.* Union Bank, 3 Id. 234; Bank of the United States *v.* Bank of Georgia, 10 Wheaton, 348; Price *v.* Neal, 3 Burrow, 1355.

† Parsons on Bills, 179; Munroe *v.* Bordier, 8 C. B. 862.

INSURANCE COMPANY *v.* TRANSPORTATION COMPANY.

1. When two causes of loss concur, one at the risk of the assured and the other insured against, or one insured against by A. and the other by B, if the damage caused by each peril can be discriminated, it must be borne proportionably.
2. But if the damage caused by each peril cannot be distinguished from that caused by the other, the party responsible for the predominating, efficient cause, or that which set in operation the other incidentally to it, is liable for the loss.
3. An insurance upon a steamer against fire, "except fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power," is an insurance against fire caused by collisions.
4. Underwriters against fire are responsible for a loss occasioned by the sinking of a vessel insured when caused by fire (though the fire itself be the result of a collision not insured against), if the effect of the collision without the fire would have been only to cause the vessel to settle to her upper deck, and that be a case in which she might have been saved.

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

The Howard Fire Insurance Company insured the steamer Norwich, owned by the Norwich and New York Transportation Company, for $5000 against fire. The policy covered the steamer, her hull, boilers, machinery, tackle, furniture, apparel, &c., whether stationary or movable, whether the boat should be running or not running, and insured against all such loss or damage, not exceeding the sum insured, as should happen to the property by fire, other than fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power.

While on one of her regular trips from Norwich to New York, on Long Island Sound, the steamer collided with a schooner, the latter striking her on her port side, and cutting into her hull below the water-line, in consequence of which she immediately and rapidly began to fill with water. Within ten or fifteen minutes after the collision, the water reached the floor of the furnace, and the steam thereby generated blew out the fire, which communicated with the wood-work

of the boat. Her upper works and her combustible freight were soon enveloped in flames, and they continued to burn half or three-quarters of an hour, when she gradually sunk in twenty fathoms of water, reeling over. The steamer was so constructed that her main deck was completely housed in from stem to stern, up to her promenade, or hurricane deck above. Her freight was stowed on the main deck, and her cabin and staterooms were on the hurricane deck. From the effects of the collision alone she would not have sunk below her promenade deck, but would have remained there suspended in the water, and would have been towed to a place of safety, when she, her engines, tackle, and furniture, could have been repaired and restored to their condition prior to the collision for the sum of $15,000, the expense of towage included. The sinking of the steamer below her promenade deck was the result of the action of the fire in burning off her light upper works and housing, thus liberating her freight, allowing much of it to drift away, whereby her floating capacity was greatly reduced, so that she sunk to the bottom, and all the damage which she suffered beyond the $15,000 above named as chargeable to the collision, (amounting to $7300), including the cost of raising the boat, was the natural and necessary result of the fire, and of the fire *only*.

The Transportation Company having set up a claim for indemnity against the Insurance Company, for a loss by fire within the policy, and the company declining to pay, suit was brought in the court below against it; and on the facts as already stated, and specially found as facts by the Circuit Court, judgment was given for the plaintiff. The Insurance Company brought the case here to reverse the judgment.

Messrs. J. C. Carter and G. Pratt, for the plaintiff in error, citing Mills on Causation, Brown's Inquiry into the Relation of Cause and Effect, Sir William Hamilton's Lectures, as well as numerous adjudged cases, in England and the United States, went into an ingenious and interesting though, as it struck the reporter, possibly somewhat metaphysical argu-

ment, on the subject of what was to be regarded as "the cause of any event;" how far the antecedents of a given event are connected together as the successive links in one chain; and how far there are several concurrent trains leading to the effect; concluding that in no case will the inquiry whether a given event would have happened but for another which preceded it, disclose the cause of the given event, or what is called its proximate cause, or its principal cause, or anything save this alone, that such preceding event was, or was not, a necessary contributing cause. The true meaning of the *causa causans*, the predominating cause, the series of successive causes, and of Lord Bacon's apothegm, *causa proxima non remota spectatur*, were considered at length; and the effort made to show that here—the sinking of the steamer, being the result of two concurrent causes, of which the collision was the predominating, and therefore the proximate cause—by a right application of the just rule of law, as established by the two well-known rules of Mr. Phillips, an authoritative text-writer on Insurance, the loss was attributable to the collision, and to that alone; a matter in which the Transportation Company was its own insurers; the policy having been but against fire.

Messrs. J. A. Hovey and I. Halsey, contra.

Mr. Justice STRONG delivered the opinion of the court.

Mr. Phillips, in his Treatise on the Law of Insurance, lays down two rules respecting the concurrence of different causes of loss, which the plaintiffs in error contend should be applied to this case, and which, if applied, they insist must lead to a reversal of the judgment in the court below.* The first of these is:

"In case of the concurrence of two causes of loss, one at the risk of the assured, and the other insured against, or one insured against by A., and the other by B., if the damage by the perils respectively can be discriminated, each party must bear his proportion."

* Phillips on Insurance, vol. i, §§ 1186, 1187.

The second is:

"Where different parties, whether the assured and the underwriter, or different underwriters, are responsible for different causes of loss, and the damage by each cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned, as being merely incidental to it, is liable to bear the loss."

These propositions may be accepted as correct statements of the law, and the question before us is, whether the Circuit Court, in giving judgment for the assured, failed to apply them rightly to the facts of the case.

The insurance in this case was against all such loss or damage, not exceeding the sum insured, as should happen to the property by fire, other than fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power. Thus loss from fire happening in consequence of every other cause than those excepted was covered by the policy. The insurers took the risk of fires caused by lightning, explosions, and collisions. Such was the contract.

It is urged on behalf of the plaintiffs in error the findings in the case establish that the sinking of the steamer, wherein consisted principally the loss, or that part of it in excess of $15,000 chargeable to the collision, was the result of two concurrent causes, one the fire, and the other the water in the steamer's hold, let in by the breach made by the collision. As the influx of the water was the direct and necessary consequence of the collision, it is argued that the collision was the predominating, and, therefore, the proximate cause of the loss. The argument overlooks the fact, distinctly found, that the damage resulting from the sinking of the vessel was the natural and necessary result of the fire only. If it be said that this was but an inference from facts previously found, it was not for that reason necessarily a mere legal conclusion. But we need not rely upon this. Apart from that finding, the other findings, unquestionably of facts, show that neither the collision, nor the presence of water in

the steamer's hold was the predominating efficient cause of her going to the bottom. That result required the agency of the fire. It is found that the water would not have caused the vessel to sink below her promenade deck, had not some other cause of sinking supervened. It would have expended its force at that point. The effects of the fire were necessary to give it additional efficiency. The fire was, therefore, the efficient predominating cause, as well as nearest in time to the catastrophe, which not only directly contributed to all the damage done, after the steamer had sunk to her promenade deck, but enlarged the destructive power of the water, and rendered certain the submergence of the vessel. This plainly appears, if we suppose that the fire had occurred on the day after the collision, and had originated from some other cause than the collision itself. The effects of the prior disaster would then have been complete. The steamer would have been full of water, sunk to her promenade deck, and, remaining thus suspended, would have been towed to a place of safety and saved, in that condition, to her owners, except for the new injury. But the fire occurring on the next day, destroying the upper works and the housing, thus liberating the light freight and greatly reducing the floating capacity of the steamer, would have caused her to sink to the bottom as she did. In the case supposed the water would have been as truly a concurrent and efficient cause of the steamer's sinking, as it was in the case now in hand. It would have operated in precisely the same manner, remaining dormant until given new activity. But could there have been any hesitation in that case, in determining which was the proximate, the efficient, predominating cause of the sinking of the vessel? And can it be doubted that the underwriters against loss by fire would be held responsible for such a loss? Wherein does the case supposed differ in principle from the present, when the facts found are considered? True, the fire in this case was caused by the collision, but the policy insured against fire caused by collision. True, the fire immediately followed the filling of the steamer with water, or commenced while she was filling, but the effects of the

fire are conclusively distinguished from the breach in the steamer's hull, and the filling of her hold with water. The damages caused by the several agencies have been discriminated, and its proper share assigned to each. It is an established fact that the damaging effect of the water, independent of the fire, would not have reached beyond sinking of the steamer to its upper deck, when she would have been saved from further injury.

There is, undoubtedly, difficulty, in many cases, attending the application of the maxim, "*proxima causa, non remota spectatur*," but none when the causes succeed each other in order of time. In such cases the rule is plain. When one of several successive causes is sufficient to produce the effect (for example, to cause a loss), the law will never regard an antecedent cause of that cause, or the "*causa causans.*"* In such a case there is no doubt which cause is the proximate one within the meaning of the maxim. But, when there is no order of succession in time, when there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished. Such is, in effect, Mr. Phillips's rule. And certainly that cause which set the other in motion and gave to it its efficiency for harm at the time of the disaster must rank as predominant. In the present case, however, the rule hardly seems applicable, because the damage resulting from the fire and that caused by the filling of the steamer are clearly distinguished.

It is true, as argued, that as the insurance in this case was only against fire, the assured must be regarded as having taken the risk of collision, and it is also true that the collision caused the fire, but it is well settled that when an efficient cause nearest the loss is a peril expressly insured against, the insurer is not to be relieved from responsibility by his showing that the property was brought within that peril by a cause not mentioned in the contract.† The case quoted—

* General Mutual Insurance Company *v.* Sherwood, 14 Howard, 366.

† St. John *v.* The American Mutual Insurance Company, 1 Kernan, 519.

St. John v. *The American Mutual Insurance Company*—is instructive, and is, in one particular at least, responsive to the argument of the plaintiffs in error. It exhibits the difference, in effect, between an express exception from a risk undertaken, and silence in regard to a peril not insured against. The policy, as here, was against fire, but it contained a provision that the company would not be liable "for any loss occasioned by the explosion of a steam boiler." While it was in force there was an explosion of a steam boiler which caused the destruction of the property insured by fire. It was held the insurers were not liable. The proviso, or exception, was construed as extending to *fire* caused by such explosions, for, as the parties were contracting about the peril of fire alone, an *express* exception of all loss from explosions must have been meant to cover fire when a consequence of explosions, otherwise the exception would have been unmeaning. But the court said, if nothing had been said in the policy respecting a steam boiler, the loss, having been occasioned by fire, as its proximate cause, would have rested on the insurers, though it had been shown, as it might have been, that the fire was kindled by means of the explosion. The judgment thus turned on the effect of an express exception. Had there been none, the court would not have inquired how the fire happened, whether by an explosion or not. In the case before us there is no exception of collisions, or fires caused by collisions. It must therefore be understood that the insurers took the risk of all fires not expressly excepted.

It has been argued that because the policy was against fire only, the assured are to be considered their own insurers against perils of the sea, including collisions, and as insurers against marine risks are liable for collisions, with all their consequences, including fires, the assured in this case must be held to have undertaken that risk. This would be so if they had taken out no policy against fire. But that works a material difference. Suppose these underwriters had insured the steamer against collisions and fire, and had then reinsured in another company against fire alone, as they

might have done, would it have been a sufficient answer to a suit brought by them against their insurers, that the fire which caused the steamer to sink was itself caused by a collision? No one will affirm that. Yet upon the theory of the plaintiffs in error, this is substantially what is now attempted Before any policy was issued, the Transportation Company were their own insurers against collisions and fire, no matter how caused. They sought protection against some of the possible consequences of these risks, and they obtained a policy insuring them against all loss by fire, except fire caused by certain things, of which collision was not one. Against every other consequence of a collision than a fire, they remained their own insurers, but the risk of fire was no longer theirs.

We have already sufficiently said that the amount of the loss caused by the collision, apart from the fire, was distinctly ascertained, and the insurers were not charged with it. So was the amount of loss caused by the fire itself ascertained. If therefore it was a case of the concurrence of two causes of loss, one at the risk of the assured, and the other of the insurers, the damage resulting from each has been discriminated, and the insurers have been held liable only for that caused by the peril against which they contracted.*

Judgment has therefore been given in conformity with the rules as above stated, in Phillips on Insurance. It is

AFFIRMED.

NOTE.

At the same time with the preceding case was adjudged another, in error, from the same circuit, to wit, that of

WESTERN MASSACHUSETTS INSURANCE COMPANY *v.* SAME DEFENDANTS,

In which the controlling question was the same as in the case just reported—a question which the court said that they did not propose to reconsider. This second case had been adjudged be-

* Vide Heebner *v.* Eagle Insurance Company, 10 Gray, 143.

low, before the other one, and not on a finding of facts by the court, but on a verdict by a jury; the issues of fact being submitted to it under instructions from the court.

In this second case the policy provided that the loss or damage should be estimated according to the true and actual cash value of the said property "at the time the fire should happen;" and evidence of the value of the steamer before the collision took place having been offered by the owners of the steamer, the insurance company objected to it, and on their objection it was excluded.

Evidence was allowed to be given against the defendants' objection, to show how much it cost to raise the steamer, and $22,500 were allowed; the value of the wreck when recovered

The plaintiff based his estimate of damages upon the cost of repairing and restoring the vessel to her former condition, exclusive of the amount properly chargeable to the collision.

The judge charged, that the main question for the jury to determine was whether the loss sustained by the plaintiffs was the natural, necessary, and inevitable consequence of the fire. Then, after referring to the facts as proved, he added:

"The question is, would the steamer have gone to the bottom but for the fire? This is a vital question, and must be decided by the jury before the plaintiff can recover. You will say, in view of the evidence, whether she would have gone to the bottom or only settled down to her promenade deck and remained suspended in the water but for the effect produced by the fire. If she would not have sunk but only settled in the water to the promenade deck, except for the effect of the fire in reducing her floating capacity, then the plaintiffs are entitled to recover."

As to the damages, after stating the plaintiffs' base of estimate, he said:

"You will determine upon the evidence whether in your judgment the repairs that were put upon her enhanced her value beyond her cash value before the commencement of the fire. If they did, you will deduct from the damage you find proved a sum equal to such increase of value."

The jury found for the plaintiffs, and judgment went accordingly.

The case was argued by the same counsel as the preceding one; the objection by the counsel of the insurance company, plaintiffs in error, being to the charge on the main question, to the instruction as to damages and on the admission of the evidence to show how much it cost to raise the steamer, which the learned

counsel contended that the defendants could not in any event be liable for, the rule of damages being fixed in the policy.

Mr. Justice STRONG delivered the opinion of the court.

As the issues of fact in this case were submitted to a jury, it is to be considered whether they were submitted with proper instructions.

It is complained that the Circuit Court instructed the jury that the way to determine the question whether the insurers were liable was to consider and determine whether the steamer would have sunk except for the effect of the fire. This is hardly a fair statement of the manner in which the case was submitted. The charge must be taken, not in detached portions, but according to its general tenor and effect. That what the judge did charge, was, in our opinion, proper instruction, is sufficiently shown by what we have said in the case just decided. We have also shown that the policy contained no implied exception against the consequences of any marine peril.

The only other thing which need be noticed is the allegation of the plaintiffs in error that the jury were instructed to ascertain the amount of the damage, not by reference to the actual cash value of the subject, but by the cost of restoration. If this complaint were founded in fact, it would call for a reversal of the judgment, for the policy stipulated that loss or damage should be estimated according to the true and actual cash value of the property at the time the same should happen. But when the insured offered evidence to prove what was the actual cash value of the steamer before the collision, from which the damage caused by the collision might have been deducted, and thus the cash value of the property at the time when the fire attacked it might have been ascertained, the plaintiffs in error objected and the evidence was excluded. There remained, then, no way of establishing the cash value except by ascertaining the cost of restoration to the condition in which the steamer was before the fire. This was allowed, but the jury were instructed that if the cost of repairs exceeded the damage done by the fire they should deduct the excess. It is plain, therefore, that under such instructions the loss of the assured must have been measured by the standard provided in the policy.

It is sufficient to say of the admission of evidence to prove how much it cost to raise the steamer, that if it was erroneous

it did no harm. The value of the boat when raised was proved to have been exactly equal to the cost of raising her, and the insurers had the benefit of it.

Nothing need be said of the other exceptions. They were not pressed in the oral argument, or in the printed briefs, and they exhibit no error.

JUDGMENT IS AFFIRMED

STATE TONNAGE TAX CASES.

COX *v.* THE COLLECTOR.

TRADE COMPANY *v.* SAME.

1. Although taxes levied, as on *property*, by a State upon vessels owned by its citizens, and based on a valuation of the same, are not prohibited by the Federal Constitution, yet taxes cannot be imposed on them by the State "at so much per ton of the registered tonnage." Such taxes are within the prohibition of the Constitution, that "no State shall, without the consent of Congress, lay any duty of tonnage."
2. Nor is the case varied by the fact that the vessels were not only owned by citizens of the State, but exclusively engaged in trade between places within the State.

ERROR to the Supreme Court of Alabama.

These were two cases, which, though coming in different forms, involved one and the same point only; and at the bar—where the counsel directed attention to the principle involved, separated from the accidents of the case—were discussed together as presenting "precisely the same question." The matter was thus:

The Constitution ordains that "no State shall without the consent of Congress *lay any duty of tonnage.*" With this provision in force as superior law, the State of Alabama passed on the 22d of February, 1866, a revenue law. By this law, the rate of taxation for property generally was the one-half of one per cent; but "on *all* steamboats, vessels, and other water crafts plying in the navigable waters of the State," the act levied a tax *at "the rate of* $1 *per ton of the registered tonnage thereof,"* which it declared should "be assessed and col-

lected at the port where such vessels are registered, if practicable; otherwise at any other port or landing within the State where such vessel may be."

The tax collector was directed by the act to demand, in each year, of the person in charge of the vessel, if the taxes had been paid. If a receipt for the same was not produced, he was to immediately assess the same according to tonnage, and if such tax was not paid on demand he was to seize the boat, &c., and, after notice, proceed and sell the same for payment of the tax, &c., and pay the surplus into the county treasury for the use of the owner. If the vessel could not be seized, the collector was to make the amount of the tax out of the real and personal estate of the owner, &c.

Under this act, one Lott, tax collector of the State of Alabama, demanded of Cox, the owner of the Dorrance, a steamer of 321 tons, and valued at $5000, and of several other steamers, certain sums as taxes; and under an act of 1867, identical in language with the one of 1866, just quoted, demanded from the Trade Company of Mobile certain sums on like vessels owned by them; the tax in all the cases being proportioned to the registered tonnage of the vessel.

The steamboats, the subject of the tax, were owned *exclusively by citizens of the State of Alabama*, and were engaged in the navigation of the Alabama, Bigbee, and Mobile Rivers, carrying freight and passengers between Mobile and other points of said rivers, *altogether within the limits of that State.* These waters were navigable from the sea for vessels of "ten and more tons burden;" and it was not denied that there were ports of delivery on them above the highest points to which these boats plied. The owners of the boats were not assessed for any other tax on them than the one here claimed. The boats were enrolled and licensed for the coasting trade. Though running, therefore, between points altogether within the limits of the State of Alabama, the boats were, as it seemed,* of that sort on which Congress lays a tonnage duty.

* See Act of July 18th, 1866, § 28, 14 Stat. at Large, 185.

Cox, under compulsion and protest, paid the tax demanded of him, and then brought *assumpsit* in one of the inferior State courts of Alabama, to get back the money. The Trade Company refused to pay, and filed a bill in a like court, to enjoin the collector from proceeding to collect. The ground of resistance to the tax in each case was this, that being laid in proportion to the tonnage of the vessel, the tax was laid in a form and manner which the State was prohibited by the already quoted section of the Constitution from adopting. The right of the State to lay a tax on vessels according to their value and as property was not denied, but on the contrary conceded.* Judgment being given in each case against the validity of the tax, the matter was taken to the Supreme Court of Alabama, which decided that it was lawful. To review that judgment the case was now here.

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

The right of the State to tax the property of the citizen is admitted by us; but we assert that the tax should be upon property *as property*, and not *because* it is in the shape of vessels or boats having a greater or less capacity.

"Tonnage duties," as defined by the learned Bouvier,† are "duties on vessels in proportion to their capacity." Now Congress has imposed such duties from the 20th July, 1790‡ till the present time.§ The duties are imposed upon vessels plying on the navigable waters of the United States for the purpose of traffic, according to the tonnage measurement of the vessel. The manner in which the vessel shall be admeasured is prescribed, and the time and place at which the

* It is barely necessary to note that an additional ground of defence to the tax was taken, in the fact that by the act of Congress admitting Alabama into the Union, it is declared, "that all navigable waters within the said State shall forever remain public highways, free to the citizens of said State, and of the United States, *without any tax, duty, impost, or toll therefor*, imposed by the said State." This ground not being passed upon by this court, need not be adverted to further.

† Law Dictionary, tit. "Tonnage."

‡ 1 Stat. at Large, 135

§ 12 Ib. 558; 14 Ib 185.

Argument in support of the tax.

duties shall be collected are determined by law. The same officer collects these duties who collects other duties.* The tax is collected yearly at the port where the vessel enters or clears for the first time.†

The argument of Mr. Langdon‡ in the Convention of 1787, "that the regulation of tonnage was an essential part of the regulation of trade, and that the States ought to have nothing to do with it," has been practically applied in this legislation of Congress. But the Alabama statute is similar in what it does to the enactments of the General Government. The duty is assessed in the same manner, is a yearly tax, and is made for the same cause. We insist, therefore, that it is void.§

The injustice of the tax in this instance, it may be added, is striking The value of one of these boats, the Dorrance, is $5000; her tonnage, 321 tons. At the rate of taxation established by the Alabama revenue acts for property (the half of one per cent.), the tax on this vessel would be $25; but assessed on tonnage, it is $643.25; more than twelve per cent. on the value of the property.

Mr. P. Phillips, contra:

The vessels being owned by citizens of the State, and employed exclusively in commerce within the State, are like all other property within its jurisdiction, subject to taxation.‖ This being admitted, of what consequence can it be to the citizens of any other State, what *form* the State may adopt in which to impose the tax? Why should the consent of Congress be asked, to the imposition of a tonnage tax in a case, when it is admitted that the State has full power to tax. It is evident that this provision is of the category of prohibitions, in which we find that "no preference shall be given in any regulation of commerce to the ports of one State over

* 1 Stat. at Large, 287, ch. 35, § 44; 13 Id. 69.

† 14 Id. 185, ch. 201, § 28. ‡ 3 Madison Papers, 1586

§ Sinnot *v.* Davenport, 22 Howard, 227; Foster *v.* Davenport, Ib. 245.

‖ Passenger Cases, 7 Howard, 402; Naths[illegible] Louisiana, 8 Id. 82; Hays *v.* Pacific Co., 17 Id. 599.

those of another;" and that "vessels bound to or from one State, shall not be obliged to enter, clear, or pay duties in another." These, like all other constitutional provisions, extend to cases where there is a general interest or concern. They do not deal with cases where the citizens of the State are alone interested. The Constitution does not deal with words, but with substance, and is to be construed accordingly. A tax which in reality operates as a "tonnage" duty, though not in the form of such a duty, would, when the prohibition was intended to apply, be held invalid.* On the other hand, when the case is not within the intent of the prohibition, the form of the tax will be disregarded. Pilot fees in one case† were levied at so much per ton, and yet this court held, that to consider this as a tonnage duty, "would be to confound things essentially different. It is the thing, and not the name which is to be considered." The Constitution provides that "no State shall levy any duty on imports or exports," yet when the question was presented to this court, as to the power of the State to levy a tax on goods imported from another State, the court did not confine itself to the mere word "import," but proceeded to inquire into the true meaning and design of the prohibition, and held, that the word did not include imports from another State, but was applicable alone to goods brought from a foreign country.‡

That the tax may operate very unequally upon different sorts of property owned by the people of Alabama, is no argument against the constitutionality of the tax, though it may be so against its policy. But the policy of any State tax is a matter for the legislature of the State alone to decide on. It will be admitted by the other side, that the same inequality might be lawfully brought about if it were done in another form.

Nor, we may reply in passing, is the inequality produced by the Alabama statute, greater than that which Congress

* Steamship Company *v.* Port Wardens, 6 Wallace, 31.

† Cooley *v.* Board of Wardens, 12 Howard, 314.

‡ Woodruff *v.* Parham, 8 Wallace, 123.

produces by its statutes laying a tonnage tax; for an old and decayed vessel, though it may be worth but quarter as much as a well-built, new, and sound one, must pay, under the act of Congress, if the tonnage capacity of the two vessels be the same, exactly the same amount of tax.

Reply: Though the vessels in this particular case are all owned by citizens of Alabama, the statute taxing them, applies to "all" vessels plying in the navigable waters of the State by whomsoever owned. We say that the *statute* is void, and not simply that this particular tax is unlawful.

Mr. Justice CLIFFORD delivered the judgment of the court, giving an opinion in each of the cases.

I. IN THE FIRST CASE.

Assumpsit for money had and received is an appropriate remedy to recover back moneys illegally exacted by a collector as taxes in all jurisdictions where no other remedy is given, unless the tax was voluntarily paid or some statutory conditions are annexed to the exercise of the right to sue, which were unknown at common law.

Where the party assessed voluntarily pays the tax he is without remedy in such an action, but if the tax is illegal or was erroneously assessed, and he paid it by compulsion of law, or under protest, or with notice that he intends to institute a suit to test the validity of the tax, he may recover it back in such an action, unless the legislative authority, in the jurisdiction where the tax was levied, has prescribed some other remedy or has annexed some other conditions to the exercise of the right to institute such a suit.*

On the twenty-second of February, 1866, the legislature of Alabama passed a revenue act, and therein, among other things, levied a tax "on all steamboats, vessels, and other water-crafts plying in the navigable waters of the State, at

* Elliott *v.* Swartwout, 10 Peters, 150; Bend *v.* Hoyt, 13 Id. 267.

the rate of one dollar per ton of the registered tonnage thereof," to "be assessed and collected at the port where such vessels are registered, if practicable, otherwise at any other port or landing within the State where such vessel may be."*

Five steamboats were owned by the plaintiffs, who were citizens of that State, doing business at Mobile under the firm name set forth in the record. All of the steamboats were duly enrolled and licensed in conformity to the act of Congress entitled "An act for enrolling and licensing ships and vessels to be employed in the coasting trade of the United States," and the record shows that at the time the taxes, which are the subject of controversy, were imposed and collected, all those steamboats were engaged in the navigation of the Alabama, Bigbee, and Mobile Rivers, in the transportation of freight and passengers between the port of Mobile and other towns and landings on said rivers, within the limits of the State, the said rivers being "waters navigable from the sea by vessels of ten or more tons burden."†

Such steamboats are deemed ships and vessels of the United States, and as such are entitled to the privileges secured to such ships and vessels by the act of Congress providing for enrolling and licensing ships and vessels to be employed in that trade.‡

Annexed to the agreed statement exhibited in the record is a schedule of the taxes imposed and collected, in which are also given the names of the respective steamboats, their tonnage and their value, and the proportion assessed by the county as well as that imposed by the State. Committed as the assessments were to the same person to collect, it is immaterial whether the taxes were assessed for the State or for the county, as the collector demanded the whole amount of the plaintiffs, and they paid the same under protest, the sums specified as county taxes including also a charge made by the collector for fees in collecting the money.

* Sess. Acts 1846, p. 7. † 1 Stat. at Large, 77. ‡ Ib. 805.

Restatement of the case in the opinion.

Separately stated the taxes were as follows: On the steamboat C. W. Dorrance, 321 tons burden, valued at five thousand dollars, taxed, state tax $321, county tax $322.25; Flirt, tonnage 214 tons, valued at two thousand five hundred dollars, taxed, state tax $214, county tax $215.25; Cherokee, tonnage 310 tons, valued at fifteen thousand five hundred dollars, taxed, state tax $310, county tax $311.25; Coquette, tonnage 245 tons, valued at four thousand dollars, taxed, state tax $245, county tax $246.25; St. Charles, tonnage 331 tons, valued at fifteen thousand dollars, taxed, state tax $331, county tax $332.25; showing that the county tax as well as the state tax is one dollar per ton of the registered tonnage of the steamboats, exclusive of the fees charged by the collector.

Demand of the taxes having been made by the collector, the plaintiffs protested that the same were illegal, but they ultimately paid the same to prevent the collector from seizing the steamboats and selling the same in case they refused to pay the amount. They paid the sum of two thousand eight hundred and forty-eight dollars and twenty-five cents as the amount of the taxes, fees, and expenses demanded by the defendant, and brought an action of assumpsit against the collector in the Circuit Court of the State for Mobile County to recover back the amount, upon the ground that the sum was illegally exacted. Judgment was rendered in that court for the plaintiffs, the court deciding that the facts disclosed in the agreed statement showed that the taxes were illegal, as having been levied in violation of the Federal Constitution. Appeal was taken by the defendant to the Supreme Court of the State, where the parties were again heard, but the Supreme Court of the State, differing in opinion from the Circuit Court where the suit was commenced, rendered judgment for the defendant, whereupon the plaintiffs sued out a writ of error and removed the record into this court for re-examination.

I. Two principal objections were made to the taxes by the plaintiffs, as appears by the agreed statement, which is made a part of the record. (1) That the taxes as levied and col-

lected were in direct contravention of the prohibition of the Constitution, that "no State shall, without the consent of Congress, levy any duty of tonnage," and the proposition of the plaintiffs was and still is that the act of the legislature of the State directs in express terms that such taxes shall be levied on all steamboats, vessels, and other water-crafts plying in the navigable waters of the State. (2) That the State law levying the taxes violates the compact between the State and the United States, that "all navigable waters within the said State shall forever remain public highways, free to the citizens of the said State and of the United States, without any tax, duty, impost, or toll therefor imposed by the said State."*

1. Congress has prescribed the rules of admeasurement and computation for estimating the tonnage of American ships and vessels.†

Viewed in the light of those enactments, the word tonnage, as applied to American ships and vessels, must be held to mean their entire internal cubical capacity, or contents of the ship or vessel expressed in tons of one hundred cubical feet each, as estimated and ascertained by those rules of admeasurement and of computation.‡

Power to tax, with certain exceptions, resides with the States independent of the Federal government, and the power, when confined within its true limits, may be exercised without restraint from any Federal authority. They cannot, however, without the consent of Congress, lay any duty of tonnage, nor can they levy any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws, as without the consent of Congress they are unconditionally prohibited from exercising any such power. Outside of those prohibitions the power of the States to tax extends to all objects within the sovereign power of the States, except the means and instruments of the Federal government. But ships and vessels

* 3 Stat. at Large, 492. † 13 Id. 70; Ib. 444.

‡ Alexander *v.* Railroad, 3 Strobhart, 598.

owned by individuals and belonging to the commercial marine are regarded as the private property of their owners, and not as the instruments or means of the Federal government, and as such, when viewed as property, they are plainly within the taxing power of the States, as they are not withdrawn from the operation of that power by any express or implied prohibition contained in the Federal Constitution.*

Argument, therefore, to show that they may be taxed as other property belonging to the citizens of the State is hardly necessary, as the opposite theory is indefensible in principle, contrary to the generally received opinion, and is wholly unsupported by any judicial determination. Direct adjudication to support that proposition is not to be found in the reported decisions of this court, but there are several cases which concede that such a tax, if levied by a State, would be legal, and no doubt is entertained that the concession is properly made.†

Such a concession, however, does not advance the argument much for the defendant, as it is not only equally true but absolutely certain that no State can, without the consent of Congress, lay any duty of tonnage, and the question still remains to be determined whether the taxes in this case were or were not levied as duties of tonnage, as it is clear, if they were, that the judgment of the State court must be reversed.

Taxes levied by a State upon ships and vessels owned by the citizens of the State *as property, based on a valuation of the same* as property, are not within the prohibition of the Constitution, but it is equally clear and undeniable that taxes levied by a State upon ships and vessels as instruments of commerce and navigation are within that clause of the instrument which prohibits the States from levying *any duty of tonnage*, without the consent of Congress; and it makes no difference whether the ships or vessels taxed belong to the citizens of the State which levies the tax or the citizens

* Nathan *v.* Louisiana, 8 Howard, 82; Howell *v.* Maryland, 3 Gill, 14.

† Passenger Cases, 7 Howard, 402; Hays *v.* The Pacific Mail Steamship Co., 17 Id. 598.

of another State, as the prohibition is general, withdrawing altogether from the States the power to lay any duty of tonnage under any circumstances, without the consent of Congress.*

Annual taxes upon property in ships and vessels are continually laid, and their validity was never doubted or called in question, but if the States, without the consent of Congress, tax ships or vessels as instruments of commerce, by a tonnage duty, or indirectly by imposing the tax upon the master or crew, they assume a jurisdiction which they do not possess, as every such act falls directly within the prohibition of the Constitution.†

Prior to the adoption of the Constitution the States attempted to regulate commerce, and they also levied duties on imports and exports and duties of tonnage, and it was the embarrassments growing out of such regulations and conflicting obligations which mainly led to the abandonment of the Confederation and to the more perfect union under the present Constitution.

Congress possesses the power to regulate commerce with foreign nations and among the several States, and it is well-settled law that the word commerce, as used in the Constitution, comprehends navigation, and that it extends to every species of commercial intercourse between the United States and foreign nations and to all commerce in the several States, except such as is completely internal and which does not extend to or affect other States.‡

Authority is also conferred upon Congress to lay and collect taxes, but this grant does not supersede the power of the States to tax for the support of their own governments, nor is the exercise of that power by the States, unless it extends to objects prohibited by the Constitution, an exercise of any portion of the power that is granted to the United States.

* Gibbons *v.* Ogden, 9 Wheaton, 202; Sinnot *v.* Davenport, 22 Howard, 238; Foster *v.* Davenport, Ib. 245; Perry *v.* Torrence, 8 Ohio, 524.

† Passenger Cases, 7 Howard, 447, 481.

‡ Gibbons *v.* Ogden, 9 Wheaton, 193.

Whether the act of laying and collecting taxes, duties, imposts, and excises was a branch of the taxing power or of the power to regulate commerce, was directly under consideration in the case last cited, and it was conclusively settled that the exercise of such a power must be classed with the power to levy taxes. Had the Constitution, therefore, contained no prohibition, it is quite clear that it would have been competent for the States to levy duties on imports, exports, or tonnage, as they had done under the Confederation.

Tonnage duties are as much taxes as duties on imports or exports, and the prohibition of the Constitution extends as fully to such duties if levied by the States as to duties on imports or exports, and for reasons quite as strong as those which induced the framers of the Constitution to withdraw imports and exports from State taxation. Measures, however, scarcely distinguishable from each other may flow from distinct grants of power, as for example, Congress does not possess the power to regulate the purely internal commerce of the States, but Congress may enrol and license ships and vessels to sail from one port to another in the same State, and it is clear that such ships and vessels are deemed ships and vessels of the United States, and that as such they are entitled to the privileges of ships and vessels employed in the coasting trade.*

Ships and vessels enrolled and licensed under that act are authorized to carry on the coasting trade, as the act contains a positive enactment that the ships and vessels it describes, and no others, shall be deemed ships or vessels of the United States entitled to the privileges of ships and vessels employed in the trade therein described.†

Evidently the word license, as used in that act, as the court say in that case, means permission or authority, and it is equally clear that a license to do any particular thing is a permission or authority to do that thing, and if granted by a person having power to grant it, that it transfers to the grantee the right to do whatever it purports to authorize.

* 1 Stat. at Large, 287; Ib. 305; 3 Kent (11th ed.), 208.

† Gibbons *v.* Ogden, 9 Wheaton, 212.

Unquestionably the power to regulate commerce includes navigation as well as traffic in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade as well as the officers and seamen employed in their navigation.*

Steamboats, as well as sailing ships and vessels, are required to be enrolled and licensed for the coasting trade, and the record shows that all the steamboats taxed in this case had conformed to all the regulations of Congress in that regard, that they were duly enrolled and licensed for the coasting trade and were engaged in the transportation of passengers and freight within the limits of the State, upon waters navigable from the sea by vessels of ten or more tons burden.

Tonnage duties, to a greater or less extent, have been imposed by Congress ever since the Federal government was organized under the Constitution to the present time. They have usually been exacted when the ship or vessel entered the port, and have been collected in a manner not substantially different from that prescribed in the act of the State legislature under consideration. Undisputed authority exists in Congress to impose such duties, and it is not pretended that any consent has ever been given by Congress to the State to exercise any such power.

If the tax levied is a duty of tonnage, it is conceded that it is illegal, and it is difficult to see how the concession could be avoided, as the prohibition is express, but the attempt is made to show that the legislature in enacting the law imposing the tax, merely referred to the registered tonnage of the steamboats "as a way or mode to determine and ascertain the tax to be assessed on the steamboats, and to furnish a rule or rate to govern the assessors in the performance of their duties."

Suppose that could be admitted, it would not have much

* Brown *v.* Maryland, 12 Wheaton, 445; New York *v.* Miln, 11 Peters, 134; People *v.* Brooks, 4 Denio, 476; Steamboat Co. *v.* Livingston, 3 Cowen, 743.

tendency to strengthen the argument for the defendant, as the suggestion concedes what is obvious from the schedule, that the taxes are levied without any regard to the value of the steamboats. But the proposition involved in the suggestion cannot be admitted, as by the very terms of the act, the tax is levied on the steamboats wholly irrespective of the value of the vessels as property, and solely and exclusively on the basis of their cubical contents as ascertained by the rules of admeasurement and computation prescribed by the act of Congress.

By the terms of the law the taxation prescribed is "at the rate of one dollar per ton of the registered tonnage thereof," and the ninetieth section of the act provides that the tax collector must, each year, demand of the person in charge of the steamboat whether the taxes have been paid, and if the person in charge fails to produce a receipt therefor by a tax collector, authorized to collect such taxes, the collector having the list must at once proceed to assess the same, and if the tax is not paid on demand he must seize such steamboat, &c., and after twenty days' notice, as therein prescribed, shall sell the same, or so much thereof, as will pay the taxes and expenses for keeping and costs.*

Legislative enactments, where the language is unambiguous, cannot be changed by construction, nor can the language be divested of its plain and obvious meaning. Taxes levied under an enactment which directs that a tax shall be imposed on steamboats at the rate of one dollar per ton of the registered tonnage thereof, and that the same shall be assessed and collected at the port where such steamboats are registered, cannot, in the judgment of this court, be held to be a tax on the steamboat as property. On the contrary the tax is just what the language imports, a duty of tonnage, which is made even plainer when it comes to be considered that the steamboats are not to be taxed at all unless they are "plying in the navigable waters of the State," showing to a demonstration that it is as instruments of commerce and

* Sess. Acts 1866, pp. 7, 31.

not as property that they are required to contribute to the revenues of the State.

Such a provision is much more clearly within the prohibition in question than the one involved in a recent case decided by this court, in which it was held that a statute of a State enacting that the wardens of a port were entitled to demand and receive, in addition to other fees, the sum of five dollars for every vessel arriving at the port, whether called on to perform any service or not, was both a regulation of commerce and a duty of tonnage, and that as such it was unconstitutional and void.*

Speaking of the same prohibition, the Chief Justice said in that case that those words in their most obvious and general sense describe a duty proportioned to the tonnage of the vessel—a certain rate on each ton—which is exactly what is directed by the provision in the tax act before the court, but he added that it seems plain, if the Constitution be taken in that restricted sense, it would not fully accomplish the intent of the framers, as the prohibition upon the States against levying duties on imports or exports would be ineffectual if it did not also extend to duties on the ships which serve as the vehicles of conveyance, which was doubtless intended by the prohibition of any duty of tonnage. "It was not only a *pro rata* tax which was prohibited, but *any duty* on the ship, whether a fixed sum upon its whole tonnage, or a sum to be ascertained by comparing the amount of tonnage with the rate of duty."

Assume the rule to be as there laid down and all must agree that "the levy of the tax in question is expressly prohibited, as the schedule shows that it is exactly proportioned to the registered tonnage of the steamboats plying in the navigable waters of the State."

Strong as the language of the Chief Justice is in that case, it is no stronger than the language employed by the Supreme Court of the State to which this writ of error was addressed in the case of *Sheffield* v. *Parsons*,† in which the court in effect

* Steamship Co. *v.* Port Wardens, 6 Wallace, 34.

† 3 Stewart & Porter, 304.

says that no tax, custom, or toll, can be levied "on the tonnage of any vessel, without the consent of Congress, for any purpose." Precisely the same rule was applied by that court to vessels duly enrolled and licensed for the coasting trade, and which were exclusively engaged in the towage and lighterage business in the bay and harbor of Mobile, carrying passengers and freight between the city and vessels at the anchorage below the bar.*

Some stress was laid in that case upon the circumstance that the vessels taxed were engaged in transporting cargoes to and from vessels engaged in foreign commerce, bound to that port, but it is quite clear that that circumstance is entitled to no weight, as the prohibition extends to *all ships and vessels* entitled to the privileges of ships and vessels employed in the coasting trade, whether employed in commercial intercourse between ports in different States or between different ports in the same State.†

Formerly harbor-masters, at the port of Charleston, by an ordinance of that city, might exact one cent per ton, once in every three months, of every steam packet or other vessel from certain adjoining States trading steadily there and performing regular successive voyages to that port, but when the question came to be presented to the Court of Errors of that State, the judges unanimously held that the exaction was a duty of tonnage, and that, as such, the provision was unconstitutional and void.‡

Taxes in aid of the inspection laws of a State, under special circumstances, have been upheld as necessary to promote the interests of commerce and the security of navigation.§

Laws of that character are upheld as contemplating benefits and advantages to commerce and navigation, and as altogether distinct from imposts and duties on imports and exports and duties of tonnage. Usage, it is said, has sanctioned

* Lott *v.* Morgan, 41 Alabama, 250.

† People *v.* Saratoga and Rensselaer Railroad Company, 15 Wendell, 131; Steamboat Company *v.* Livingston, 3 Cowen, 743.

‡ Alexander *v.* Railroad, 3 Strobhart, 598.

§ Cooley *v.* Port Wardens, 12 Howard, 314.

such laws where Congress has not legislated, but it is clear that such laws bear no relation to the act in question, as the act under consideration is emphatically an act to raise revenue to replenish the treasury of the State and for no other purpose, and does not contemplate any beneficial service for the steamboats or other vessels subjected to taxation.

Beyond question the act is an act to raise revenue without any corresponding or equivalent benefit or advantage to the vessels taxed or to the shipowners, and consequently it cannot be upheld by virtue of the rules applied in the construction of laws regulating pilot dues and port charges.*

Attempt was made in the case of *Alexander* v. *Railroad* to show that the form of levying the tax was simply a mode of assessing the vessels as property, but the argument did not prevail, nor can it in this case, as the amount of the tax is measured by the tonnage of the steamboats and not by their value as property.

Reference is made to the case of the *Towboat Company* v. *Bordelon*† as asserting the opposite rule, but the court is of a different opinion, as the tax in that case was levied, not upon the boat but upon the capital of the company owning the boat, and the court in delivering their opinion say the capital of the company is property, and the constitution of the State requires an equal and uniform tax to be imposed upon it with the other property of the State for the support of government.

For these reasons the court is of opinion that the State law levying the taxes in this case is unconstitutional and void, that the judgment of the State court is erroneous and that it must be reversed, and having come to that conclusion the court does not find it necessary to determine the other question.

JUDGMENT REVERSED with costs, and the cause remanded for further proceedings in conformity to the opinion of the court.

* State *v.* Charleston, 4 Rich., S. C. 286; Benedict *v.* Vanderbilt, 1 Robt. N. Y. 200.

† 7 Louisiana An. 195.

II. IN THE SECOND CASE.

Much discussion of the questions involved in this record will not be required, as they are substantially the same as those presented in the preceding case, which have already been fully considered and definitely decided.

Submitted, as the case was, in the court below, on a demurrer to the bill of complaint, and on the answer of the respondent, it will be necessary to refer to the pleadings to ascertain the nature of the controversy, by which it appears that the complainants are a corporation, created by the legislature of the State of Alabama, having their place of business at Mobile, in that State; that they were the owners of twelve steamboats, as alleged in the bill of complaint, filed by them on the twelfth of October, 1867, in the Chancery Court for that county, and that the respondent is the collector of taxes for that county, and a resident of the city of Mobile.

Coming to the merits, the complainants allege that the respondent, as such collector, pretends and insists that they are liable under the laws of the State to pay a State tax of one dollar per ton of the registered tonnage of the said several steamboats, without any regard to their value as property; that he also claims that he, as such collector, is authorized by law to collect that amount of the complainants, and also another sum, equal to seventy-five per cent. of the State tax, for the county, and also another sum, equal to twenty-five per cent. of the State tax, as a school tax, making in all a tax of two dollars per ton of the registered tonnage of the said several steamboats, exclusive of the fees of the collector and assessor, amounting to one dollar and fifty cents on each of the said steamboats. All of the taxes in controversy in this case were levied by virtue of an act of the legislature approved February 19th, 1867, entitled "An act to establish revenue laws for the State," and it is conceded that the provisions, so far as respects this controversy, are the same as the act under which the taxes were

levied in the preceding case.* Bills of the taxes, it is alleged, were rendered to the complainants, but it is not necessary to enter into these details, except to say that the taxes were levied in the same form as in the preceding case, and the complainants allege that the respondent claims that he is authorized, in case they refuse to pay the taxes, to seize the respective steamboats, and that he may proceed, after twenty days' notice, to sell the same, or as much thereof as will pay the taxes, expenses, and costs. They, the complainants, deny the legality of the taxes, and allege that the respondent, as such collector, threatens to seize the said steamboats and to proceed to sell the same to pay the taxes, expenses, and costs, which, they insist, would be contrary to equity. Being without any remedy at law, as they allege, they ask the interposition of a court of equity, and allege that the taxes are illegal upon two grounds, which are as follows:

1. That the tax is a duty of tonnage, levied in violation of the tenth section of the first article of the Constitution, and in support of that allegation they allege that all the steamboats, at the time the taxes were levied, were, and that they still are, duly enrolled and regularly licensed to engage in the coasting trade under and in pursuance of the revenue laws of the United States, and that all the duties imposed upon the steamboats by the laws of the United States have been paid and discharged.

2. That the law of the State levying the taxes is in violation of the act of Congress passed to enable the people of Alabama Territory to form a constitution and State government, and for the admission of the same into the Union, and of the ordinance passed by the people of the Territory accepting that provision.† Wherefore they pray for process and for an injunction. Process was issued and served, and the respondent appeared and filed an answer, setting up the validity of the taxes, and alleging that the taxes were not intended to be a tonnage duty, but simply and only a tax on

* Sess. Acts 1867, p. 645; Revised Code 1867, p. 169, art. ii, § 434, p 11.

† 3 Stat. at Large, 492.

the personal property held by the complainants. He also demurred to the bill of complaint, insisting that nothing alleged and charged therein was sufficient to require a further answer. Prior to the filing of the answer the chancellor granted a temporary injunction, and the cause having been subsequently submitted to the court on bill and answer, the chancellor entered a decree making the injunction perpetual, and the respondent appealed to the Supreme Court of the State, where the injunction was dissolved and the bill of complaint was dismissed. Dissatisfied with that decree the complainants sued out a writ of error and removed the cause into this court.

Different remedies are accorded to a complaining party in different jurisdictions for grievances such as the one set forth in the bill of complaint before the court. Usually preventive remedies are discountenanced as embarrassing to the just operations of the government, and the party taxed is required to pay the tax and seek redress in an action of assumpsit against the collector for money had and received. Decided cases may also be referred to where it is held that trespass will lie against the assessor, if it appear that the whole tax was levied without authority, as in that state of the case it is held that the assessor had no jurisdiction of the subject-matter. Preventive remedies, however, are accorded in some of the States, and in cases brought here by writ of error under the twenty-fifth section of the Judiciary Act, if no objection was taken in the court below to the form of the remedy employed, and none is taken in this court, it may safely be assumed that the proceeding adopted was regarded in the court below as an appropriate remedy for the alleged grievance. Doubts upon that subject cannot be entertained in this case, as the record shows that both courts heard and determined the case upon the merits, and all parties conceded throughout the litigation that the complainants were entitled to the relief prayed in the bill of complaint, if the taxes were illegal, and the law levying the same was unconstitutional and void.

Power to tax for the support of the State governments exists in the States independently of the Federal government, and it may well be admitted that where there is no cession of jurisdiction for the purposes specified in the Constitution, and no restraining compact between the States and the Federal government, the power in the States to tax reaches all the property within the State which is not properly denominated the instruments or means of the Federal government.*

Concede all that and still the court is of the opinion that the tax in this case is a duty of tonnage, and that the law imposing it is plainly unconstitutional and void. Taxes, as the law provides, must be assessed by the assessor in each county on and from the following subjects and at the following rates, to wit: "On all steamboats, &c., plying in the navigable waters of the State, at the rate of one dollar per ton of the registered tonnage thereof," which must be assessed and collected at the port where such steamboats are registered, &c.† Copied as the provision is from the enactment of the previous year, it is obvious that it must receive the same construction, and as the tax is one dollar per ton it is too plain for argument that the amount of the tax depends upon the carrying capacity of the steamboat and not upon her value as property, as the experience of every one shows that a small steamer, new and well built, may be of much greater value than a large one, badly built or in need of extensive repairs. Separate lists are made for the county and school taxes, but the two combined amount exactly to one dollar per ton, as in the levy for the State tax, and the court is of the opinion that the case falls within the same rule as the case just decided.

Evidently the word tonnage in commercial designation means the number of tons burden the ship or vessel will

* Nathan *v.* Louisiana, 8 Howard, 82; McCulloch *v.* Maryland, 4 Wheaton, 429; Society for Savings *v.* Coite, 6 Wallace, 604; Brown *v.* Maryland, 12 Wheaton, 448; Weston *v.* Charleston, 2 Peters, 467.

† Revised Code, 169.

carry, as estimated and ascertained by the official admeasurement and computation prescribed by the public authority. Regulations upon the subject are enacted by Parliament in the parent country and by Congress in this country, as appears by several acts of Congress.* Tonnage, says a writer of experience, has long been an official term intended originally to express the burden that a ship would carry, in order that the various dues and customs which are levied upon shipping might be levied according to the size of the vessel, or rather in proportion to her capability of carrying burden. Hence the term, as applied to a ship, has become almost synonymous with that of size.† Apply that interpretation to the word tonnage as used in the tax act under consideration, and it is as clear as anything can be in legislation that the tax imposed by that provision is a tonnage tax, or duty of tonnage, as the phrase is in the Constitution.

State authority to tax ships and vessels, it is supposed by the respondent, extends to all cases where the ship or vessel is not employed in foreign commerce or in commerce between ports or places in different States. He concedes that the States cannot levy a duty of tonnage on ships or vessels if the ship or vessel is employed in foreign commerce or in commerce "among the States," but he denies that the prohibition extends to ships or vessels employed in commerce between ports and places in the same State, and that is the leading error in the opinion of the Supreme Court of the State. Founded upon that mistake the proposition is that all taxes are taxes on property, although levied on ships and vessels duly enrolled and licensed, if the ship or vessel is not employed in foreign commerce or in commerce among the States.

Ships or vessels of ten or more tons burden, duly enrolled and licensed, if engaged in commerce on waters which are navigable by such vessels from the sea, are ships and vessels of the United States entitled to the privileges secured to

* 1 Stat. at Large, 305; 13 Id. 444.

† Homan's Com. and Nav., Tonnage.

such vessels by the act for enrolling or licensing ships or vessels to be employed in the coasting trade.*

Such a rule as that assumed by the respondent would incorporate into the Constitution an exception which it does not contain. Had the prohibition in terms applied only to ships and vessels employed in foreign commerce or in commerce among the States, his construction would be right, but courts of justice cannot add any new provision to the fundamental law, and, if not, it seems clear to a demonstration that the construction assumed by the respondent is erroneous.

DECREE REVERSED and the cause remanded for further proceedings in conformity to the opinion of this court.

THE JUNCTION RAILROAD COMPANY *v.* THE BANK OF ASHLAND.

1. If a bond be not usurious by the law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleges that the place of payment was inserted as a shift or device to evade the law of the place where the bond was made.
2. Where a plea is erroneously overruled on demurrer, and issue is joined on another plea, under which the same defence might be made, the judgment will not be disturbed after verdict.
3. A prohibition against lending money at a higher rate of interest than the law allows will not prevent the purchase of securities at any price which the parties may agree upon.
4. Whether a negotiation of securities is a purchase or a loan, is ordinarily a question of fact; and does not become a question of law until some fact be proven irreconcilable with one or the other conclusion.
5. Though the negotiation of one's own bond or note is ordinarily a loan in law, yet if a sale thereof be authorized by an act of the legislature, it becomes a question of fact, whether such negotiation was a loan or a sale.
6. The requiring or giving of collateral security for the payment of a bond when negotiated, is not inconsistent with the transaction being a sale.
7. The law of Ohio authorizing railroad companies to sell their own bonds and notes at such prices as they may deem expedient, is extended by comity to the companies of other States authorized to transact business in Ohio.

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* 1 Stat. at Large, 205; Ib. 287.

Statement of the case.

8. A corporation cannot plead usury to a bond payable in New York. Statute law there prevents it.
9. The courts of the United States will take judicial notice of the public laws of the several States; and, in Indiana, of the private as well as public laws of that State.

ERROR to the Circuit Court for the District of Indiana.

This was an action of debt brought by the Bank of Ashland, a corporation of Kentucky, against the Junction Railroad Company, a corporation of Indiana, to recover the amount of nine bonds of the latter company for one thousand dollars each, with interest coupons attached. The bonds bore date the 1st day of July, 1853, and were payable to Caleb Jones, or bearer, at the office of the Ohio Life Insurance and Trust Company, in the city of New York, on the 1st day of July, 1863, with interest at the rate of ten per cent. per annum, payable half-yearly. The declaration contained twenty special counts on the bonds and coupons, and one common count for money lent, paid, had and received, and account stated. To the last count there was a plea of *nil debet*, and to the twenty special counts the defendant filed four special pleas, the substance of which was that the bonds were obtained by the plaintiff from the Ohio Life Insurance and Trust Company, and that they were originally negotiated by the defendant to that company in Cincinnati at par, under the pretence of a sale of the bonds, but, in truth, by way of a loan of money from the Ohio Trust Company to the defendant, upon interest at the rate of ten per cent. per annum—a rate which, as stated in the first special plea, the Ohio Company, by its charter, was prohibited from taking, and which, as stated in the second of said pleas, the defendant, by the law which authorized it to do business in Ohio, was prohibited from paying; and which, as stated in the third plea, was forbidden by the usury laws of New York, where the bonds were made payable. The pleas alleged that the plaintiff took the bonds with notice of the usurious consideration. These pleas being demurred to and overruled, the defendant filed a fourth special plea to the same counts, setting forth substantially the same facts as in the first plea,

with a more specific averment of a corrupt and usurious agreement. To this plea the plaintiff replied that the bonds were purchased from the defendant by the Ohio Life and Trust Company in good faith, and that the plaintiff received them in good faith, with the assurance and belief that they had been so purchased and had not been received as security for a loan.

A jury being waived, the cause was tried by the court, which made a special finding of the facts; the substance of which was, that the bonds declared on were, as alleged in the pleas, originally negotiated by the defendant below to the Ohio Life Insurance and Trust Company, at its office in Cincinnati, Ohio, at par, being parcel of one hundred and twenty-five bonds negotiated together; that the defendant proposed to sell the bonds to the Trust Company, but the latter refused to take them unless some persons other than the defendant would guaranty their payment, which was done; whereupon the negotiation was consummated; that said negotiation did not amount to a loan of money, but to a sale of the bonds, and that the transaction involved nothing usurious; that in 1857 the Trust Company transferred the bonds to the plaintiff below in payment of a debt; and that the plaintiff took them in good faith, without any notice of the fact of usury or of illegality in the issuing of the bonds, but had notice of the guaranty. Upon these facts the court below gave the plaintiff judgment for the full amount of the bonds and interest; and the defendant brought the case here.

To enable the reader the better to judge at this point of the case, whether the judgment below was rightly or not rightly given, it should be mentioned, that in New York by a statute enacted April 6th, 1850, a defence of usury cannot be set up by corporations; that by a supplement to its charter, dated January 29th, 1851, the Junction Railroad Company was empowered to borrow money or sell its securities at any rate of interest; and that by statute of Ohio, passed December 15th, 1852, any railroad company authorized to borrow money and issue bonds for it, may sell its bonds when, where, and at such rate and price as the directors

deem most advantageous to the road; and finally, that by a second statute of the same State, the Junction Railroad Company was made a corporation of Ohio, and authorized to perform any act as if originally incorporated therein.

Messrs. C. P. James, Rufus King, and S. J. Thompson, for the plaintiffs in error; Messrs. A. G. Porter and W. H. Wadsworth, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

Unless this case has become embarrassed by the pleadings, the facts as found by the court present a clear case in favor of the plaintiff. If they could have been given in evidence under the common count, we should have felt no hesitation in sustaining the judgment on that count alone, disregarding the special counts and the pleadings thereto. But it has been held that an agreement under seal for the payment of money cannot be received to support the common money counts. It will be necessary, therefore, to examine the case with reference to the defences set up in the special pleas. In all of them usury and want of authority in the original parties to make the negotiation are the points of defence relied on.

With regard to the question what law is to decide whether a contract is, or is not, usurious, the general rule is the law of the place where the money is made payable; although it is also held that the parties *may* stipulate in accordance with the law of the place where the contract is made. In this case it is conceded by all the pleas, and shown by the special finding of the court, that the place of payment of the bonds in question was the city of New York. By the law of that State, passed April 6th, 1850 (of which the Circuit Court had a right to take judicial notice),* no corporation is allowed to interpose the defence of usury. None of the special pleas allege that the place of payment mentioned in the bonds was adopted as a shift or device to avoid the statute of usury. The device complained of was a pretended sale of

* Owings *v.* Hall, 9 Peters, 625.

the bonds, when the transaction was really a loan. Admitting that it was a loan, it is not denied that it was made *bonâ fide* payable in New York. Hence the pleas cannot stand as pleas of usury, properly so called. They must stand, if at all, on the allegation that one or both of the contracting parties was prohibited by law from making such a contract.

It is certain, however, that no such prohibition exists in the case of the defendant. By the supplement to its charter, passed by the legislature of Indiana January 29th, 1851, it was authorized to borrow money or sell its securities at any rate of interest or price it might deem proper. The courts in Indiana are authorized by the constitution of that State to take judicial notice of all its laws; and, therefore, the Circuit Court could take judicial notice of this law. By the law of Ohio, passed December 15th, 1852, any railroad company authorized to borrow money, and to execute bonds or promissory notes therefor, was authorized to sell such bonds or notes at such times and in such places, either within or without the State, and at such rates, and for such prices, as in the opinion of the directors might best advance the interests of the company. This is tantamount to a repeal of the usury laws as to such companies. And although this law had primary reference to the railroad companies of Ohio, yet the Supreme Court of that State, in a very sensible and judicious opinion, has decided that it extends by comity to railroad companies of other States borrowing money in Ohio. Indeed, the second special plea sets forth a statute of Ohio, in relation to this very defendant, which makes it a corporation of Ohio, as well as Indiana, and authorizes it to perform any act within the State of Ohio the same as if it had originally been incorporated therein. This act, it seems to us, rendered the exercise of comity hardly necessary to bring the defendant within the privileges of the Ohio act of 1852.

It must be conceded, therefore, *first*, that the transaction in question, if a loan at all, was not a usurious loan by the law of the place which governed the contract; and, *secondly*, that the defendant had a perfect right to make it. This ob-

servation is applicable to all the special pleas, and disposes entirely of the second of them, in which the defendant relies on its own disability to borrow money at a higher rate of interest than seven per cent.; and also disposes of the third of said pleas, in which the statute of usury of the State of New York is pleaded. There remains, then, only the first plea, in which the point is taken that the Ohio Life Insurance and Trust Company was, by its charter, prohibited from *taking* more than seven per cent. interest. This point is fully presented in the last plea on which issue was taken, and the defendant can, therefore, receive no harm, though the demurrer to its first plea was wrongly sustained. It still had the benefit of that defence under the last plea; and the result is presented to us in the finding of the court. That finding is, that the transaction was not a loan at all, but only a sale of the bonds; and it is not pretended that the Ohio Life and Trust Company might not *purchase* securities of this sort at any price it might deem expedient. But the defendant contends that this was a conclusion of law on the part of the court, and that it was erroneous. Surely the question whether a negotiation of bonds was a sale or a loan is ordinarily, and *primâ facie*, a question of fact. To make it a question of law, some fact must be admitted or proved, which is irreconcilable with one conclusion or the other. What fact in this case is irreconcilable with the conclusion that this negotiation was a sale? The defendant contends that the fact that the bonds were its own obligations is such a fact, and alleges that in law a party cannot sell its own obligations to pay money. But it certainly may do this, if authorized by law to do it; and it is shown that this very thing was authorized by the laws of Ohio, to the benefit of which the defendant was expressly, as well as by comity, entitled.

Again, the defendant alleges that the exaction of collateral security for the payment of the bonds was a fact wholly irreconcilable with a sale. We do not think so. Once concede that the obligor may sell its own bonds, what difference can it make how fully and strongly they may be secured?

The requirement of guaranties can only amount to evidence of intention at most; the weight of which, in connection with all the circumstances of the case, is to be judged of by the tribunal to which the facts are submitted. This has been fairly done in the present case, and the decision is against the defendant.

In this view of the case we do not decide whether the demurrer to the first plea was, or was not, well taken. We are disposed to think that it was; but do not deem it necessary to incumber the case with the discussion of that question.

JUDGMENT AFFIRMED.

UNITED STATES *v.* CHILD & CO.

1. The doctrine of the case of *United States* v. *Adams* (7 Wallace, 463), affirmed and held to govern the case.
2. Neither in that case nor in this was the voluntary submission of a claim against the government to the special commission appointed to investigate such claims essential to bar a recovery against the United States.
3. The bar in both cases rested upon the voluntary acceptance by the claimants of a smaller sum than their claim as a full satisfaction of the whole, and acknowledging this in a receipt for the amount paid; the demand having been disputed for a long time by the government, and the smaller sum accepted without objection or protest.
4. Such acceptance being without force or intimidation and with a full knowledge of all the circumstances, the fact that the sum was so large that the claimants were induced by their want of the money to accept the less sum in full is not duress.

APPEAL from the Court of Claims, on a claim by Child & Co., merchants of St. Louis, against the United States for $163,111, as a balance due on a sale of military stores.

The Court of Claims found a case which in the parts material was thus:

1st. In the autumn of 1861, and before the 14th of October of that year, the city of St. Louis being the headquarters of the Department of the West, Major McKinstry, chief quartermaster of the department, under the express orders of Major-General

Fremont, commanding the department, purchased stores of the claimants, the fair value of which was $478,119.62, the price charged by the claimants.

The payment of the quartermaster vouchers held by the claimants was suspended by the Secretary of War, in common with all others issued before the 14th October, 1861, by reason of suspected frauds, extravagance, and irregularities in the Department of the West.

On the 25th October, 1861, a military commission, consisting of the Honorable David Davis, of Illinois; the Honorable Joseph Holt, of Kentucky, and Mr. Hugh Campbell, was appointed by the Secretary of War, whose powers and duties were defined to be to report upon all unsettled claims against the military Department of the West that might have originated prior to the 14th of October, 1861.

After the committee had entered upon its investigations, the provost-guard of St. Louis forcibly entered the office of the claimants, and against their consent seized and carried before the commission their vouchers, business papers, and private books of account. The commission examined them all, and at the conclusion of its investigations indorsed upon the vouchers the amounts allowed by *it*, and ordered that the sum of $163,111 be deducted from the vouchers. The commission also withheld all of the vouchers until the claimants signed a receipt or agreement, *not under seal and without consideration*, which provided that when the reduced amounts allowed by the commission should be paid, the payment should be in full of all the claimants' demands against the United States. The claimants on their part *never submitted their vouchers to the arbitration or decisions of the commission*, and did not sign the receipt voluntarily, but under protest and to obtain possession of their vouchers withheld until they should do so.

The claimants after receiving back from the commission their vouchers presented them for payment to the Quartermaster-General, but the disbursing officer of the United States refused to pay the same, on the ground that he had no legal authority to do so, and continued to refuse payment until the enactment by Congress of a joint resolution approved 11th March, 1863:

"That all sums allowed to be due from the United States to individuals, by the commission heretofore appointed by the Secretary of War," "shall be deemed to be due and payable, and

shall be paid by the disbursing officers in each case, upon the presentation of the voucher, with the commissioners' certificate thereon, in any form plainly indicating the allowance of the claim and to what amount."

Thereupon the Quartermaster-General "referred the said vouchers to Major M. S. Miller, quartermaster, for payment, under the above quoted joint resolution of Congress;" and Major Miller, in pursuance of this order, paid to the claimants, upon these vouchers, the amounts allowed by the commission.

The claimants, at the time of receiving payment, made no formal objection or protest, but were required to, and did, sign a receipt *not under seal and without consideration*, whereby they acknowledged having received such reduced amounts "in full of the above account."

Such were the facts as found by the Court of Claims. The court did not find anything about Child & Co.'s having accepted the amount reported as due by the commission, because they would have become bankrupt had they not done so. But in the *opinion* of the Court of Claims, as given in the official report of the case, the court,* in speaking of the receipts which Child & Co. had given for the money, says:

Of these receipts two things may be said: In the first place, the acts of the commission had taken from the claimants their business books of account; had suspended their business transactions; *had reduced them to the verge of bankruptcy*, and had been constantly met by the claimants' repeated and most earnest protests.

The Court of Claims, as a conclusion of law upon the *facts found in their finding*, decided,

1st. That the purchases were lawful and valid.

2d. That neither Congress nor the claimants having submitted the controversy to the arbitrament of the commission, the said commission was not possessed of jurisdiction or power to determine the rights of the parties, and that the deductions

* 4 Court of Claims Reports, 185.

made by the commission from the claimants' vouchers did not constitute a valid or binding award. And further, that the agreement or receipt, signed by the claimants on receiving back their vouchers, was obtained and exacted by duress of their goods, and was wholly without consideration, and void.

3d. That the joint resolution approved 11th March, 1863, was simply an authority and direction to the defendants' disbursing officers to pay the amounts allowed by the commission; and that the resolution did not ratify the reductions made by the commission from the claimants' vouchers, nor change, nor affect the legal rights and liabilities of the parties. That the payment of the reduced amount made to the claimants under the resolution by the express order of the quartermaster-general, and its acceptance by the claimants, without objection or protest, did not estop or conclude the claimants from seeking legal redress for the balance remaining due upon their accounts; and that the receipts required by the quartermaster at the time of payment, expressing upon their face that a less sum was received than that due, and being without consideration, did not operate as a release of the balance of the claimants' accounts, and were wholly void.

The Court of Claims accordingly decided that the claimants should recover the balance claimed, to wit: $163,111.

From this decision the United States appealed to this court. The case being here, it was remanded at the request of the government to the Court of Claims for certain additional findings, on questions raised. The supplemental findings found:

1st. That the claims of the claimants were never submitted to the commission, either before or after the seizure of the books and papers; but that, before the seizure, the claimants, in pursuance of the published notice of the commission (requiring all claims which had accrued before the 14th of October, 1861, to be presented to it), had in some manner, not shown to the Court of Claims, presented or given notice of their claims against the defendants to the said commission. But that the claimants had not presented their original vouchers, nor any proofs to the commission.

2d. That after the seizure, and while the books and papers

were withheld from the claimants by the commission, the claimants did appear before the commission with witnesses; but what the witnesses testified, or whether or not they were produced before the commission to support the claims, did not appear at the trial.

The claim, as the reader will have observed, belonged to a class of demands against the government, originating at St. Louis in the early days of the civil war, and which by order of the President were investigated at the time by a special commission appointed for the purpose. In some respects, therefore, it resembled the cause of *United States* v. *Adams*, twice passed on in this court;* first on an appeal, the record of which stated that Adams had presented his claim to the commission, and the second—after a decision of that appeal by this court, in which decision it was assumed that Adams had "voluntarily submitted his claims to the adjudication and decision of the said commissioners"—on a motion by Adams to refer the case back to the Court of Claims, because it had erroneously found as a fact, that he had voluntarily presented his claims, whereas, the truth was —as was shown on the motion—that he had not presented them himself at all, but that General Meigs, head of the bureau of a department of this class of claims, had presented them, and that they had been heard *ex parte*. In the opinion on the appeal (the first case),† this court—admitting fully that the commission had no legal authority to compel a hearing before them, and that he might have gone to the Court of Claims—held the fact to be that Adams had "voluntarily submitted his claims to the adjudication and decision of the said commission," and adverting to this and to the fact that after the award by the commission of a smaller sum than that claimed, Adams took it and gave a receipt—a document which the government set up as concluding him, while *he* contended that he was free to explain it—the court declared that:

"In the view we have taken of the case, the giving of the

* 7 Wallace, 463; 9 Id. 554.

† 7 Wallace, 479, 481.

receipt is of no legal importance. The bar to any further legal demand against government does not rest upon this acquittance, but upon the *voluntary submission of the claims to the board;* the hearing and final decisions thereon; the receipt of the vouchers containing the sum or account found due to the claimant, and the acceptance of the payment of that amount under the act of Congress providing therefor. . . . So far as respects the cases of *voluntary submission* before the board, we regard the finding followed by acceptance as conclusive as if it had been before the first Court of Claims, and heard and decided there, and the amount found due paid by the government."

In the second case* (the motion to remand), the court say:

"Though it is true that the appellee did not present his claim to the board, as stated in the finding in the record on appeal, it cannot, in view of the original record of the evidence before the Court of Claims, be denied that he made himself a party to the proceedings and took the benefit of the adjustment of his accounts by them, which brings the case within the principle decided in 7th Wallace."

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States:

We rely on *United States* v. *Adams.* There are no distinguishing facts. The Court of Claims, indeed, in their additional findings in the present case, find that the claim in this case was never submitted to the commission; but while thus finding they proceed to find further, "that, before the said seizure, the claimants, in pursuance of the public notice of the said commission, had, in some manner not shown to the court, presented or gave a notice of their claims to the said commission." This last statement contradicts, as matter of fact, the finding that the claims were never submitted, and shows that that was rather a conclusion of law from the facts than a finding of a question of fact, and that upon the *facts* found by the Court of Claims, it was an erroneous conclusion.

No particular form of submission of claims has been estab-

* 9 Wallace, 554.

lished by the commissioners or by the Secretary of War, and if the claimants had "in some manner presented or given notice of their claims to the said commission," such presentation or notice of their claims could constitute nothing but a submission of them for investigation. Moreover, the Court of Claims finds further, "that the claimants did appear before the said commission with witnesses," which establishes the fact, that they did actually submit their claims to the consideration of the commissioners.

Whether the receipt given by the respondents to the commission at St. Louis was extorted by duress, or by the illegal withholding of their vouchers, is immaterial. The respondents did get back their vouchers, and they did afterwards, when under no "duress," accept the money allowed them by the commission under the joint resolution of Congress, as the Court of Claims admits, without formal protest. This payment of the money, a final settlement, was an accord and satisfaction of the whole demand.

Messrs. H. E. Davis, Bartley, and Casey, contra:

The good faith of the appellees and the fair price of their stores sold, being expressly found, the question is whether the acceptance by them of the amount awarded by the commission bars a recovery of the balance.

The acceptance is not a ratification of the action of the commission, nor a sufficient ground of reversal of the judgment of the Court of Claims.

1st. Because the finding of said commission was not an *award.*

This conclusion results from the *fact* expressly found, that the appellees did not at any time present or submit their claims to the jurisdiction or arbitrament of said commission. In the case of *United States* v. *Adams*, it was decided that the authority of the commission to decide upon the claim resulted from the *voluntary* submission of the claimant. That fact being wanting in this case, removes the only foundation upon which an award by the commission can be sustained.

2d. Because the facts found by the Court of Claims are not sufficient to constitute an *accord and satisfaction.*

In order to support a legal accord and satisfaction, there must be some new consideration moving from the party who sets it up. The payment of part of a debt in consideration of the creditors relinquishing the residue, where the whole debt is due at the time, will not support a plea or averment of accord and satisfaction. This is settled law, since Pinell's case, reported by Coke, followed by Pratt, C. J., in *Cumber* v. *Wayne;** also more explicitly by Lord Ellenborough in *Fitch* v. *Sutton,*† and now firmly established in nearly every State in the Union.‡

3d. Because the acceptance by the appellees of the money awarded by the commission does not of itself furnish evidence that the appellees accepted payment of such sum as a *compromise.* There is not a single fact in this case which sustains such an assumption. A *compromise* as defined by Mr. Justice Bouvier in his valuable Law Dictionary, is "an agreement between two or more persons who, to avoid a lawsuit, settle their differences on such terms as they can *agree upon.*"

The *opinion* of the Court of Claims, given in the official report of this case below, tells the circumstances under which the money paid on these contracts was received by the appellees. This opinion, though indeed no part of the findings or of the record, is of course founded on the evidence given in the case, and is to be entirely relied on. It shows that the court had in its mind, as a very important element of the case, a fact omitted to be found specifically in the technical "finding;" but which, of course, they supposed would be obvious from the nature of the case.

Payment was accepted, because, from the outlays which Child & Company had made on behalf of the government, they were "*reduced then to the verge of bankruptcy.*" The sums dealt in were very large. That house—indeed few houses—could long remain out of so vast a sum and not become bank-

* 1 Strange, 426.

† 5 East, 232.

‡ 1 Smith's Leading Cases, notes to Cumber *v.* Wayne.

rupt. The government cannot be subjected to the influences which oblige private debtors to pay their debts. It pays no interest for withholding even the greatest sums, though, by confession, justly due. Acceptance of payment from such debtors, in such an emergency as Child & Company were placed in by the non-payment, was payment accepted under duress. Formerly, indeed, it was held that illegal restraint of the person was necessary to constitute duress, and that a detention of papers or goods of the party would not be duress. That doctrine is now, by numerous cases, exploded.* Indeed, in *Astley* v. *Reynolds*, so far back as the time of Strange,† speaking of a payment of money made under prudential influences, the court says: "We think also this a payment by compulsion. The plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be where the party has his freedom of exercising his will."

The defence made by the receipt of a part of the claim, is at best one of the most technical character, and by a proud government ought not to be allowed to defeat a claim, if it be a just one, for property advanced to it in a crisis where its very existence was in peril, and in a region where the claimants were the faithful few among the faithless.

Mr. Justice MILLER delivered the opinion of the court.

The claim of the appellees for the sum of $478,119.62 was examined by the special commission appointed by the President. It allowed the sum of $315,008.15 on the demand, and rejected the remainder of $163,111.47. The claimants accepted the sum so allowed by the commission, gave re-

* White *v.* Heylman, 10 Casey, 142; Ripley *v.* Gelston, 9 Johnson, 201; Wheeler *v.* Smith, 9 Howard, 55; Elliott *v.* Swartwout, 10 Peters, 137; Hearsey *v.* Pruyn, 7 Johnson, 179; Ashmole *v.* Wainwright, 2 Queen's Bench, 837; Wakefield *v.* Newbon, 6 Ib. 281; Parker *v.* The Great Western R. R. Co., 7 Manning & Granger, 253; Harmony *v.* Bingham, 1 Duer, 229; Shaw *v.* Woodcock, 7 Barnewall & Cresswell, 73; Atlee *v.* Backhouse, 3 Meeson & Welsby, 633.

† 2 Strange, 916; and see Collins *v.* Westbury, 2 Bay, 214.

ceipts in full of the accounts included in the demand, and have brought this suit to recover the amount rejected by the commission.

These facts are undisputed, and part of the findings of the Court of Claims in the case. If they stood alone they would bring it within the principles laid down by this court in the case of the United States against Adams. That case was twice argued before us and affirmed by a full bench, and as we are satisfied with the principles on which it was decided they must govern us in passing on subsequent cases, so far as they fall within its rulings.

But the claimants contend that other facts found by the Court of Claims take this case out of the propositions laid down for the government of that case, and entitle them to an affirmance of the judgment rendered in their favor by the Court of Claims. An important difference between the two is said to exist in the fact that Adams voluntarily submitted his claim to the commission we have mentioned, and the claimants in this case did not. And it is insisted that this submission constituted an important, if not a controlling element in the decision of the Adams case.

The court in discussing the question of the conclusiveness of a receipt which Adams had given in order to obtain possession of his vouchers, and which he asserted to have been obtained by duress, says: "In the view we have taken of the case, the giving of the receipt is of no legal importance. The bar to any further legal demand against government does not rest upon this acquittance, but upon the voluntary submission of the claims to the board; the hearing and final decision thereon; the receipt of the vouchers containing the sum or account found due to the claimant, and the acceptance of the payment of that amount under the act of Congress providing therefor."

Counsel for the claimants construing the phrase "voluntary submission," here used, to mean such a submission as would constitute the commissioners a board of arbitrators, or at all events, such a submission as would render their decision legally conclusive, deny that the parties in the present

case ever made such a submission. As much importance seems to have been given to this question by both parties, an order was obtained from this court on motion of the appellants directing the Court of Claims to make a more specific finding of facts on that subject. Such a supplementary finding is in the present record, and that court says, among other things, that the claims of the claimants were never submitted to said commission. But they further say in this supplementary finding, that the claimants had, in some manner not shown to the court, presented or given notice of their claim against the United States to the said commission, but that they had not presented their *original vouchers*, or any proofs, to the said commission. They also find that the claimants appeared before said commission with witnesses, but what they testified to is not shown.

Taking these findings together, it seems to us that the Court of Claims meant to say that the claimants did not submit their claims to the commission as arbitrators, or with intent that their decision should be conclusive, but that they did present their claims and did appear to support them with witnesses. This view of their meaning is confirmed by reference to their original finding, in which it is said that "claimants on their part never submitted their *vouchers* to the *arbitration* or *decision* of the commission." No doubt these were the facts of the case; and as to this part of it they come fairly within the decision of the court in Adams's case.

In the opinion of the court then delivered, it is held that this board had no authority to compel parties to submit their claims to it, and that its decisions were not conclusive when they did submit them. The court, referring to the various ways open to claimants to obtain satisfaction of their demands, and after speaking of an application to Congress, a suit in the Court of Claims, and a submission to this special commission, adds: "This tribunal afforded an additional advantage over others, namely, that if, after the hearing and adjustment of the claims, the claimants were not satisfied, they were free to dissent and look for redress to the only

legal tribunals provided in such cases." And to the application of Adams to remand the case to the court below, founded on the allegation that the Court of Claims had made a mistake in finding that he had submitted his claim to the board, this court responds:* "Though it is true that the appellee did not present his claim to the board, *as stated in the finding in the record on appeal*, it cannot, in view of the original record of the evidence before the Court of Claims, be denied that he made himself a party to the proceedings and took the benefit of the adjustment of his accounts by them, which brings the case within the principle decided in 7th Wallace."

But though the claimants might have refused to abide by the decision of the board and sought relief from the Court of Claims or from Congress, they did not do so.

We lay out of view in this case, as in the Adams case, the receipts which they gave, under protest, in order to regain possession of their vouchers. But we cannot disregard the finding of the Court of Claims that, after Congress had appropriated money to pay the sums found due by the commissioners, the claimants received the amount so allowed, and signed upon each voucher a receipt whereby they acknowledged having received said reduced amount "in full of the above account." And that at the time of receiving this payment they made no formal objection or protest, but were required to and did sign the receipt above described.

Although it is found by the court that these receipts were not under seal and were without consideration, the latter statement must have some meaning not apparent to us, in view of the other fact found also, that over $315,000 was paid to the claimants on those accounts at the time they gave the receipts.

To avoid the legal effect of these facts it is argued that not only in giving the receipts above mentioned, but also in accepting the money for which they were given, the complainants acted under duress.

* 9 Wallace, 554.

We can hardly conceive of a definition of duress that would bring this case within its terms. Authorities are cited to show that where, under peculiar circumstances, property is withheld from the owner and he is forced to pay some unjust demand to obtain possession of it, he can afterwards maintain a suit for the money so paid. But no case can be found, we apprehend, where a party who, without force or intimidation and with a full knowledge of all the facts of the case, accepts on account of an unliquidated and controverted demand, a sum less than what he claims and believes to be due him, and agrees to accept that sum in full satisfaction, has been permitted to avoid his act on the ground that this is duress. If the principle contended for here be sound, no party can safely pay by way of compromise any sum less than what is claimed of him, for the compromise will be void as obtained by duress. The common and generally praiseworthy procedure by which business men every day sacrifice part of claims which they believe to be just to secure payment of the remainder would always be duress, and the compromise void.

But it is argued that the government should be held to a different rule than that which applies to private parties. It is said that the amount in dispute here was so large that the claimants were compelled to accept what was offered, to avoid bankruptcy.

No fact found by the Court of Claims, or otherwise presented by the record, justifies us in supposing that the claimants were threatened with insolvency, and the circumstance that the claim which was the subject of the compromise was a very large one can hardly be accepted in a court of law or equity as a reason for setting it aside. If indeed there was any such pressing motive in the minds of the claimants arising out of the condition of their private affairs as influenced them strongly to accept the offer of the government, it cannot, in the absence of fraud or constraint on its part, invalidate the settlement.

It seems to us that this case, under the ordinary principles of law applicable to its class, is free from embarrassment.

If there had been no reference to, and no finding by, the commission, it would still remain true, that here was a claim, the justice of which had been denied and the amount that was due on it had been in dispute for nearly two years. The government finally says to the claimants: "We will pay you a certain sum on this disputed claim provided you will take it in full satisfaction of the whole;" when, without intimidation, without fraud or concealment on the part of the government, without protest or objection on their part, the claimants accept the money offered and sign a receipt acknowledging it to be in full of the whole claim. Is not this a legal and binding compromise of the disputed demand? Is it not a voluntary adjustment of the matter in dispute between the parties? And we think that it is a strong additional argument in favor of the validity of this settlement, when it is called in question in court, that the sum so agreed upon was found to be a balance justly due on the claim by a commission of three capable and honest men, appointed by the government to ascertain what was due, and that before this commission the other party presented his claim and produced his witnesses, and was allowed a full and fair hearing to any extent that he desired.

In this view of the case it is of no avail to urge that the Court of Claims has found that the whole claim was just and ought to be paid. After the compromise that question was no longer open to inquiry. It is of the very essence of such adjustments of disputed rights that the contest shall be closed; and whatever consideration might be given the finding of the Court of Claims on that subject in another department of the government, this department, which sits to administer the law, must be governed by its recognized principles.

JUDGMENT REVERSED and the case remanded to the Court of Claims, with directions to render judgment

IN FAVOR OF THE UNITED STATES.

Syllabus.

Mr. Justice CLIFFORD, with whom concurred the CHIEF JUSTICE, dissenting:

The Court of Claims having found that the claim in this case was never submitted to the commission appointed by the direction of the President to examine such claims, I am unable to concur in the conclusion of the court that the case is controlled by the decision of the court in the case of *United States* v. *Adams*, in 7th Wallace, and for the reason that the claim was never so presented.

DAVIS and FIELD, JJ., absent.

UNITED STATES *v.* BURNS.

1. The army regulation No. 1002, which declares that "no officer or agent in the military service shall purchase from any other person in the military service or make any contract with any such person to furnish supplies or services, or make any purchase or contract in which such person shall be admitted to any share or part, or to any benefit to arise therefrom," does not apply to contracts on behalf of the United States, which require for their validity the approval of the Secretary of War. The secretary, though the head of the War Department, is not in the military service in the sense of the regulation, but is a civil officer.
2. In February, 1858, a contract was made on behalf of the United States with Sibley, an officer in the army of the United States, for the manufacture and use of what is known as the Sibley tent, of which tent Sibley had secured a patent, by which contract the government was authorized to make and procure as many of the tents as it might require by paying the sum of five dollars for each tent, the contract to continue until the 1st of January, 1859, and longer unless the United States were notified to the contrary. In April, 1858, Sibley executed to Burns, another officer in the army of the United States, an assignment of "the one-half interest in all the benefits and net profits arising from and belonging to the invention," from and after February 22d, 1856. Soon after the commencement of the rebellion Sibley resigned his commission in the army of the United States and joined the Confederates. Burns remained true in his allegiance to the government of the United States and served in the army of the Union. After the resignation and defection of Sibley one-half of the royalty on each tent made or procured by the government was paid to Burns, under the contract with Sibley, until December 26th, 1861, when further payments to him were forbid-

Statement of the case.

den by order of the Secretary of War, although the government continued to manufacture and use the tents as previously: *Held*, 1st, that the assignment of Sibley passed to Burns one-half interest in the contract of Sibley with the government, and the right to a moiety of the royalty stipulated; 2d, that the order of the Secretary of War, in December, 1861, did not terminate the contract; 3d, that the War Department, by its previous payments to Burns of one-half of the royalty stipulated, severed his claim from that of Sibley under the contract; 4th, that the act of March 3d, 1863, in barring Sibley, by reason of his disloyalty, of any action upon the contract with the government in the Court of Claims, does not affect the rights of Burns to his moiety under that contract or his right of action for the same in the Court of Claims. The act severs their claims.

3. The Court of Claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading.

APPEAL from the Court of Claims, in which court the petitioner claimed against the United States the amount due on a contract authorizing them to make and use a certain tent known as the Sibley tent.

The facts found by the Court below were thus:

1st. On the 22d of April, 1856, letters-patent were issued to Major H. H. Sibley for an improved tent, since known as the Sibley tent.

2d. On the 6th of February, 1858, General Thomas, assistant quartermaster-general at Philadelphia, in a letter addressed to W. E. Jones, "agent for the Sibley patent tent," stated that he had received information from the quartermaster-general that the tent might be adopted into the service, provided a satisfactory arrangement could be made for the use of the patent, or for the tents, at a reasonable rate, and proposed that the department should pay him the sum of $5 for each tent made for the use of the army, *as long as the agreement might be confirmed by the War Department*, and asking a reply to the proposition. To this letter Mr. Jones replied that he was willing to enter into a temporary arrangement of that nature, and to authorize the assistant quartermaster to make as many of the tents as the government might require, by paying him $5 for each tent; the arrangement to hold good *until the 1st of January, 1859, and longer, unless notified to the contrary by him.*

On the 18th of February, 1858, the terms proposed in the letter of Mr. Jones were approved by the Secretary of War, and a contract was made accordingly, between the United States and Jones, as the agent of the Sibley tent patent, by which the United States were authorized to make and procure as many of the tents as the government might require by paying $5 for each tent, and this arrangement was to hold good until the 1st of January, 1859, and longer, unless the United States were notified to the contrary. And the tent was adopted as one of the tents of the army by the army regulations.

On the 16th of April, 1858, Sibley assigned to Major W. W. Burns, another officer in the army of the United States, "the one-half interest in all the benefits and net profits arising from and belonging to the invention of a certain improved conical tent, known as the Sibley tent, from and after the 22d of February, 1856, forever."

Soon after hostilities commenced between the United States and the Confederates, Major Sibley resigned his commission in the army of the United States and joined the Confederates. Major Burns remained true to his allegiance and served in the army of the Union.

On the 22d of August, 1861, General Meigs, quartermaster-general, instructed General Thomas, assistant quartermaster-general at Philadelphia, under whose directions Sibley tents were made and contracted for for the United States, that the case of the claim of Major Burns to the royalty of the Sibley tent having been examined by the department, it was considered that he was entitled to one-half of the royalty as originally fixed between the government and Major Sibley, the inventor. It was accordingly directed that General Thomas should pay Major Burns $2.50 on each such tent manufactured by the government, and that the other half of the original royalty, formerly paid to Sibley, would for the future be withheld, as well as all that might be due him; for that in consequence of the defection of that officer, it was considered that all his right and title thereto had reverted to the government.

Burns was accordingly, for some time afterwards, paid $2.50 on each tent under the contract.

On the 26th of October, 1861, Major Meigs, quartermaster-general, in a communication to the Secretary of War, submitted the question whether the contract in respect to the royalty allowed Burns was or was not in violation of paragraph 1002 of Revised Regulations for the Army. The paragraph is in these words:

"No officer or agent in the military service shall purchase from any other person in the military service, or make any contract with any such person to furnish supplies or services, or make any purchase or contract in which such person shall be admitted to any share or part, or to any benefit to arise therefrom."

Upon this communication, the government at this time having made 38,158 tents, Mr. Cameron, the Secretary of War, on the 26th December, 1861, indorsed as follows:

"No further payments will be made to Major W. W. Burns on account of royalty on the Sibley tent."

This order was communicated to officers of the War Department, though not communicated to the petitioner or the patentee, Major Sibley, but from its date no payments on account of the royalty were made. The last payment on account of the royalty was on the 3d of September, 1861. Notwithstanding the order, however, the government continued to make and use the tents. The petition of Burns asked for payment from the government of one-half the royalty, or $2.50, for those tents which it had made and not paid him for.

On the 3d March, 1863, Congress passed an act amending the act establishing the Court of Claims, the twelfth section of which amendatory act provides:

"That in order to authorize the said court to render a judgment in favor of any claimant, if a citizen of the United States, it shall be set forth in the petition that the claimant . . . has at all times borne true allegiance to the government of the

United States, and . . . has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said government, which allegation may be traversed by the government; and if on the trial such issue shall be decided against the claimant his petition shall be dismissed."*

The original act establishing the Court of Claims gives the court jurisdiction—

"To hear and determine all claims founded upon by 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, that may be suggested to it by a petition filed therein, &c."†

The Court of Claims entered a judgment in favor of the petitioner for one-half of the royalty, or $2.50 on each of 40,497 tents (the number which, as a fact, it found had been made), amounting to the sum of $101,242.50.

From this judgment the United States appealed.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States:

We do not ourselves make, as a point, the question submitted on the 26th of October, 1861, by Quartermaster Meigs to the Secretary of War; though of course the court is free to consider it as one which has occurred to others. The judgment, however, was perhaps erroneous on other grounds.

The contract gave the War Department a right to determine the contract. The department did determine it when Secretary Cameron indorsed on the note of Quartermaster Meigs that "no further payments will be made to Major W. W. Burns on account of royalty on the Sibley tent." Stoppage of payment was the most effective form of notice to Burns. It was, perhaps, previously (on the 1st January, 1859), determined by the efflux of the time for which it was to run; Sibley not having notified to the government a con-

* 12 Stat. at Large, 767. † 10 Id. 612.

trary wish on his part. The *contract* being determined, if not on the 1st January, 1859, certainly on the 26th December, 1861, no suit lies in the Court of Claims. The government may have acted tortiously in making tents under the patent when it had no right by contract to do so. But for relief against such action, Congress is the body to address.

Sibley assigned to Burns no interest in the patent by the agreement of April 15th, 1858. The assignment was made after Sibley's contract with the United States. It could give Burns no right as against the United States; or anything but a right to call Sibley to account with him for moneys which Sibley might receive under the contract. Burns's right was thus but an equitable right, on which no suit lies in the Court of Claims.*

By Sibley's becoming a rebel, perhaps his whole right under the patent became forfeit. If not, certainly by being a public enemy his partnership with Burns was dissolved, and his own right under the patent suspended. What rights then has Burns, who was no party to the contract, and who claims but under Sibley?

Messrs. Carpenter, Hughes, Denver, and Peck, contra

Mr. Justice FIELD delivered the opinion of the court.

Upon the facts found by the Court of Claims, we are of opinion that the contract entered into on behalf of the United States with Major Sibley, by which the government was authorized to make and procure as many of the Sibley tents as it might require, by paying the sum of five dollars for each tent, was a valid contract, and not within the prohibitions of the army regulation, number 1002. That regulation does not apply to contracts on behalf of the United States, which require for their validity the approval of the Secretary of War. Though contracts of that character are usually negotiated by subordinate officers or agents of the government, they are in fact and in law the acts of the secretary,

* Bonner *v.* United States, 9 Wallace, 156.

whose sanction is essential to bind the United States. The secretary, though the head of the War Department, is not in the military service in the sense of the regulation, but, on the contrary, is a civil officer with civil duties to perform, as much so as the head of any other of the executive departments.

It would be carrying the regulation to an absurd extent to hold it was intended to preclude the War Department from availing itself, by purchase or any other contract, of any property which an officer in the military service might acquire, if its possession or use were deemed important to the government. If an officer in the military service, not specially employed to make experiments with a view to suggest improvements, devises a new and valuable improvement in arms, tents, or any other kind of war material, he is entitled to the benefit of it, and to letters-patent for the improvement from the United States, equally with any other citizen not engaged in such service; and the government cannot, after the patent is issued, make use of the improvement any more than a private individual, without license of the inventor or making compensation to him.

In the present case there is no question of the right of Sibley to the improved conical tent. He received a patent for the improvement in April, 1856, and, by the contract with him, the United States recognized his right to it, and to compensation for its use.

The contract was nothing more, in fact, than a license from him to the government to manufacture or procure the tent, and use it, upon payment of a stipulated sum. By its terms the license extended until the 1st of January, 1859, and longer unless the United States were notified to the contrary. The power of determining this license thus remained with the patentee after that period, but the United States could also at any time have determined their liability by ceasing to make the tents. It does not appear that either party ever desired the termination of the license. Neither Sibley, nor Burns, who had become, as hereafter stated, equally interested with Sibley in the contract, ever expressed

any intention to withdraw the license; and the United States continued to make and use the tents until the whole number were obtained, for which the present claim is asserted. The order of the secretary in December, 1861, declaring that no further payments should be made to Burns on account of the royalty on the tent, was not intended, in our judgment, either as a repudiation of the liability of the United States to him for the tents previously procured, amounting to over thirty-eight thousand, or of their liability to him for any tents that might be subsequently made, but only to leave the rights of Burns, connected as they were with a patent issued to one who had resigned his commission in the National army and entered the Confederate service, to be determined by the proper judicial tribunals. If the secretary had intended to terminate the contract something more would have been required on his part, whilst the United States continued to manufacture and use the tents, than a mere direction to withhold the payments stipulated for such manufacture and use.

Burns, as we have said, had become equally interested with Sibley in the contract with the United States. In April, 1858, Sibley had executed to him an assignment of "the one-half interest in all the benefits and net profits arising from and belonging to the invention," from and after the 22d of February, 1856, a period anterior to the issue of the patent. Whether this assignment be held to have transferred a legal title to one-half of the patent itself is not, in our judgment, important. It passed a half interest in the contract of Sibley with the government, and the right to a moiety of the royalty stipulated by that contract.

The War Department recognized this half interest of Burns, and, until the order of the secretary in December, 1861, paid a moiety of the royalty to him. It thus severed his claim under the contract from that of Sibley. But independent of this fact the rights of Burns in the contract and the compensation stipulated could not be forfeited nor impaired by the disloyalty of his associate. He was true in his allegiance to the government and served in the army of the Union. His claim could, therefore, be presented and con-

sidered in the Court of Claims by the act of March 3d, 1863. His associate, Sibley, is at the same time barred by that act of any action there, either joint or several, by reason of his disloyalty. The act does thus, in fact, sever their claims, allowing the claim of one to be prosecuted and barring that of the other. The technical rule of pleading in an action in a common law court, by which a contract with two must be prosecuted in their joint names, if both are living, has no application to a case thus situated. And the Court of Claims, in deciding upon the rights of claimants, is not bound by any special rules of pleading.

We see no error in the ruling of that court, and therefore its judgment is

AFFIRMED.

HOLLADAY *v.* KENNARD.

1. During the late civil war the defendant was proprietor of a stage and express line upon the overland route to California. The stage was attacked by Indians and robbed of its contents, amongst which was a safe containing money of the plaintiff below. The judge charged the jury, in determining what was the duty of the express agent at that time, to inquire what a cool, self-possessed, prudent, careful man would have done with his own property under the same circumstanues; that it was the defendant's duty to provide such a man for this hazardous business. *Held*, that the charge was not erroneous; that it only required of the defendant what might be called ordinary care and diligence under the special circumstances of the case.
2. What is ordinary negligence depends on the character of the employment. Where skill and capacity are required to accomplish an undertaking, it would be negligence not to employ persons having those qualifications.
3. When goods in the hands of a common carrier are threatened to be destroyed or seized by a public enemy, he is bound to use due diligence to prevent such destruction or seizure.
4. It is not necessary that he should be guilty of fraud or collusion with the enemy, or wilful negligence, to make him liable; ordinary negligence is sufficient.

ERROR to the Circuit Court for the Southern District of New York.

This was an action of trespass on the case against one

Statement of the case.

Holladay as a common carrier, for the loss of a package of money delivered to his agent at Atchison, in Kansas, on the 2d of January, 1865, to be carried to Central City, in Colorado Territory. The defendant was the proprietor of the overland stage line, which was then engaged in the transportation of passengers and goods from Atchison to Placerville, in California, as a part of the great through mail line across the continent. The package in question was delivered to the United States Express Company in New York, which forwarded it to Atchison and there delivered it to the defendant's agent. It was placed in a safe made of leather and iron, and carried in the stage in charge of an express agent in the defendant's employ. At the time of the loss there were no persons in the stage but this express agent and the driver. The loss occurred by the stage being robbed by hostile Indians at Julesburg, on the morning of the 7th of January.

The civil war at this period was still pending, and the Sioux, Cheyennes, and Arapahoes were hostile to the United States, and were constantly committing outrages against persons and property whilst crossing the plains between Missouri and California. It required much courage, coolness, and vigilance to carry on the business of transportation by the overland route.

Julesburg at that time was a station of the express line, consisting of a log house and stable, a telegraph office and warehouse, occupied by three or four persons in charge. About a mile east of Julesburg was a mud house, called Bulin's ranch. About a mile west of Julesburg was a military post, occupied by about forty United States troops, under command of Captain O'Brien, and consisting of an "adobe" building about fifty feet long, with several outbuildings, and provided with two or three pieces of light ordnance.

About two o'clock in the morning, when three or four miles east of Julesburg, the stage was fired into by the Indians. Making what speed they could the express agent and driver reached Bulin's ranch with the stage, staid there

till daylight, and then went on to Julesburg, where they changed horses. They then proceeded to the military post and informed Captain O'Brien that they had been attacked by Indians, and the express agent requested him to give them an escort to protect the stage on its further progress. The captain said he could not give them an escort, as he had but forty men on duty, and was then mounting them to go and fight the Indians, who were in sight, and told the agent to remain where he was, as it would not be safe for him to go up the road. He then went with his command to engage the Indians, who, he said, were about fifteen hundred in number. After the troops had left the post the express agent changed the mail there and then returned to Julesburg and had the horses put into the stable. They had not been put out more than fifteen minutes when the Indians were observed coming towards the station following the troops, fourteen of whom had been killed. There being no time to hitch the horses to the stage, the driver and express agent mounted each a horse and followed the soldiers back to the military post. The Indians stopped at the station, robbed the stage, and broke open the safe and rifled it of its contents. The troops soon brought their howitzers to bear on the savages and compelled them to retire to the hills.

Upon this evidence the court instructed the jury that the attack of the Indians was that of a public enemy, and that defendant was exonerated from the ordinary responsibility of a common carrier, and was not liable for the loss of the money unless his agents were guilty of some carelessness, negligence, or want of vigilance or attention, which contributed to the loss. The plaintiff below contended that they were guilty of carelessness and negligence, *first*, in leaving the military post after being charged by Captain O'Brien to remain there; *secondly*, in unhitching and putting out the horses, on going back to Julesburg. These points were left, and as this court said "very properly left," to the jury as questions of fact. But in giving the jury instructions on this subject the presiding judge told them:

"In determining what was the duty of the express agent at

that time, I can lay down no better rule for your guidance than this: What, in your judgment, would a cool, self-possessed, prudent, careful man have done with his own property under the same circumstances? . . . Such a man it was the duty of Mr. Holladay to provide for this very hazardous business. It was his duty to provide a cool, self-possessed man, a cautious, prudent man; a man of good judgment and forethought."

Adverting also to the fact that the evidence showed, that if the express agent had taken the advice of Captain O'Brien the stage would not have been robbed, the court added:

"*But the result is not the criterion by which you are to judge.*"

The defendant's counsel, notwithstanding the language above quoted in italics, regarding the instruction previously given as contrary to law, and as exacting too much from the defendant, at the trial requested the judge to charge,

First. That the capture of the package by the Indians threw on the plaintiff the burden of proving fraud or collusion of the carrier with the captors.

Secondly. That if the jury believed that the express agent exercised his best judgment at Julesburg, the defendant could not be charged with negligence.

Thirdly. That wilful negligence is required to charge a carrier who has lost property by the act of the public enemy.

The judge declined to charge the jury on these points otherwise than he had done in the course of his address to the jury, and verdict and judgment having gone against the defendant he brought the case here.

Mr. H. M. Ruggles, for the plaintiff in error; Messrs. W. W. McFarland and Joseph La Roque, contra.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

The effect of the charge, as delivered, was, that although a common carrier is not responsible for the destruction or loss of goods by the act of a public enemy, he is nevertheless bound to use due diligence to prevent such destruction or loss. If his negligence or want of proper attention contrib-

uted thereto he would be liable therefor. It was not necessary, in this case, that there should have been fraud or collusion with the Indians, or wilful negligence on the part of the defendant, or his agents, to render him liable. Supposing the express agent to have been a suitable person for the duty he had to perform, all that the charge exacted of him was, such care and attention as he naturally would have taken of his own goods, that is, ordinary care and attention.

Surely, the law requires this degree of diligence, and would make the defendant liable for the want of it, that is, for ordinary negligence. Whether such negligence was or was not proved, was fairly left to the jury?

The only point, it seems to us, on which any doubt could arise as to the entire accuracy of the charge, is, as to the degree of care and attention required of the defendant himself in the selection of the agent. The court held that it was his duty to provide for this hazardous business a cool, self-possessed, prudent man, of good judgment and forethought. Now, surely, no one would think of employing a man wanting in any one of these qualifications to carry his own goods across the Plains at that time. Ordinary prudence would dictate that such a man was essential for that hazardous service. Here, again, the charge really requires of the defendant to do nothing more than, as a prudent man, he would do in the transaction of his own business; in other words, it only exacts ordinary diligence and attention at his hands. Ordinary diligence, like most other human qualifications or characteristics, is a relative term, to be judged of by the nature of the subject to which it is directed. It would not be any want of ordinary care or diligence to intrust the shoeing of a horse to a common blacksmith, but it would be gross negligence to intrust to such a person the cleaning or repair of a watch. A man who would be perfectly competent to perform the duties of an express messenger now, on the Union Pacific Railroad, with a commodious express car at his service, might have been a very unfit and incompetent agent in 1865, when nothing but a mail-coach traversed the prairie, and roving bands of hostile Indians infested the route.

Now, whether the agent in charge of the line, on this occasion, was such a man as should have been employed could only be judged of by what he did, or what he neglected to do; and it was fairly left to the jury to say whether his conduct was such as a proper and competent man would have pursued; or whether it was wanting in that respect; and the court took the pains to warn the jury that the result is not always a true criterion whether a man pursued a prudent course or not. They must judge fairly in reference to all the circumstances.

We do not mean to be understood as laying down any different rule from that which was laid down by this court in the late case of *Railroad Company* v. *Reeves*,* namely, that ordinary diligence is all that is required of the carrier to avoid or remedy the effects of an overpowering cause. We think that when this case, with all its circumstances, is fairly considered, this was all that the judge who tried the cause exacted of the defendant, and that the question of negligence was fairly left to the jury.

JUDGMENT AFFIRMED.

GERMAIN *v.* MASON.

1. Though several defendants may be affected by a judgment or decree, there may be such a separate judgment or decree against one of them that he can appeal or bring a writ of error without joining the other defendants.
2. A judgment *in personam* against one defendant for a sum of money, which at the same time establishes the debt as a paramount lien on real estate as to other defendants, may be brought to this court by the party against whom the personal judgment is rendered, without joining the others.

MOTION by *Mr. Nathaniel Wilson* to dismiss a writ of error to the Supreme Court of Montana Territory; the case as it seemed, from a not very clear record, being thus:

J. Mason and L. B. Duke brought suit in the court below

* 10 Wallace, 176.

against Jules Germain to recover a balance due for work and materials furnished in building a house, and to enforce a mechanic's lien against the house and the lot on which it was built for the debt. One C. L. Dahler, A. J. Davis, and eighteen other persons, who the petition stated "had or claimed to have some interest, claim, or lien on the incumbered premises," were made defendants, but the petition alleged that their interest, claim, or lien, if any, had accrued subsequently to that of the plaintiffs; and it prayed "for judgment *against the said Jules Germain in the sum of* $6651," and that it be adjudged that the defendants, C. L. Dahler, A. J. Davis, and the eighteen others named, and all persons claiming under them subsequently to the commencement of the action, be barred and foreclosed of all right, claim, lien, &c., in, on, or to the incumbered premises, "and that the premises be decreed to be sold," &c. The court decided that the lien of the plaintiffs was paramount to that of all other persons, and gave judgment against Germain *in personam* for the debt, with an order that if it could not otherwise be made out of him, the real estate on which the lien was claimed should be sold, and out of the proceeds of the sale the debt of the plaintiffs should be first paid. To this judgment Germain alone sued out a writ of error. The writ purported to be taken—

"Because in the records and proceedings, as also in the rendition of the judgment of a plea between J. Mason and L. B. Duke, plaintiffs, and Jules Germain *et al.*, *defendants*, a manifest error hath happened, to the great damage *of the said Jules Germain, one of said defendants* as aforesaid, as by *his* complaint appears."

The bond recited that "Jules Germain, *one* of the defendants in the above cause, had prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment," and the obligors undertook "on the part of *the appellant*" that *he* would pay the costs, &c.

Mr. Wilson, in support of his motion, argued that as the writ of error described the defendant in the original suit as Jules

Opinion of the court.

Germain *et al.*, the case fell within the ruling in *Deneale* v. *Stump's Executors*,* and similar subsequent cases, and that the writ should be dismissed.

Mr. M. Blair, *contra:* The money judgment is against Germain alone. He singly can appeal.

Mr. Justice MILLER delivered the opinion of the court.

The cases relied on for the dismissal of the writ are all reviewed in *Mussina* v. *Cavazos*,† and it is there said that they rest upon the principle that all the parties to the original judgment must, when it is a *joint* judgment, be brought before this court, and that this is not done by a writ which does not give their names.

In the case before us the writ is sued out by Germain alone, who is the only party mentioned as damaged by the alleged error of the court, and who alone gives the appeal bond. If, therefore, Germain can bring the writ without joining other parties as plaintiffs in error, the writ is not defective.

We have examined the record—a very confused one—but from it we gather enough to satisfy us that the judgment of which Germain complains is such a separate judgment against him as authorizes him to ask a review of it here without joining his co-defendants in the court below, who have not thought proper to disturb the judgment.‡

The lien creditors, co-defendants with Germain, have not sought to reverse the judgment; but Germain, who has a separate, distinct, personal judgment against him for money, in which the other defendants have no interest, has a right, we think, to prosecute a writ of error in his own name without joining them.

MOTION OVERRULED.

* 8 Peters, 526.

† 6 Wallace, 355.

‡ Masterson *v.* Herndon, 10 Wallace, 416.

HANNIBAL RAILROAD *v.* SWIFT.

1. The obligations and liabilities of a common carrier are not dependent upon contract, though they may be modified and limited by contract; they are imposed by the law, from the public nature of his employment.
2. If a common carrier of passengers and of goods and merchandise have reasonable ground for refusing to receive and carry persons applying for passage, and their baggage and other property, he is bound to insist at the time upon such ground if desirous of avoiding responsibility. If not thus insisting he receives the passengers and their baggage and other property, his liability is the same as though no ground for refusal existed.
3. The liability of a common carrier of goods and merchandise attaches when the property passes, with his assent, into his possession, and is not affected by the carriage in which it is transported, or the fact that the carriage is loaded by the owner. The common carrier is an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety.
4. It is not a ground for limiting the responsibility of a common carrier, where no interference is attempted with his control of the property carried, that the owner of the property accompanies it and keeps watch for its safety.
5. Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of a passenger other than his baggage, in relation to which no fraud or concealment is practiced or attempted upon its employees, it assumes with reference to the property the liability of a common carrier of merchandise.
6. Surgical instruments, in the case of a surgeon in the army travelling with troops, constitute part of his baggage.

ERROR to the Circuit Court for the District of Missouri.

Swift, a surgeon in the army of the United States, brought a suit in the court below against the Hannibal and St. Joseph Railroad Company, to recover the value of certain baggage and personal property, owned by him, and lost when in a course of transportation on the said road.

The case, which was agreed on by the parties, and tried by the court without a jury, was thus:

The plaintiff had been stationed as a surgeon in the army, with his wife and family, previous to the rebellion, at Fort Randall, Dacotah Territory. A part of the garrison, with the plaintiff, having been ordered to report for duty at Cincinnati,

Statement of the case.

arrived in December, 1861, at St. Joseph, Missouri, where they were to take the cars of the railroad of the company now sued, for Hannibal, on the Mississippi River, the eastern end of the road. The plaintiff was accompanied by his wife and family, and they carried with them their wearing apparel, some household outfit, and other property.

On their arrival at St. Joseph, the commanding officer gave notice to the railroad company that he required transportation for the troops, their baggage, camp equipments, arms, munitions, and the chattels of himself, as well as those of the plaintiff, from St. Joseph to Hannibal. At that time nearly all that portion of the State of Missouri through which the railroad ran, was in a state of rebellion against the United States. For some months previously, armed bands of rebels had committed frequent depredations on the railroad by firing into trains, burning bridges, trains of cars, and station-houses, destroying culverts, and tearing up the track. The railroad agents at St. Joseph communicated these facts to the commanding officer of the troops, and so did the officer who was then in command of United States troops at St. Joseph. On account of the great danger to the command along the line of the road from these bands, the officers of the road refused to make any contract for the transportation of the command over the road, and none was made or signed until after the command had arrived at Hannibal, at which place the amount of compensation for transportation was agreed upon.

On demand of the commanding officer the railroad company furnished transportation for the troops, their baggage, camp equipments, arms, munitions of war, and the chattels of himself as well as those of the plaintiff. Out of several cars standing in the yard of the railroad company at St. Joseph, the commanding officer selected the car in which the baggage belonging to the officers and men of the command, its camp equipage, arms, and munitions, also the property of the plaintiff, for which this action was brought, were loaded. In the said car 9000 cartridges were placed. The car was well built and in a secure condition; and the plaintiff was

aware that his property was placed in that car. The commanding officer, as is customary where troops are moving by public conveyance from one point to another, detailed some men from his command to guard that car, while another portion packed and loaded it with the property mentioned. The soldiers carried their arms in their hands for use in case of an attack from the enemy. None of the railroad company's officers, agents, or servants had anything to do with selecting, packing, or loading the car selected, but after the same was completed, and the car locked up by the commanding officer, the agents of the railroad company placed the car in the train next to the tender of the engine that moved the car, and the train upon which the command were transported from St. Joseph to Hannibal. The train in which the car was placed was a regular passenger train of the railroad company, and was well manned and equipped. It had a baggage car attached to it and a baggage-master in charge of the car, whose duty it was to receive and take charge of all baggage of passengers transported on said train, and who did take charge of all baggage of passengers on the train that was offered him, checks being given therefor. There was ample room in the baggage car for the plaintiff's baggage, and the baggage car and its contents were not burned or destroyed. The car containing the property sued for was the only one burnt, and no part of the train was attacked or molested by armed rebels or otherwise as known. The plaintiff did not place the property sued for in charge of the baggage-master or other agent or servant of the defendant, except as above stated, nor was the same ever received by the defendant, except as thus stated, that is, by taking possession of the car and placing it in the train. It did not appear, from anything in the agreed case, that the control and management of the car or of the train by the agents and servants of the defendant were subsequently interfered with by the commanding officer, or the plaintiff, or any of the troops.

The car in which the property was loaded as above mentioned, whilst on the way from St. Joseph to Hannibal,

from some cause unknown, and, so far as known, without any fault of the agents, or servants of the railroad company, except as disclosed above, took fire and, with most of its contents, was consumed. After the discovery of the fire most of the contents of the car could have been saved, but from fear of injury by explosion of the cartridges known to be therein.

A surgeon in the United States Army is entitled by army regulations to 800 pounds of baggage.

The court held that the plaintiff was entitled to recover, and the case went to a referee under the stipulation of the parties to ascertain the damages sustained.

The property lost, for which the action was brought, consisted of the wearing apparel of plaintiff and family; table furniture, including silverware to the value of $204.50; three buffalo robes, two deer robes, hair mattresses and pillows, writing-desks, tables, engravings, pictures, and statuary, and numerous articles of a household outfit; besides jewelry to the value of $787.50; a set of surgical instruments of the value of $350, and an unpublished manuscript on veterinary surgery. The property weighed twenty-seven hundred pounds.

The value of the jewelry, as above stated, and $1000 as the value of the manuscript, were allowed by the referee in assessing the damages. He also allowed interest on the damages from the time of the loss to the filing of his report.

The Circuit Court, however, on exception, disallowed the value of the jewelry and the manuscript, as well as the interest given by the referee, allowing interest on the principal sum only from commencement of the suit.

The following exceptions of the defendant to the referee's report were overruled by the court: (1) To the allowance of the value of more than 800 pounds of baggage. (2) To the allowance of the value of the silverware. (3) To the allowance of the value of plaintiff's surgical instruments.

The court sustained the assessment for the sum of $3129.60, for which judgment was entered in favor of the plaintiff, and the railroad company brought the case here.

Mr. James Carr, for the plaintiff in error:

The goods were never delivered to the railroad company. It had expressly refused to receive them. The car in which they were shipped was selected by the officer in command of the troops; it was guarded, loaded, and packed by them, and then locked by the officer. They were in the *exclusive* custody and control of the officer and men. He and his men were the agents of the plaintiff for this particular purpose. They continued in this exclusive custody and control from the time that the goods were loaded, until the car in which they were, with its contents, was burnt. It was the only car in the train that was burnt. If the plaintiff desired to hold the company responsible as a common carrier why did he not deliver his goods to its servants, and let them select the car and pack and load to suit themselves? The company ought not to be held responsible for the unskilful or negligent loading and packing of the agents of the plaintiff.

But if it be held that there was a delivery to the company, then the delivery was obtained by compulsion, and is not binding.

The plaintiff was guilty of negligence in having his goods loaded in the car with the nine thousand musket cartridges; things of a highly combustible nature, and liable to ignite by the friction occasioned by the oscillation of the train. He voluntarily had his goods placed in that car. He had the privilege of putting them in the baggage car in charge of the baggage-master. He did not do so. The baggage car was not burnt or anything in it injured. *Volenti non fit injuria.*

The army regulations entitled the plaintiff to transportation for only eight hundred pounds of baggage; whereas the fact is, that he had two thousand seven hundred pounds of things, which he was having transported at the expense of the government, and at government rates, and under the ægis of the government. Nor was what he had baggage. Silverware is not baggage;* nor samples of merchandise;†

* Bell *v.* Drew, 4 E. D. Smith, 59.

† Hawkins *v.* Hoffman, 6 Hill, 586; Chicago, &c., Railroad Co. *v.* Marcus, 88 Illinois, 219.

nor a trunk of merchandise;* nor bank notes in a travelling trunk.†

Mr. J. Hubley Ashton, contra:

The case shows that on the demand of the officer in command of the troops, the defendant *furnished* transportation for them, as well as the plaintiff, and the public and private property which they brought; that the car in which this property was stored was placed *by the agents of the company* in the train on which the command was carried; and that, on the arrival of the troops at Hannibal, the compensation, payable for transporting the troops and the property, was fixed by agreement between the proper officer and the company, and the amount afterwards received by the defendant from the United States. The payment made by the government was thus for *one entire service*, just as if the amount had been agreed upon and paid before the troops started, and the company had then furnished cars to convey them and their baggage and the public property in their charge. The compensation received was none the less because it was adjusted afterwards.

The only reason why no contract was made before the train started was, that the company did not desire to be responsible for any loss happening through rebel violence. At that early day of the rebellion it was doubtless supposed that such loss would not be within the exception of the act of the public enemy.

No express stipulation was made, however, before the train went off, discharging the company from *any* of the duties annexed to its employment.

Now, in view of these facts, it is vain to say that this property was never delivered to the defendant, and that it refused to receive the goods.

The arrangement in regard to the baggage was made by the proper officer with the company. That this arrangement

* Pardee *v.* Drew, 25 Wendell, 459; Collins *v.* Boston & M. Railroad Co., 10 Cushing, 506.

† Orange County Bank *v.* Brown, 9 Wendell, 86.

contemplated a separate car for all the property with the command, and not the ordinary conveyance in the regular baggage car, as in the case of a private passenger, cannot affect the carrier's responsibility. Nor can it matter that the officer selected the car. The car was the defendant's. It must be equally unimportant that the soldiers loaded the car, and not the servants of the company, so far as the question of the delivery of the goods to it for carriage is concerned. A company will not be exonerated, because the owner of the goods furnishes his own car, and assumes the loading and unloading, and furnishes a brakeman to accompany the car. This is expressly decided in *Mallory* v. *Tioga Railroad.** Nor will it be if the goods are placed in a crate belonging to an express company, and placed in charge of the carrier.† Nor where a warehouseman, having goods to send by rail, applied to the company, who ran a car upon a side track to the warehouse.‡ Nor if the owner accompanies the goods to look after them.§ Nor where a passenger on a boat takes charge of his property after it is placed on the boat.‖ If the carrier receive an article for carriage, though not bound to receive it at the time or place, or in the condition in which offered, he is responsible.¶

No question of negligence, in the matter of loading the car, can arise here, as the agreed case expressly finds that the car took fire "from some cause unknown." It cannot be inferred here and now that it was fired by the explosion of the cartridges, or by a spark from the engine. The latter is, however, the most probable theory, as the *defendant's* agents placed the car next to the tender of the engine, the unsafest place of all for it in the train.

On the question of damages. As to the weight of baggage. The defendant received from the government the agreed

* 39 Barbour, 488.

† New Jersey Navigation Co. *v.* Merchants' Bank, 6 Howard, 344.

‡ Illinois Central Railroad *v.* Smyser, 38 Illinois, 361; Merritt *v.* Old Colony Railway, 11 Allen, 80.

§ Robinson *v.* Dunmore, 2 Bosanquet & Puller, 416.

‖ Fisher *v.* Clisbee, 12 Illinois, 344.

¶ Pickford *v.* Grand Junction Railway, 12 Meeson & Welsby, 766.

compensation for its carriage along with the rest of the property. Presumably, the *proper* fare and freight for persons and property accompanying the command were agreed upon; and the company received all it was entitled to for the service. It is not found that it claimed any greater compensation than it got. If the government paid for more baggage than the officer was entitled to carry, under regulations, in the quartermaster's wagons, that was its affair.

The company furnished transportation for all the property with the command, and incurred the carrier's responsibility for all. If some of the property was not strictly baggage, the acceptance of it for carriage renders the company liable for it.*

The term *baggage*, is necessarily a *relative* term, and must be defined by the facts and circumstances of each case; including the object and length of the journey, and the habits and condition in life of the passenger. It is a question for the jury, rather than the court.† Thus a proper sum of money for travelling expenses, contained in a trunk, is to be considered part of the passenger's personal baggage; and the amount must be determined by the whole journey, and include accidents, sickness, and sojourns by the way. So manuscript books, the property of a student, and the papers and books of a lawyer, in travelling on business.‡ A valuable diamond breastpin, a gold breastpin, and a miniature set with gold, have been included in a lady's baggage.§ So a *watch in a trunk.*‖

The only objection that can be made to the allowance of the little silverware is, that it is not found that it was necessary for plaintiff's family. But this court will presume that all

* Minter *v.* Pacific Railroad, 41 Missouri, 507; Glasco *v.* New York Central Railroad, 36 Barbour, 561; Cahill *v.* London and N. W. Railway, 13 C. B. (N. S.), 818, Exchequer Chamber; Butler *v.* Hudson River Railroad, 3 E. D. Smith, 571.

† 1 Smith's Leading Cases, 6th American edition, 382; Merrill *v.* Grinnell, 30 New York, 609; Woods *v.* Devin, 13 Illinois, 746; Parmelee *v.* Fischer, 22 Illinois, 212.

‡ Hopkins *v.* Westcott, 6 Blatchford Circuit Court, 64.

§ McGill *v.* Rowand, 3 Barr, 452. ‖ Jones *v.* Voorhees, 10 Ohio, 145.

matter of fact was found that may be necessary to support the judgment. Besides, the finding is that it was household outfit. And in the case of an officer travelling with his family from one post to another, it would be included in the term "baggage."

As for the surgical instruments, it has been held that these, in the case of a medical man, are baggage.*

Mr. Justice FIELD delivered the opinion of the court.

Two questions are presented by the record for our determination: 1st, whether upon the facts stated in the agreed case the railroad company was liable as a common carrier for the safe conveyance of the baggage and other property of the plaintiff; and, 2d, whether there was any error in the assessment of damages as allowed by the Circuit Court.

The railroad company was chartered by the legislature of Missouri in 1847, and for many years its railroad between the city of Hannibal, on the Mississippi River, and the city of Saint Joseph, on the Missouri River, has been constructed and in operation. Between those places the company was, in 1861, a common carrier, over its road, of passengers and their baggage, and of goods and merchandise. As such carrier, its duties and liabilities were plain; as a carrier of passengers it was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage, and their baggage, and as a carrier of goods, to take all other property offered for transportation, and was responsible for the safe conveyance of the baggage and other property to the point for which they were destined, or the termination of the road, unless prevented by inevitable accident or the public enemy. Its obligations and liabilities in these respects were not dependent upon the contract of the parties, though they might have been modified and limited by such contract. They were imposed upon it by the law, from the public nature of its employment, independent of any contract.

If at any time reasonable ground existed for refusing to

* Giles v. Fauntleroy, 13 Maryland, 129.

receive and carry passengers applying for transportation, and their baggage and other property, the company was bound to insist upon such ground if desirous of avoiding responsibility. If not thus insisting, it received the passengers and their baggage and other property, its liability was the same as though no ground for refusal had ever existed.

It does not appear from the agreed case that the company refused to transport over its road the troops of the United States, and the plaintiff and his family who accompanied them, when they arrived, in December, 1861, at Saint Joseph, or their baggage. camp equipments, arms, munitions, and other property, but only that it refused to enter into any special contract for the transportation, on account of the danger to the troops from the insurrectionary condition of the country through which the road ran, and the frequent depredations committed by armed bands of rebels upon the railroad, and its track, bridges, depots, and station-houses.

It was usual at the time, and during the entire war, for railroad companies to transport troops of the United States, with their baggage, at a less rate per head, and their equipments, arms, and munitions at a less rate per pound, than the prices paid by ordinary passengers for similar services, and it was undoubtedly the desire of the commanding officer in this case to have a special contract as to the amount of compensation to be paid for the transportation. As we read the agreed statement it was only a contract of this kind, fixing the rate of compensation, which was refused.

Whether the reasons assigned would also have justified a refusal to transport the troops and the plaintiff, with his family, and their baggage and other property, it is unnecessary to determine. It is enough to fasten a liability upon the company that it did not insist upon these reasons and withhold the transportation, but, on the contrary, undertook the carriage of men and property without being subjected to any compulsion or coercion in the matter.

The liability of the company was in no respect affected by the fact that the baggage, camp equipments, arms, and munitions of the troops, and the property of the plaintiff were

placed in a separate car, selected by the commanding officer out of several cars standing in the yard of the company, and not in its regular baggage car, or by the fact that the car was loaded by some of the soldiers detailed for that purpose, and not by the servants of the defendant. The car selected belonged to the company, and, after it was loaded and locked by the commanding officer, the agents and employees of the company took charge of it and placed it in the regular train, which transported the troops and the plaintiff and his family, next to the tender of the engine. The liability of the company attached when it thus took possession of the property. No objection was made at the time to the selection of a separate car for the baggage and other property of the troops and the plaintiff, or to the kind of property offered for transportation, or to the manner in which the property was packed, or to the locking up of the car by the commanding officer. If objection existed on any of these grounds, or on any other ground not concealed but open to the observation of the company, it should have been stated before the property was received. The company might then have insisted, as a condition of its undertaking the transportation, upon the selection of a different car, or upon superintending its loading, or upon the possession of its key, or upon all of these things. Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier.

The case of *Mallory* v. *The Tioga Railroad Company*,* is much stronger than this. There the company only agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, he to load and unload the cars and to furnish brakemen, to be under the control of the conductor of the train, to accompany them, yet the company was held liable, as a common carrier, for injuries to the cars and the property of the plaintiff not caused by inevitable accident or the public enemy. The court did not consider

* 39 Barbour, 488.

the fact that the property was transported in the cars of the plaintiff, and that the cars were loaded and unloaded by him, affected, in any respect, the liability of the company, the entire train in which the cars were moved being, whilst on the route, under the control and management of its servants and employees.

In all such cases the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property.

It does not distinctly appear, from the agreed case, whether any troops were detailed to guard the car which contained their property and that of the plaintiff, except while the car was being loaded. But if it were admitted that a special guard was appointed for the car on the route, the admission would not aid the company or relieve it of liability. The control and management of the car, or of the train, by the servants and employees of the company, were not impeded or interfered with; and where no such interference is attempted it can never be a ground for limiting the responsibility of the carrier that the owner of the property accompanies it and keeps a watchful lookout for its safety.

The ruling of the court upon the findings of the referee, appointed to ascertain the damages sustained by the plaintiff, does not appear to us to be open to any valid objection. A considerable portion of the property, it is true, was not personal baggage, which the company was obliged to transport under the contract to carry the person; nor does it appear that it was offered to the company as such. It embraced buffalo robes, hair mattresses, pillows, writing desks, tables, statuary, and pictures, in relation to which there could be no concealment, and it is not pretended that any was attempted. Where a railroad company receives for trans-

portation, in cars which accompany its passenger trains, property of this character, in relation to which no fraud or concealment is practiced or attempted upon its employees, it must be considered to assume, with reference to it, the liability of common carriers of merchandise. It may refuse to receive on the passenger train property other than the baggage of the passenger, for a contract to carry the person only implies an undertaking to transport such a limited quantity of articles as are ordinarily taken by travellers for their personal use and convenience; such quantity depending of course upon the station of the party, the object and length of the journey, and many other considerations. But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage.

Here two companies of artillery in the army of the United States sought transportation with their arms, equipments, and ammunition. The plaintiff, as surgeon in the army, was ordered to accompany the troops, and for him and his family and his property transportation was also sought as part of the general transportation for the whole command. On arrival at Hannibal the amount of compensation for the entire transportation, which included carriage of men and property, was agreed upon and was subsequently paid. It is to be presumed when the compensation was fixed that the company took into consideration not merely the peculiar kind of property carried by the troops, which could hardly be treated as simple baggage of travellers, but also the property besides baggage possessed by the plaintiff and his family. The value of the unpublished treatise on veterinary surgery, and of the jewelry, as estimated by the referee, was excluded in the amount allowed. The value of the surgical instruments was properly included. Instruments of that character, in the case of a surgeon in the army travelling with troops,

may properly be regarded as part of his baggage. He may be required to use these instruments at any time, and must, accordingly, have them near his person where they can be had upon a moment's notice. Whether the table silverware of the plaintiff, although of a very limited amount, can be regarded in the same manner, admits of much doubt. It does not appear that the plaintiff or his family had any occasion for this ware on the cars, or even that they carried it with any intention of using it on the route. It is not, however, necessary to charge the defendant that it should be treated as baggage. Its value may be properly included in the amount of damages, considering it only as part of the property which the company received as a common carrier of goods, and against the loss of which, from any cause but inevitable accident or the public enemy, it was, as such carrier, an insurer to the plaintiff.

We see no error in the judgment of the Circuit Court, and it is accordingly

AFFIRMED.

KEARNEY v. CASE.

1. A paper, found in the record, purporting to be a statement of facts agreed to by the parties, and filed with the clerk after the writ of error is issued, or after the case is disposed of by the Circuit Court, cannot be noticed here on writ of error though both parties consent.
2. Prior to the act of March 3d, 1865, parties to an action at law could submit the issues of fact to be tried by the court without a jury, but they were bound by the judgment of the court, and could not have a review on error of any ruling of the court on such trial.
3. To enable parties to have such a review and to enable them to make a valid agreement to waive a jury the act above-mentioned was passed, which for that purpose required the waiver to be in writing and filed with the clerk.
4. There can, under this act, be no review of the ruling of the court in such cases, unless the record shows that such an agreement was signed and filed with the clerk.
5. But the existence of such a writing may be shown in this court: 1st, by a copy of the agreement; or 2d, by a statement in the finding of facts by the court that it was executed; or 3d, by such statement in the record

entry of the judgment; or 4th, by such statement in the bill of exceptions.

6. Unless it appears that such an agreement was filed, the judgment must be affirmed, unless error appear in other parts of the record than the finding of facts and judgment of the court thereon.
7. Parties may still waive a jury as they could before the act of 1865, without filing a written stipulation, but in such case no error can be considered in the action of the court on such trial; but the judgment will be held valid unless other errors are apparent in the record.
8. Parties will be presumed in this court to have waived their right to a trial by jury of issues of fact, whenever it appears that they were present at the trial in person or by counsel, and made no demand for a jury.
9. But unless it appears that they were so present, or otherwise gave consent, it is error, for which the judgment must be reversed, to try such issues in actions at law without a jury.

ERROR to the Circuit Court for the District of Louisiana; the case being this:

The act of Congress of March 3d, 1865, after presenting in its first two sections the manner in which grand and petit jurors are to be selected and impanelled in criminal cases, proceeds in its fourth thus to enact:

"Issues of fact in civil cases in any Circuit Court of the United States, may be tried and determined by the court without the intervention of a jury, whenever the parties or attorneys of record *file a stipulation in writing with the clerk of the court waiving a jury.*"

It then goes on in the same section:

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

This statute being in force, Case, on the 13th September, 1868, as receiver of the First National Bank of New Orleans,

brought suit against Kearney on two promissory notes owned by the bank.

Without any agreement in writing filed to have the case tried under the above-quoted act of Congress, or any agreement in writing at all, so far as the transcript of the record showed, a trial was afterwards had *by the court*, which rendered judgments against the defendant on the 12th of January, 1869.

Though, as above-mentioned, no agreement to submit in writing appeared or was inferable, the record of the judgment showed that counsel were present on both sides when the trial was had. It ran thus:

"December 7th, 1868. This cause came up for trial—J. D. Rouse and Elmore and King, for plaintiff; J. G. L. Bright and Bradford, Lea, and Finney, for defendants—when, after hearing the pleadings, evidence, and argument, the court considering the same, it is ordered, adjudged, and decreed that Charles Case do recover, &c., &c."

A writ of error was applied for and obtained by the defendant, on the 28th of January, 1869, and filed on the same day; a citation being issued and served on that day.

On the *6th of November*, 1869, a paper bearing date the 19th of October, 1869, and signed by the plaintiff, and by the counsel of the defendant, was filed in the court below, which contained an agreement by them that the statement of facts set forth therein should be "the statement of facts for the writ of error returnable to the Supreme Court of the United States." There was no bill of exceptions.

On the transcript of such a record the case came here. The question now was what the court should do on such a record.

Mr. T. J. Durant, for the plaintiff in error—considering that the recorded presence of the counsel showed an agreement to waive a jury, and was tantamount or superior to a copy of an agreement in writing, filed with the clerk, such as the act of Congress of March 3d, 1865, contemplated but did not exact

Argument for the defendant in error.

as absolute condition for a trial by the court, and that a case for review was sufficiently made by the paper agreed on and signed by the two parties, and filed of record—argued the case upon its merits; arguing afterwards that if the court should be of opinion that on such a record the merits could not be gone into, then, still, and certainly, the judgment ought not to be affirmed; but ought rather to be reversed; for if the absence of an agreement to waive a jury was sufficient to prevent a review, it was equally sufficient to show that the court had acted unconstitutionally in trying without consent of parties or their counsel the issue itself.

But if not reversed it ought to be remanded for a new trial. The statement was indeed agreed on by counsel, and was not a "finding" by the court. But it fell within *Insurance Company* v. *Tweed*.* There counsel for both parties in *this* court had agreed to certain parts of the opinion of the court below, as containing the material facts of the case, and to treat them as facts found by that court though not so found. That agreement of counsel was held as good as a finding under the act of March 3d, 1865. So the statement here was filed after the judgment. But in this point it was saved by *Flanders* v. *Tweed*;† for there the statement of the judge had not been filed till three months after the judgment. But the case being (as is this one) from Louisiana, where the civil law practice prevails, and the parties having meant to put the case in form for review, and having believed that it was so put in form, the court did not affirm the judgment, but sent the case back for a new trial.

Mr. B. H. Bristow, Solicitor-General, contra:

The statement of facts was not filed until many months after the issue and filing of the writ, and cannot be regarded as part of the record, or as anything on which error can be assigned.‡ *Flanders* v. *Tweed* was a special case, and almost in terms declared not to be a precedent. And the statement there was the judge's.

* 7 Wallace, 44. † 9 Id. 426. ‡ Avendaro *v.* Gay, 8 Wallace, 376.

Argument for the defendant in error.

Besides, in *Norris* v. *Jackson*,* this court laid down the following rules as the result of an examination by it of the fourth section of the act of 1865, in reference to cases where issues of fact are submitted to the court:

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

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

"3. That if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions, or they must present to the court their propositions of law, and require the court to rule on them.

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

Here the court found no special verdict, nor does the statement which was filed after judgment even purport to have been submitted to the court, or to set forth the facts upon which its judgment was founded. In the latter respect, more especially, is the case under consideration clearly distinguishable from *Insurance Company* v. *Tweed*, where certain parts of the opinion of the court below, which appeared in the record, having been agreed to by the parties as containing the material facts of the case, were treated here as facts found by the court.

As there is no question of law open to re-examination here, there being no bill of exceptions nor anything upon which error can be assigned, the judgment must be presumed to be right, and on that ground should be affirmed.†

In this view, it is thought unimportant to argue merits.

* 9 Wallace, 125.

† James *v.* Bank, 7 Wallace, 692.

Opinion of the court.

Mr. Justice MILLER delivered the opinion of the court.

No question arises on the process or pleadings; there is no bill of exceptions, and the plaintiff in error relies on what purports to be a statement of facts in the case to show the error of which he complains. That statement is signed by the defendant in error and by the counsel for the plaintiff; and does not profess to be facts found by the judge. The writ of error had been sued out nine months before this paper was signed and filed with the clerk.

It needs no argument to show that this court cannot look into such a paper as part of the record, nor make it the foundation of revising the judgment, though both parties consent to it. The case here must be tried on the rulings of the court below on what was before it, and this must appear by the record; and if the facts are to be considered they must appear by bill of exceptions, or by an agreed statement submitted to the court for its judgment, or by the finding of the court under the statute. It cannot be permitted for the parties, by consent to make up a case for this court after it has passed from the control of the court below. The case of *Insurance Company* v. *Tweed* is not a parallel case. There the statement, such as it was, was made by the judge, and on it he founded his judgment. It was made and filed at the time the judgment was rendered, and, although defective in many respects, there was sufficient in it to present the legal propositions, if the confused character of the paper was waived. This the counsel here desired to do, and the court permitted. We are all of opinion, therefore, that the paper called a statement of facts must be disregarded.

But what judgment must follow? If the transcript of the record contained the written agreement of the parties submitting the case to the court, as provided by the act of March 3d, 1865, we should have no difficulty in affirming the judgment. But not only is there no such paper found, but there is no statement anywhere in the record that the parties did agree, either in writing or otherwise, to submit the case to the court.

Opinion of the court.

The Judiciary Act of 1789, § 12, declares that the trial of issues in fact in the Circuit Courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury. This provision and that found in the seventh amendment of the Constitution, adopted after the Judiciary Act, namely, "that in suits at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," constituted the only legislative rule for the Federal courts, except in Louisiana, until the act of 1865. Undoubtedly both the Judiciary Act and the amendment to the Constitution secured the *right* to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid.* Notwithstanding, however, the number of cases in which the waiver of this right is mentioned, and either expressly or tacitly held to be no objection to the judgment, it is remarkable that so little is said as to the mode in which this waiver shall be made to appear. In most of the cases it is somewhere in the record stated affirmatively that the parties did waive a jury, or did consent to the trial by the court without a jury. In the case of *Bank of Columbia* v. *Okely*,† the court held that there was an implied waiver of this right when the defendant made his note negotiable at the Bank of Columbia, there being in the charter of that bank a provision authorizing the collection of such debts by a summary proceeding, which did not admit of a jury trial. In *Hiriart* v. *Ballon*,‡ where a summary judgment was rendered against a surety in an appeal bond, it was held that the defendant, by be-

* Bank of Columbia *v.* Okely, 4 Wheaton, 235; Hiriart *v.* Ballon, 9 Peters, 156; Parsons *v.* Armor, 3 Id. 425; United States *v.* Rathbone, 2 Paine, 578; Guild v. Frontin, 18 Howard, 135; Suydam *v.* Williamson, 20 Id. 427; Kelsey *v.* Forsyth, 21 Id. 85; Campbell *v.* Boyreau, 21 Id. 223; Burr *v.* Des Moines Co., 1 Wallace, 102.

† 4 Wheaton, 235.

‡ 9 Peters, 156.

coming surety in a court whose rules provided for such summary judgment, had waived his right to a trial by jury. It seems, therefore, that both by express agreement in open court, and by implied consent, the right to a jury trial could be waived.* But as was shown in the recent case of *Flanders* v. *Tweed*,† this court had held that no review of the decision of the court below could be had of any ruling at the trial where the parties had consented to accept the court, instead of a jury to decide issues of facts.

In this state of the law the act of 1865 was passed. The first two sections are devoted to prescribing the manner in which grand and petit juries shall be selected and impanelled in criminal trials. The fourth section enacts that issues of fact in civil cases, in any Circuit Court of the United States, may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record, file a stipulation in writing with *the clerk* of the court waiving a jury. It then proceeds to prescribe the mode of finding the facts, and the effect to be given to such finding, and provides for a review of the case by this court. The manner in which the record is to be prepared for this and the extent of the inquiry in this court are specifically pointed out.

The question arises on this statute whether this mode of submitting a case to the court without a jury was intended to be exclusive of all other modes, so that if there is no stipulation in writing waiving a jury, there is error, for which the judgment must be reversed. Although the language of the section might admit of that construction, it is not the only one of which it is susceptible. As stated in the case already referred to, of *Flanders* v. *Tweed*, the main purpose of the act undoubtedly was to enable the parties who were willing to waive a jury to have the case reviewed on writ of error when tried by the court alone. This was rendered necessary, as shown by Mr. Justice Nelson in the opinion in that case, by the former decisions, based on the

* See Phillips *v.* Preston, 5 Howard, 290. † 9 Wallace, 425.

idea that in such cases the court did not sit as a court of law, but as *quasi* arbitrators. To remove this difficulty, the statute provided a mode by which the parties who agreed to waive a jury should have the benefit of a writ of error to the rulings of the court on questions of law. The language of the section is that the stipulation may be *filed with the clerk of the court*, which is undoubtedly designed to enable the parties to make agreements in vacation; and it is required to be in writing, to prevent either party demanding a jury unexpectedly at the trial. In those courts where juries are called from a great distance and detained at a heavy sacrifice, the courts usually give jury trials the preference. The benefit, therefore, of an announcement by which the number of these trials is diminished, and the case placed in an attitude to be taken up at the convenience of the court and the parties is obvious. We cannot believe that Congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the Supreme Court of any question of law arising in the trial, they must first file their written stipulation, and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except. If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it. This we understand to be the effect of the opinion in *Flanders* v. *Tweed*.

But, although a written stipulation in the Circuit Court is essential to a review in this court, is the presence of the agreement or its copy in the transcript sent here indispensable? A copy of it should come up, as observed by Mr. Justice Nelson, and that is the more appropriate evidence of compliance with the statute. Still we are not prepared to say that if it shall affirmatively appear in any other part of the record proper, that such a writing was made by the

parties, that it will not be sufficient here. If, for instance, it is stated in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing, the record would show that the condition in which a review is allowed existed, and we would not feel at liberty to contradict the record in this respect. In a case where there is no evidence that it was submitted in writing under the statute, but the record shows affirmatively that the parties waived a jury, we hold such evidence of waiver to be sufficient to support the judgment, but not sufficient to authorize a review of the rulings of the court at the trial. But the record before us contains no statement that the parties agreed in writing to submit the case to the court, nor any express statement that they waived a jury at all. The language of the judgment is that

"This cause came up for trial; J. D. Rouse and Elmer and King for plaintiffs; G. L. Bright and Bradford, Lea, and Finney, for defendants; when, after hearing the pleadings, evidence, and argument, the court considering the same, it is ordered, adjudged, and decreed," &c.

Is this court at liberty to infer from the entry a waiver of the right to a jury trial? When we consider the cases already cited, in which such a waiver has been implied, and that the right to have a jury when a party demands it is so universally known and respected, we think that it is almost a necessary inference, where a party is present by counsel and goes to trial before the court without objection or exception, he has voluntarily waived his right to a jury, and must be held in this court to the legal consequences of such a waiver.* But we are not prepared to go further.

If the state of the pleadings presents issues of fact to be tried, and there is nothing to show that the party complaining of the error was present by himself or counsel at the trial, and no jury was called, we think it is error for the

* Phillips v. Preston, 5 Howard, 290.

court to try those issues without a jury, because there can be no presumption that the party has waived his legal and constitutional right to have a jury.

The record before us presents, in the light of these views, a case where the parties consented to waive a jury, but did not take the steps necessary to secure the right to a review of the findings of the court as provided by statute.

There is, therefore, no error of which we can take cognizance, and the judgment of the Circuit Court is

AFFIRMED.

MILLER *v.* LIFE INSURANCE COMPANY.

1. The rules laid down in *Norris* v. *Jackson*, 9 Wallace, 125, and in *Flanders* v. *Tweed*, Ib. 425, and in the preceding case of *Kearney* v. *Case*, *supra* 275, as to the mode of finding the facts by the court (waiving a jury), under the act of March 3d, 1865 (relative to the trial of issues of fact in civil causes), and as to the effect to be given to such finding, and the manner in which the record is to be prepared for this and the extent of the inquiry to be made in this court, again set forth in detail.
2. Under that act, when on a suit on a policy of insurance the question was whether a waiver of a payment in *cash* of the premium had or had not been made, *held* in a case where the court found on the evidence as a fact that it *had* been waived, that the correctness or incorrectness of a series of requests which were founded on an assumption that it had *not* been, were not subject to review here under the act.
3. Where an insurance company instructed its agents not to deliver policies until the whole premiums are paid, "as the same will stand charged to their account until the premiums are received," and the agent did, nevertheless, deliver a policy giving a credit to the insurer and waiving a cash payment, *held* that the company, it being a stock company, was bound.

ERROR to the Circuit Court for the District of Maryland; the suit being one by Mrs. H. Miller against the Brooklyn Life Insurance Company to recover $5000, insured by her husband, Walter Miller, for her benefit, on his own life.

The evidence proved, or tended to prove, the following case: The insurance company—a stock company, not a mutual one—being desirous of taking risks in St. Louis,

appointed Dutcher & Fasset their general agents for that place, and gave to them, as they did to all their general agents, a printed book, showing to them their powers as agents, and containing the instructions under which the company meant that they should act. The book contained these passages:

INSTRUCTIONS TO AGENTS.

Agents must not deliver policies until the whole premiums are paid, *as the same will stand charged to their accounts until the premiums are received*, or the policies returned to the office.

POWERS OF AGENTS.

Agents are not authorized to make, alter, or discharge contracts, waive forfeitures, name an extra rate for special risks, or bind the company in any way; their duties being simply to obtain applications for insurance, to collect and transmit premiums, and, generally, to be the medium of communication between the policy-holder and the company.

Agents are not authorized to write the receipt of premium, or make any indorsement whatever on the policy. The president or secretary are alone authorized to sign receipts for premiums on the part of the company. When a receipt is delivered to a policy-holder by an agent, such agent must countersign the same as an evidence of payment to him.

The said Dutcher & Fasset being thus established as the recognized general agents of the company, Walter Miller, the husband, then of St. Louis, applied, in that place, June 19th, 1868, for a contract of insurance for his wife's benefit, to Dutcher & Fasset, general agents of the insurance company in the State of Missouri. The application, a printed form in part, was headed:

BROOKLYN LIFE INSURANCE COMPANY.

Statement required from persons proposing to effect assurance in this company, and which forms the basis of the contract.

It was stated in this paper that the assured wished to pay

partly by note and partly in cash. And at the close of it these words occur:

"It is agreed by the undersigned . . . that the policy of assurance hereby applied for shall not be binding upon this company until the amount of premium as stated therein shall have been received by said company, or some authorized agent thereof, during the lifetime of the party therein assured."

At the time of the application, the deceased having ascertained from Dutcher what was the amount of the cash portion of the premium, and what the portion to be embraced in notes, said to him:

"Send the policy to me, with the notes, and call on Solomon Scott for the cash part. He has just promised me that he will pay it."

This Scott had been a partner in business and was a particular friend of Miller's.

The application was forwarded by the agents to the home office in New York, and in the course of a week the policy was received by Dutcher & Fasset. Miller in the meantime had gone to Maryland.

The policy, dated June 21st, 1868, and the premium notes for him to sign, were mailed to him, in a note dated July 2d, 1868, in which the agents said:

"You will find inclosed the yearly note and the six months' note, both of which you will please to sign and return us by mail. *The cash payment we will get of Scott when the time arrives.*"

It was stated in the policy that it was made—

"In consideration of the representations and agreement contained in the application therefor, and of the sum of $254.85 to them in hand paid, and of the annual premium of $254.85, to be paid on or before the 21st of June in each year during the continuance of this policy."

And it was provided in it, among other things, that in case the assured

"Should not pay or cause to be paid the premium as afore-

said, on or before the day herein mentioned for the payment thereof, or any note or notes which may be given to and received by said company in part payment of any premium, &c. . . . then this policy shall cease, and be null, void, and of no effect."

On the margin of the policy were these words:

"Agents are not authorized or permitted to waive, alter, or change any of the provisions of this policy."

Miller signed the notes sent to him in the letter of Dutcher & Fasset, and returned them, but said nothing about the cash premium. In their letter to Miller, inclosing the policy, Dutcher & Fasset sent a receipt in this form, partly printed, and apparently as to that part a form with which the insurance company furnished all their agents:

RECEIPT.

BROOKLYN LIFE INSURANCE COMPANY,
141 Broadway, New York.

Walter Miller—June 21st, 1868—Policy No. 4447—Life—Amount of $5000—Amount of Premium, $254.85.

NOTE.		CASH.	
One-third loan note, . .	$101 94	Two-thirds cash, . . .	$76 46
Cash note, ...	76 45	Interest on loan note, . .	7 13
	$178 39	" cash note, . .	2 67
		Total cash,	$86 26

Received payment,

DUTCHER & FASSET,
Agents.

July 1st, 1868.

N. B. Agents MUST NOT DELIVER policies until premium is received, as no policy is IN FORCE until PAID for.

Dutcher & Fasset, as the evidence went strongly to show, frequently gave credit for the cash payment in the case of persons whom they knew would pay when called on, and in this case they sent the receipt, because, as one of them testified, they had "confidence that they could get the money at any time they called for it."

As it turned out, however, Dutcher & Fasset did not get the money payment from Scott, although it was a fact that

Scott had promised to pay it, and there was no allegation anywhere of fraud.

The following correspondence now took place.

[*Dutcher & Fasset to Miller.*]

ST. LOUIS, July 23d, 1868.

WALTER MILLER, ESQ.,
Reese's Corner, Maryland.

DEAR SIR: The last of the month we make our report according to custom, and last evening, going home, I (the writer) called in the store and found our friend Scott intending to start East on Monday. I suggested to him that he should pay your cash part of premium as you suggested to me, but he would not listen to it at all; so we depend on you for it, the amount being $86.26, made up as follows:

One-half of cash premium, ...	$76 46
Interest on annual note, ...	7 13
" " six months' note, ...	2 67
	$86 26

For which amount please send me check on New York.

Truly yours,
DUTCHER & FASSET.

[*Miller to Dutcher & Fasset.*]

REESE'S CORNER, MARYLAND, August 3d, 1868.

MESSRS. DUTCHER & FASSET,
St. Louis.

GENTLEMEN: In reply to yours of the 23d, I regret that Mr. Scott did not do as he promised you. I did not solicit or ask him to pay the note. He told you that he would pay you the note. Had he not told you I should have provided for the amount long since. I have about sixty dollars on hand. Will get the $86 26 and send to Baltimore and purchase a draft on New York, and have it sent in a day or two.

Hoping that all things will be all right in a few days, I am,

Yours truly,
W. MILLER.

[*Same to Same.*]

REESE'S CORNER, MARYLAND, August 18th, 1868.

MESSRS. DUTCHER & FASSET,
St. Louis.

DEAR GENTS: I shall ship some wheat to-morrow to Messrs. Cox & Brown, Baltimore, and will direct them to send you a draft on New York for $86.26. I regret the delay, and hope it may never occur again. Shall be in St. Louis this fall. Will make arrangements to have all my notes paid at maturity.

Yours truly,
W. MILLER.

The draft, however, not coming, Dutcher & Fasset wrote again thus:

ST. LOUIS, September 10th, 1868.

W. MILLER, ESQ.,
Reese's Corner, Maryland.

DEAR SIR: Your several letters have been received; the last, under date of August 18th, in which you remark, "I shall ship wheat to-morrow to Messrs. Cox & Brown, Baltimore, and will instruct them to send you a draft on New York for $86.26."

The draft has never been sent, or it has never come to hand. Now, sir, we are fearful you will lose your policy if payment is not made soon. Give it your attention at once, if you please; and as it has been running so long, you will have to add the interest, which will be $1.34, making the amount to be remitted $87.60.

Truly yours,
DUTCHER & FASSET,
Agents.

And hearing that he was "quite sick," wrote thus:

ST. LOUIS, October 14th, 1868.

WALTER MILLER, ESQ.,
Reese's Corner, Maryland.

DEAR SIR: We learn from Mr. Scott that you are quite sick. As you have not paid your cash payment on your life policy in the Brooklyn, you must be aware that the policy is forfeited, and we now inclose you two notes for part payment of the pre-

mium. It has now been standing for four months beyond the time of payment.

You will please return the policy to us. The writer regrets very much to hear of your illness, and hope you may speedily recover.

Truly yours,

DUTCHER & FASSET,
General Agents.

Miller died before this last letter reached him, and the company refusing to pay, solely upon the ground that the policy had never been in force by reason of the non-payment of the premium, the widow brought this suit, as already said, in the court below, on the policy. By consent of parties the case was tried by the court without the intervention of a jury; this sort of trial being in virtue of the 4th section of an act of Congress of March 3d, 1865, which after enacting that issues of fact in civil cases may be determined by the court without a jury, whenever the parties file a stipulation in writing, &c., proceeds thus:

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

The testimony which tended to prove a case, such as above given, being closed, the record thus disclosed

THE PLAINTIFF'S PRAYER.

If the court shall find that the application for the policy was made by Miller, through the general agents of the defendant, at St. Louis; that upon said application the defendant executed said policy and sent the same to its general agents at St. Louis; that the said general agents, upon receipt by them of the policy, forwarded and delivered the same to Miller, who, in obedience

to the directions of the said general agents executed and remitted to them the premium notes provided for, and that Miller died in October, 1868, and that the defendant refused to pay the insurance money, solely upon the ground that the policy was not in force; and further shall find that neither at the time of said application for insurance, nor at the time said policy was sent to or received by said Miller, did the said general agents demand immediate payment of the cash premium, but on the contrary agreed to call upon Solomon Scott for such cash premium when to them it should seem proper so to do; and said agents waived the payment of said cash premium for several months, and treated the said policy as an executed contract, then, if the court so find, the plaintiff, by her counsel, prays the court to render its verdict and judgment for the plaintiff, even though it should further find that the said cash premium was never in fact paid.

Under this prayer of the plaintiff the court below wrote this

JUDGMENT.

The court finds all the facts stated in the above prayer, and orders judgment to be entered for the plaintiff for the sum of $5013, and costs.

The defendant had contended and so prayed the court to rule:

1st. That *if* Dutcher & Fasset never intended to waive the payment of the cash portion of the premium, and if deceased did not believe that said payment was intended to be waived, there was in law no waiver of it.

2d. *If* the deceased knew that Dutcher & Fasset had no authority to deliver the policy without payment of the cash portion of the premium, there was no waiver.

3d. *If* Dutcher & Fasset's authority was such as stated above, the defendant was not bound by their delivery of the policy without payment of the premium.

4th. That the facts, if true, as stated in the testimony in reference to the application for insurance, the correspondence between Miller and Dutcher, the sending of the policy and receipt to Miller, and the receipt of the notes by Dutcher & Fasset, showed that there was no waiver.

5th. That all the facts in reference to the subject, in evidence, if true, showed there was no waiver.

The court refused thus to rule, but found that the payment of the cash premium was waived, and gave judgment in the way already mentioned.

Mr. William Shepard Bryan, for the plaintiff in error:

First. By the contract the policy was not to be binding on the company until the premium was paid. If this condition was not intended to be waived by the agents of the company, and if the deceased did not believe it was intended to be waived, the contract was never changed. The defendant's first prayer ought to have been granted.

Second. At the delivery the deceased was informed by the memorandum, at the foot of the receipt, that the policy was not "in force until paid for." The memorandum on the policy also informed him, that the agents had no authority to waive any of its provisions. This wrongful delivery, accompanied with the notice, was no waiver. The second prayer ought to have been granted.

Third. The delivery, such as it was, was procured by the false statement that Scott would pay the premium. Such a delivery under such circumstances was naught.

All the evidence in the case shows that the plaintiff was to be considered insured when the premium was paid; and not to be considered insured if it was not paid.

Fourth. Any cases where it has been held that the insurers waived the payment of the premium, were decided on the ground that the conduct of the insurers had induced the insured to believe that it was not required.

Fifth. The prayers of the defendant presented the questions of law hypothetically to the court. Upon the hypothesis that the facts stated in the prayer were true, the court was prayed to rule that the legal propositions were correct. The court refused to adopt these legal propositions to guide it in dealing with the evidence. If they were correct they should have been adopted by the court. They were vital to the case, as the question of waiver was a mixed one of

law and fact. The question could not be determined without the aid of some legal principle establishing what facts amounted to a waiver. As the court, therefore, found a waiver, but in so doing rejected as guides to this conclusion correct legal principles which were decisive of the question, the error in law is apparent. The court's ruling was, that notwithstanding it might find every fact in defendant's prayers, a waiver existed in the case. Now if these facts, supposing them to be true, negatived a waiver, an error in law was committed by the court. And it is this ruling on the point of law which the appellate court is asked to review.

Messrs. G. C. Maund and A. Stirling, Jr., contra:

The case was tried under the act of Congress of March 3d, 1865, which put the court in the place of a jury, and the finding of the court in the place of a verdict. The question of fact was whether the agents of the company had waived a payment of the premium in cash; and the court finds, specifically, and as a fact, that they had. That finding being in the nature of a verdict cannot be reviewed. This is perfectly settled, both by the terms of the act of 1865 and by the full and satisfactory expositions of it given by Miller, J., in *Norris* v. *Jackson*,* where the rules on the subject are laid down with perfect precision and clearness,† and by Nelson, J., in *Flanders* v. *Tweed*.‡ There is nothing open, then, for discussion. The court must, by this time, treat this question as settled.§ The prayers of the insurance company are based on the contingency that if certain facts are found, in a certain way, there was no waiver; but it has been found that there was a waiver, and of course that the facts were not as hypothetically assumed. This court, under the decisions quoted, cannot review the evidence on which the finding was made. And if there was a waiver, how can the right of the plaintiff to recover be denied?

* 9 Wallace, 125. † See its rulings *supra*, p. 279. ‡ 9 Wallace, 425.

§ See *Kearney* v. *Case*, *supra*, p. 275, not adjudged when the case was argued.

It is impertinent and improper, therefore, to discuss, in this court the point whether there was a waiver, though the whole evidence, and particularly the correspondence, shows that there was; as does some of the evidence that the agents frequently waived an immediate payment of that part of the premium meant to be paid in cash; assuming the responsibility, as of course they did, themselves. The clause in the policy was intended to annul the policy after it had gone into effect, and referred not to the first cash premium, but to subsequent ones. The clause in the application of Miller is unimportant, for there is nothing in the policy to which it can attach itself. It was in direct opposition to the practice of the company, as shown by the policy, who constantly issued policies when only part of the premium was really "paid;" premium notes being taken for the balance.

The agents had power to waive; though, of course, as their instructions told them, if they delivered policies before the whole premiums were paid, the premiums would "stand charged to *their* accounts until the premiums were received;" necessarily, if the companies charged the agents with the premiums when policies were delivered without an actual payment of premiums, the companies are bound on the policies. Can it be doubted that Dutcher & Fasset are now liable to the company for the balance of the premium?

Mr. Justice CLIFFORD delivered the opinion of the court.

Issues of fact in civil cases pending in the Circuit Courts may be tried and determined by the court without the intervention of a jury, whenever the parties or their attorneys of record file a stipulation in writing with the clerk of the court waiving a jury. Such a submission necessarily implies that the facts shall be found by the court, and the act provides that the finding may be either general or special, and that it shall have the same effect as the verdict of a jury in a case where no such waiver is made. Exceptions, however, may be taken to the rulings of the court made in the progress of the trial, and if duly taken at the time the rulings were made the rulings may be reviewed here, provided the

questions are properly presented by a bill of exceptions; and when the finding is special the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment.*

On the twenty-fifth of June, 1868, the defendants insured the life of the husband of the plaintiff in the amount of five thousand dollars for the term of his natural life, "with participation of profits." Part of the premium, to wit, the sum of two hundred and fifty-four dollars and eighty-five cents was required by the rules of the company to be paid at the time the policy was delivered, and the policy recites that the plaintiff paid that sum to the defendants in hand, and the policy also states that the insured agreed to pay them a like sum on or before the twenty-first of June in each year during the continuance of the policy, and that the defendants, in consideration of those sums and of the representations and agreements contained in the application, promised and agreed to pay the plaintiff, or in case she should die before her husband, to pay the sum insured to her heirs, executors, administrators, or assigns, within sixty days after due notice and proof of the death of the person whose life is therein insured. Process was issued and served and the defendants appeared and pleaded the general issue that they never promised in manner and form as alleged in the declaration, and the issue tendered was joined by the plaintiff. Errors in pleading were waived and the parties filed a stipulation in writing that the issues of fact should be tried by the court without the intervention of a jury, and agreed that every defence admissible under any special plea should be admitted under the general issue. Evidence was introduced on both sides and the court rendered judgment for the plaintiff in the sum of five thousand and thirteen dollars and twenty-five cents, and the defendants sued out a writ of error and removed the cause into this court.

Most of the difficulty arising in the case proceeds from

* 13 Stat. at Large, 501.

the failure of the court to comply strictly with the requirements of the act of Congress, which provides that issues of fact in civil cases may be tried and determined by the court without the intervention of a jury. Where a jury is waived, as therein provided, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where an issue of fact is tried by a jury, but where the finding is general the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even though the finding is general, but the finding of the court, if general, cannot be reviewed in this court by bill of exceptions or in any other manner.

By the express words of the act the finding may be general or special, but if general it is final and conclusive between the parties, unless the court which tried the case shall grant a new trial or the judgment shall be reversed in the appellate court for some erroneous ruling made in the progress of the trial, which is duly presented by a bill of exceptions. Whether the finding is general or special the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed in this court, and in a case where the finding is special the review may also extend to the determination of the question whether the facts found are sufficient to support the judgment.

Application for the policy was made by the husband of the plaintiff, since deceased, and he obtained the same for her benefit through the general agents of the insurers. Actual payment of the cash premium was never made by the plaintiff nor by her deceased husband. Nothing of the kind was pretended at the trial, but the plaintiff introduced evidence tending to prove that the agents of the company delivered the policy without complying with that part of their instructions; that they agreed to waive that requirement and to call upon a third person, named by the decedent, for

the same whenever they should deem it proper so to do, and that the policy was delivered to the applicant and became operative under that arrangement.

Policies, as the defendants proved, were required to be issued by the officers of the company and could not be legally executed by the ordinary agents. All such agents could do, in the outset, was to prepare the application, have it duly executed, and transmit it to the home office; and it appears that they did so in this case and that they received a policy in return duly executed. Whereupon they inclosed the policy, with the two notes for the credit portion of the premium, to the decedent, who promptly signed the notes and inclosed the same in a letter addressed by mail to the persons from whom the notes, with the policy, were received. In their letter to the decedent inclosing the policy, the agents say, "the cash payments we will get of Scott when the proper time arrives." They subsequently called upon that person for the cash premium, but he refused to pay it as he had agreed to do with the decedent, and the agents thereupon gave notice of his refusal to the applicant for the policy and requested him to make the payment. He acknowledged the receipt of their letter and promised to procure a draft for the amount and send it to them in a few days, but he did not send the draft, and the agents wrote him again informing him that the draft had never come to hand, and expressing their fears that if the payment was not made soon he would lose his policy, adding that the payment had been delayed so long that he would have to add interest to the premium, amounting to one dollar and thirty-four cents. Payment being still neglected, and the agents having learned from Scott that the person insured was "quite sick," they informed him by letter that his policy was forfeited, and inclosed to him the two notes given for the credit portion of the premium, but the letter did not "reach his home" till after his death.

Such agents were instructed not to deliver policies until the whole premium was paid, and were told that if they did the premium would stand charged to them until the same

was received by the company or the policy was returned to the office. Evidence to that effect was also given by one of the agents who delivered this policy, but he admitted that it was their custom in some cases not to call for the money at the time from parties with whom they were well acquainted, and when asked on cross-examination what they meant by saying, in their letter inclosing the policy to the applicant, that they would get the cash payment of the person named when the proper time arrived, he admitted that they sometimes gave the receipt before they received the money, and that they had confidence in this case that they could get the money on call.

But the payment of the cash premium was not made, and in view of that fact and the other evidence in the case the defendants requested the court to rule as follows: (1) That the evidence showed that the agents never intended to waive the prepayment of the cash premium, and that the applicant for the policy did not believe that they intended to make any such waiver, and that the defendants, if the court so find, are not liable in this action. (2) That if the court so find, and that the applicant knew that the agents had no authority to deliver the policy without such payment, then there was no waiver of that requirement and the defendants are entitled to judgment. (3) That if the court believe from the evidence that the authority of the agents was such as is shown in their instructions, then the defendants are not bound by the act of the agents in delivering the policy without such payment, and the plaintiff cannot recover. (4) That the facts given in evidence, as recited, show that there was no waiver of that requirement, as is supposed by the plaintiff. (5) That the facts testified to by the two witnesses examined under the commission, if true, show that the agents of the defendants did not waive the payment of the cash premium.

Suppose the facts proved to have been as assumed by the defendants in their requests, then it might well be conceded that the judgment was for the wrong party, but the issues

of fact were tried and determined by the Circuit Court, and the act of Congress provides that the finding of the Circuit Court in such cases shall have the same effect as the verdict of a jury, and the Constitution provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.* Facts so tried could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of *a venire facias de novo* by an appellate court for some error of law which intervened in the proceedings.† Matters of fact found by the Circuit Court under such a submission cannot be re-examined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment.

Tested by these rules, which are believed to be undeniable, it is clear that no one of the said several requests presented by the defendants shows any ground for reversing the judgment, as every one of them assumes as facts matters dependent upon the evidence, and which are not embraced in the findings of the Circuit Court. All matters of fact must be found by the Circuit Court, and not by the Supreme Court, as the act of Congress provides that the issues of fact may be tried and determined by the Circuit Court where the suit is brought. Rejected by the Circuit Court as the several requests under consideration were, it is too plain for argument that no one of the propositions of fact therein contained is found to be true by the Circuit Court. On the contrary, the complaint of the defendants is that the Circuit Court improperly found a different state of facts, and gave judgment for the plaintiff. They contend that the Circuit

* 2 Story on the Constitution, § 1770.

† Parsons *v.* Bedford, 2 Peters, 448; 2 Story on the Constitution, § 1770.

Court ought to have found the facts to be as assumed by them in their requests, and what they seek to accomplish by the writ of error is to show that the finding of the Circuit Court is erroneous, and to induce this court to set aside that finding, affirm the propositions of fact assumed in their requests, reverse the judgment of the Circuit Court, and grant a new trial or render judgment in their favor. Enough has already been remarked to show that nothing of the kind can be done, as the act of Congress requires that the facts must be found by the Circuit Court.* Inferences of fact must be drawn by the Circuit Court, which, by the agreement of the parties, is substituted for a jury, and cannot be drawn by this court, which sits as a court of errors.† Conclusions of fact cannot be found by this court when sitting as a court of errors under the act of Congress authorizing the Circuit Courts to try and determine issues of fact in civil cases, as in the case before the court. What is required is that the findings of the Circuit Court shall contain the conclusions of fact, or, as the rule 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, and it is well-settled law that the finding must be sufficient in itself without inferences or comparisons, or balancing of testimony or weighing evidence.‡

Testimony as to a conversation between the agent of the defendants and the person designated by the applicant to pay the cash premium was introduced by the plaintiff, subject to the objection made by the defendants, but it is not necessary to examine that objection, as the testimony was subsequently stricken out at the defendants' request.

Having disposed of the exceptions to the rulings of the court, it only remains to determine whether the facts found are sufficient to support the judgment. Separate findings are much to be preferred in such a case to the form adopted

* Norris *v.* Jackson, 9 Wallace, 127.

† Tancred *v.* Christy, 12 Meeson & Welsby, 323.

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

by the Circuit Court, as the review extends to the inquiry whether the judgment can be supported by the findings. Instead of that, however, the Circuit Court adopted the prayer presented by the plaintiff, and certified in the record that "the court finds all the facts stated in the above prayer, and orders judgment to be entered for the plaintiff" in the sum therein specified.

Throughout the trial it was conceded by the plaintiff that the cash premium was never paid, but she insisted that the requirement that it should be paid before the delivery of the policy was waived by the general agents of the defendants, and the prayer presented by her counsel embodied most or all of the evidence introduced to prove that theory. Omitting unimportant words it was to the effect following: That if the court shall find that the application was made by the husband of the plaintiff through the general agents of the defendants, and that the defendants thereupon executed the policy and sent it to their general agents, and that the latter, upon the receipt of the policy, forwarded and delivered the same by mail to the applicant, who, in obedience to the directions of the said general agents, executed and remitted to them the premium notes as provided in the policy, and that the person whose life was insured died at the time alleged, whereof the defendants received notice prior to the institution of the suit, and refused to pay the sum insured solely upon the ground that the policy was not in force, and shall further find that said general agents did not demand immediate payment of the cash premium, neither at the time of the application nor at the time the policy was sent to or received by the person whose life was insured, but agreed with him to call upon the person named in the evidence for the same when to them it should seem proper so to do, and that said general agents waived the payment of said cash premium for several months, and treated the policy as an executed contract, then the plaintiff is entitled to judgment.

Assume the facts to be as stated in that prayer and found by the Circuit Court, the court here entertains no doubt that they are sufficient to support the judgment, which is *the only*

question raised by any special finding. Beyond all doubt they show a waiver, and it may be proper, in view of the circumstances, to remark that the evidence reported in the record, if it could be re-examined, is even more persuasive and convincing to that effect than the statement of the plaintiff or the finding of the Circuit Court.

Evidence of the most convincing character is reported showing that it was the custom of the agents to give credit in certain cases to persons with whom they were well acquainted and knew to be responsible, and not to call for the money at the time the policy was delivered; and one of the instructions given to such agents affords a strong presumption that the custom was known to the company, as the instruction states that agents must not deliver policies until the whole premiums are paid, as the same will stand charged to their account until the premiums are received or the policies are returned to the office. Such evidence, however, cannot be re-examined, as this court is confined to the special finding and the rulings of the Circuit Court.

Attempt is made in argument to show that general agents have no power to waive such a requirement or to deliver the policy to the insured without first exacting the payment of the cash premium, but the court here, in view of the circumstances of this case, is entirely of a different opinion.*

Where the policy is delivered without requiring payment the presumption is, especially if it is a stock company, that a credit was intended, and the rule is well settled where a credit is intended that the policy is valid though the premium was not paid at the time the policy was delivered, as where credit is given by the general agent and the amount is charged to him by the company the transaction is equivalent to payment.†

Premium notes were given in this case, and it must be

* Boehen *v.* Insurance Co., 35 N. Y. 131.

† Goit *v.* Insurance Co., 25 Barbour, 189; Sheldon *v.* Atlantic F. & M. Insurance Co., 26 New York, 460; Wood *v.* Insurance Co., 32 Id. 619; Bragdon *v.* Insurance Co., 42 Maine, 262; Trustees *v.* Insurance Co., 18 Barbour, 69; S. C., 19 New York, 305.

held, under such circumstances, that the insurance company assumes a reciprocal obligation where there is no evidence to impeach the *bonâ fides* of the transaction.*

Conditions, it is sometimes said, cannot be waived even by a general agent, but the decisive answer to that suggestion in this case is that the policy, when properly construed, does not contain any absolute condition that it shall not attach or be operative unless the cash premium is first paid by the insured, and in the absence of any such positive condition in the policy it is not necessary to enter upon a discussion of that topic.

JUDGMENT AFFIRMED.

AVERY *v.* UNITED STATES.

1. During the rebellion the United States took possession of A.'s house in a rebel town as "captured and abandoned property," rented it from 1862 to 1865, and received rents, $7000, which were in the Federal treasury. After the suppression of the rebellion, A. having returned home, the government sued him, and in March, 1867, got judgment and issued execution against him, he not pleading as a set-off the $7000 received by the United States. In May, 1869, he applied to the court to satisfy the judgment, and moved also for a writ of *auditâ querelâ*; assigning as a reason for not having pleaded a set-off, that he did not know until just before he filed his petition and made his present motion, that the money was in the treasury of the United States. *Held*, that the petition and motion were rightly denied; for that if A. had a claim on the United States, he was in fault in not having discovered and pleaded it.
2. *Auditâ querelâ* does not lie where the party has had a legal opportunity of defence and neglected it.
3. Nor in any case against the United States.

ERROR to the Circuit Court for the District of West Tennessee.

Avery owning a warehouse in Memphis, Tennessee, had become surety for the postmaster there appointed before the rebellion. During the war and after the government troops

* Whitaker *v.* Insurance Co., 29 Barbour, 319; Post *v.* Ætna Insurance Co., 43 Id. 351; Com. M. Ins. Co. *v.* Union M. Ins. Co., 19 Howard, 328.

had driven the insurgents from Memphis, and were themselves in military occupation of the place, the treasury agents of the United States taking possession of the house (under the act of Congress, as was stated in the brief of Avery's counsel, relating to captured and abandoned property), leased it to one Ford, who occupied it from September, 1862, till the same month in 1865, paying a monthly rent which amounted in all to about $7000. The rebellion being suppressed, and Avery having returned to Memphis, the United States sued him in the court below as surety on the postmaster's bond, and in March, 1867, got judgment against him for $5023, and issued execution.

In this state of facts, which for the purposes of this case, seemed to be conceded on both sides, Avery now, May, 1869, filed a petition in the same court in which the judgment had been got, setting forth the fact of the judgment and execution, the previous occupation of this property by the United States, and the receipt by rental agents of the United States, and payment into the Federal treasury of rent for it amounting to the sum of $7000, and praying the court to stay proceedings on the execution and to have the judgment declared satisfied. The ground of his petition, of course, was the alleged fact that the government had received rents from his warehouse, for a sum larger than the amount of their judgment, a fact in proof of which he annexed to his petition copies of the rental agent's receipts. As a reason why he had not presented his demand by way of set-off on the trial of the suit against him as the postmaster's surety, he alleged that he did not know at that time that the money was in the treasury of the United States, nor did he receive knowledge of that fact or evidence on which to found his demand until shortly before presenting his petition. When filing his petition he moved also for a writ of *auditâ querelâ;* asking for it on the facts and statements contained in his petition.

The court below, without any formal pleadings, denied the prayer of the petition, and also refused to grant the writ. To this, its action, the present writ of error was taken.

Messrs. Albert Pike and R. W. Johnson, for the plaintiff in error; Mr. B. H. Bristow and C. H. Hill, contra.

Mr. Justice DAVIS delivered the opinion of the court.

Conceding, for the purposes of this suit, that the order of the Circuit Court in the premises is a final judgment, within the meaning of the 22d section of the Judiciary Act, to review which a writ of error will lie, did the court err in the disposition it made of the case?

The lease of the house was authorized, if the owner of the property was voluntarily absent from it and engaged in the rebellion, and, as the Federal military forces during the term of the lease occupied Memphis, it is fairly to be inferred that Avery had abandoned his house under circumstances which warranted the officers of the government in taking possession of it; and the presumption is, in the absence of an averment in the petition to the contrary, that these officers discharged their duty, and paid into the treasury the money received by them for the rent of this property long before the suit against Avery was tried in the Circuit Court. If so, and the United States, on this account, were indebted to Avery (a point on which we express no opinion), it was the duty of Avery to plead this indebtedness by way of set-off, to the action brought against him. It is a familiar principle that no one can be relieved against a judgment, however unjust he may consider it, if he had a defence and, through his own fault, failed to present it. Avery is in this predicament. It will not avail him to say that he did not know, when the suit was tried, that the money was in the treasury, for it was his business to have informed himself on the subject. This he could easily have done, by communicating with the bureau of the Treasury Department where the accounts of the leases and sales of abandoned property were kept, and this inquiry would have resulted in obtaining evidence equally available for his purpose as that which accompanies his petition. It would lead to endless embarrassments in the administration of justice, if a party were permitted to reopen a judgment on the ground that he had

a defence which he did not present, because ignorant of it, but which, the court can see, he could have known if he had used reasonable diligence to ascertain it. It is impossible to suppose that Avery, on his return to Memphis after the war, was not informed of the state of things concerning the occupation of his house during his absence, and yet he institutes no inquiry on the subject, and when subsequently sued by the United States for a large demand, allows it to pass into a judgment without the assertion of any claim for the use of his property. Under these circumstances he cannot be permitted to do, two years after the rendition of the judgment, what he should have done on the trial of the cause.

It follows, as the result of these views, that the Circuit Court did not err in overruling the motion to recall the execution and satisfy the judgment.

Nor did it err in refusing the writ of *auditâ querelâ*, because this writ does not lie, where the party complaining has had a legal opportunity of defence and has neglected it.*

Besides *auditâ querelâ* is a regular suit in which the parties may plead and take issue on the merits,† and cannot, therefore, be sued against the United States, as in England it could not against the Crown.

JUDGMENT AFFIRMED.

WADSWORTH *v.* WARREN.

A. sued B. for rent as a co-lessee with C.; B., admitting his mere signature, set up in defence that he had signed the lease with the express understanding between him and A. that one D. would also sign it; that D. refused to sign it, and that it was then proposed by A. to have C. in the place of A.; but that he, B., positively objected to having his name on a lease with C.; that thereupon A. said that it would make no difference, for that he would release B. C. now signed. Some evidence

* Lovejoy *v.* Webber, 10 Massachusetts, 104; Thatcher *v.* Gammon, 12 Id 270; Bacon's Abrid., title *Auditâ Querelâ;* Wharton's Law Lexicon, same title.

† Brooks *v.* Hunt, 17 Johnson, 484.

Statement of the case.

tended to prove these facts and some to prove a different state of facts The court submitted it to the jury whether there had been any acceptance of the lease by B. *Held* that this was equivalent to submitting to them whether the instrument had been delivered at all as the deed of B., and that this was a proper submission; and that it was not equivalent (as contended by the plaintiff in error) to submitting whether the deed had been delivered and accepted by B. on condition that he should be released afterwards; a submission which it was admitted by the court would not stand on the same footing.

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

The action in the court below was in covenant and brought by Wadsworth, who resided in New York but owned property at Chicago, against J. B. Warren and W. Fleming, to recover rent upon a written lease of the same, alleged to have been executed by the said Warren and Fleming.

Fleming being a bankrupt, Warren alone defended. He appended to his plea denying *that he owed* the money demanded, a notice that he would give in evidence on the trial that he and one Osgood agreed, with John De Koven, the agent of the plaintiff, to rent the property mentioned, and that he signed the lease with the express understanding that Osgood should also sign it; that after he, Warren, signed the lease De Koven sent it to Wadsworth, the plaintiff, in New York, where it was executed by the plaintiff and returned to De Koven to be executed by Osgood, but that Osgood refused to execute it; that afterwards Fleming agreed with De Koven, as agent of the plaintiff, to take the premises for the same time and upon the same terms that the defendant and Osgood had agreed to take them; that when the lease was signed by Fleming the defendant objected to having his name on the lease with Fleming; that De Koven said it would make no difference, that he would release the defendant on the back of the lease; that he wanted to use the lease signed by the plaintiff and Warren, as it would obviate the necessity of sending to New York to get the plaintiff to sign a new lease; that De Koven delivered the lease to Fleming alone; that the defendant never took possession of the property demised, and never paid or was

called upon for rent until after the bankruptcy of Fleming; that the defendant never consented to be jointly bound with Fleming, or to be bound at all by the covenants in the lease, and that it was expressly understood between the defendant and De Koven that "he would, as agent of plaintiff, release defendant on the back of the lease before he delivered the same to Fleming."

The lease showed the signatures and seals of Warren (the defendant), Fleming (the bankrupt), and Wadsworth (the landlord and plaintiff), and their names were also inserted without erasures or interlineations in the body of it. It was dated the 20th of April, 1867.

The defendant Warren did not set up that any portion of the rent had been paid, but sought to establish as a defence the facts set forth in the notice above referred to. He testified that Osgood and himself agreed to take the premises for five years, at $4800 a year, and that Osgood then went to Michigan, where he resided; that shortly after Osgood went, a Mr. Jenning came to the witness with a lease which he believed was in blank, and requested him to sign it, saying that he got up all the plaintiff's leases in this way and sent them to New York for his signature; that shortly after this he received a letter from Osgood informing him that he had sickness in his family, and requesting the witness to dispose of the lease; that he then went to De Koven and told him the facts as they were, not wanting, himself, to back out after he had signed anything. He further testified:

"I told him I had found Mr. Fleming willing to take the property, and willing to give good reference. Mr. Fleming and I went down to see Mr. De Koven. Mr. De Koven said he would see about it. When Mr. Osgood came, we went over to see Mr. De Koven together. While we were talking about the lease, Mr. De Koven made the remark to Mr. Osgood, 'It won't make any difference to you; you haven't signed the lease.' I told him: 'Then,' says I, 'I won't accept the lease.' Mr. De Koven then said, 'Now, Mr. Warren, I will tell you what I will do; I will accept Mr. Fleming in here; put Fleming's name in the lease instead of Osgood's, and I will indorse a release of you

on the back of the lease.' I told him that was all right. Mr. Fleming signed his name while I was there, and returned it to Mr. De Koven, and left it there. I haven't seen the lease since. I never had anything to do with the document. I told De Koven, as Osgood would not sign the lease I would not accept. De Koven said he would put in Fleming's name instead of Osgood's, as Osgood hadn't signed it, and he would indorse to me a release on the back of the lease, giving as a reason for doing so, that it would save the time of sending the lease to New York."

This testimony was supported by that of Osgood and Fleming.

On a duplicate of the lease, signed and sealed, like the other by Wadsworth (the landlord and plaintiff), and by Warren and Fleming, the following indorsement, executed by Fleming, appeared:

"ASSIGNMENT.

"*State of Illinois, Cook County, ss.*

"In consideration of one dollar, to me in hand paid, the receipt whereof is hereby acknowledged, I have sold, assigned, and set over to the said William Fleming, all my right, title, and interest to the within lease; said Fleming assuming all liabilities under said lease, and releasing me, the undersigned, from any and all liabilities whatever under the same.

"Given under my hand and seal, at Chicago, April 27th, A.D. 1867.

"J. B. WARREN. [L. S.]"

On the other hand, De Koven, the plaintiff's agent, testified that Warren and Osgood, in the first instance, agreed to take the property upon the terms mentioned in the lease, that he had leases signed in blank by Wadsworth, that a lease was made out and that Warren signed it; that after the season for renting was over, Warren requested witness to release him and allow Fleming to take the lease; that the witness declined to do this, as Warren was the only person he looked to for payment of the rent, but consented to take Fleming in the place of Osgood; that the leases were

then filled out in duplicate, and Warren and Fleming signed them; that he gave one to Fleming and Warren and retained the other, and that the assignment from Warren to Fleming was not on the duplicate at that time; and the witness testified distinctly that he did not agree to release Warren.

The plaintiff requested the court to instruct the jury:

"*First.* The jury will disregard all evidence given in behalf of the defendant tending to show any verbal agreement or understanding between De Koven and the defendant Warren, to the effect that De Koven would release Warren from the covenant in the lease, or that Warren should not be bound by the lease.

"*Second.* The jury, upon the evidence given, should find the issue for the plaintiff."

But the court refused to give either of these instructions, and charged substantially as follows:

"The lease as produced here presents a legal claim, *primâ facie*, and the defendant is bound by it; and if there was nothing more presented, Warren would be bound, because he, having signed the lease, would be considered in law to be the party to it, and *primâ facie* to have accepted it. If not accepted by Warren, he would not be bound to pay. If a lease was signed by Warren on condition that Osgood was to be a party to it, and if Osgood refused to sign it, with the knowledge of Wadsworth or his agent, De Koven, then Warren would not be bound to accept that lease. [If Warren refused to accept the lease with Fleming, and the agent of Wadsworth agreed that to save trouble of sending another lease to Wadsworth for his signature, if Warren would put his name to the lease he should not be bound, and that Warren did not accept the lease with Fleming, then Warren would not be bound on the last lease.]

"Then come the witnesses on the part of the plaintiff. And then if all the matter is laid aside that was presented by the defendants' witnesses, and you take up the case upon the plaintiff's testimony, then, if the evidence as to the acceptance of the lease by Warren does not satisfy the jury that it was not accepted by Warren in the way I mention—*then comes the alleged promise of De Koven, the agent of Wadsworth, that he would release*

Warren from the lease—that is, a verbal promise, not executed to this day; and if such was the agreement, then Warren would have to look to De Koven for a breach of that agreement, and would have no defence here.

["As to that assignment on the lease, if this was all the understanding between these parties, that Mr. Warren was not to be liable, there was his name, and it would show; and if Fleming wanted to dispose of it or do anything with it, he could not do it legally without Warren's consent. That assignment was proper to vest the whole interest on paper in the lease in Fleming, which probably was the object of it, the consideration being nominal.]

"You will have to apply the testimony. The best way I can instruct you is to take up that given on the part of the defendant, which we admit so as to satisfy the jury on the subject of acceptance; and then, if they are not satisfied with that, *the mere verbal promise of De Koven to release Mr. Warren would not be good defence here, I think, but would leave Warren to turn over on De Koven for a breach of his promise;* and that is the way, I suppose, the thing might turn possibly on your verdict for the plaintiff; but we leave the matter with you to make the best you can of the case."

To the parts of the charge within brackets the plaintiff excepted.

Mr. J. Van Arman, for the plaintiff in error:

The case, in its best view for the defendant below, shows that all parties intended that the lease should take effect as a legal instrument, and operate, in form, at least, as a demise to Warren and Fleming, and that Warren should be *subsequently released* from his covenants in the lease. The very term "*release*" implies that the party who is to have the benefit of it has, at the time of receiving such benefit, already assumed an obligation from which he is thereby discharged; and the assignment of all his interest in the lease made by Warren to Fleming, seven days after the lease was made, shows that they both then understood that they were jointly vested with the title to the demised term. The question then is, whether a verbal agreement, at the time of the

execution of a deed, that one of the parties to it shall be released from the covenants contained in the deed, or that he shall not be bound by these covenants, can be given in evidence to defeat an action brought for an alleged breach of them. It is settled by authorities both ancient and modern that it cannot be.*

The lease, after it was signed and sealed by Warren and Fleming, was delivered by Fleming in Warren's presence to De Koven, the plaintiff's agent. When a deed is delivered to the grantee or obligee, and retained by him, he setting up that the delivery was absolute, parol proof that the delivery was conditioned or otherwise than absolute, is incompetent in a contest between such obligee and the obligor.†

The release was never executed, nor was De Koven ever called upon to execute or procure the execution of it. To be effectual it must have been evidenced by a sealed instrument executed by the plaintiff himself, or by his duly authorized agent. It will not of course be contended that a mere verbal agreement to release a party from his covenants can bar a suit for the non-performance of them.

Messrs. E. Anthony and C. F. Peck, contra, submitted that there was no error in the charge, and that the verdict was warranted, and is supported by the testimony.

Mr. Justice STRONG delivered the opinion of the court.

Were this case before us on a motion for a new trial we might feel constrained to send it back to another jury. But it has been brought here by a writ of error, and we can, therefore, reverse the judgment only for errors of law apparent in the record.

The testimony respecting the circumstances attending the transaction in question is contradictory. On the part of the

* See Sheppard's Touchstone, 59; Coke Littleton, 36; Whyddon's Case, Croke Elizabeth, 520; Countess of Rutland's Case, 5 Reports, 26; Philadelphia, Wilmington and Baltimore Railroad Co. *v.* Howard, 13 Howard, 334.

† Braman *v.* Bingham, 26 New York, 491.

defendant it is that he refused to accept the lease without having Osgood bound with him; that the plaintiff's agent agreed to take Fleming in his and Osgood's place, and agreed that when Fleming signed the contract he would indorse on it a release of Warren, saying it would avoid the necessity of sending a new lease to Wadsworth, the plaintiff, for his signature. On the other hand the plaintiff's agent denies that he promised to release Warren, and states that he told him he was the only man he looked to for the rent. He states further that the defendant brought Fleming to him, that both signed the lease and a duplicate thereof, and that the duplicate was delivered to Fleming and the defendant. The lease is dated April 20th, 1867, and on the duplicate retained by the plaintiff's agent there appears an assignment of all his interest in the lease by the defendant to Fleming. This assignment is dated April 27th, 1867, but it was evidently made on the day on which Fleming's signature to the lease was made, for there is no evidence that the duplicate retained by the plaintiff's agent was ever seen by the defendant after Fleming signed it. Coupling this with the evidence that De Koven, the plaintiff's agent, had agreed to take Fleming in the place of Osgood and Warren, and had said that signing the instrument in the manner in which it was signed, would avoid the necessity of sending a new lease to Wadsworth, the lessor, for his signature; coupling it also with the other evidence, given by the defendant himself, that he did not accept the lease, or deliver the deed, we think it was a question to be submitted to the jury whether the contract had ever been consummated, or, in other words, whether it had been delivered and accepted as the contract of the defendant. It was not, therefore, erroneous to refuse the instruction prayed for, namely, "that the jury, upon the evidence given, should find the issue for the plaintiff."

The other prayer of the plaintiff for instruction was substantially granted. The court, when speaking of the alleged promise of De Koven to release Warren from the lease, said it was a verbal promise not executed, and, "if such was the agreement, Warren would have to look to De Koven for a

breach of it, and would have no defence here." And again the court said: "The mere verbal promise of De Koven to release Mr. Warren would not be a good defence here, I think, but would leave Warren to turn over on De Koven for a breach of promise."

The remaining exceptions taken to the charge cannot be sustained. It may be admitted, as contended for, by the plaintiff in error, that when a deed has been delivered, and the delivery has been accepted, a verbal agreement between the parties, made at the time of the delivery, or previous thereto, that one of them should be released from the covenants contained in the deed, cannot defeat an action at law brought for an alleged breach of those covenants; but the charge of the court was in harmony with this doctrine. It may also be conceded that there can be no conditional delivery of a deed to the grantee, or covenantee, therein named; but nothing in the charge intimated that there could be. The question submitted to the jury was, whether there had been any acceptance of the lease by the defendant. This was equivalent to submitting the inquiry, not whether the deed had been delivered on condition that Warren should be released afterward, but whether it had been delivered at all as the deed of the defendant. That such a submission was proper, in view of the evidence, we have already said.

JUDGMENT AFFIRMED.

PERRIN *v.* UNITED STATES.

A claim for property accidentally destroyed in the bombardment and burning of a town, by the naval forces of the United States, is not of itself within the jurisdiction of the Court of Claims.

APPEAL from the Court of Claims dismissing a petition before it, as not "founded upon any law of Congress, or upon any regulation of an executive department, or upon

Statement of the case and judgment of the court.

any contract, express or implied, with the government of the United States;" confessedly the only cases, in which the court, by the statutes creating it, has jurisdiction.

Mr. W. W. Boice, for the appellants; Mr. Akerman, Attorney-General, and Mr. C. H. Hill, contra.

Mr. Justice CLIFFORD stated the case and delivered the judgment of this court.

The petitioners alleged in the court below that they were naturalized citizens of the United States; that just before the 13th of July, 1854, they arrived at San Juan del Norte, or Greytown, possessed of a valuable invoice of merchandise, with the intention of establishing a commercial house in some part of Central America; that on that day the town of San Juan was bombarded and burnt by the United States sloop-of-war Cyane, and all the merchandise, books, and papers of the petitioners, together with their personal effects. Appearance was entered by the Assistant Attorney-General, and he demurred to the petition because it did not set forth facts sufficient to constitute a cause of action, and the court below sustained the demurrer and dismissed the petition. Whereupon the petitioners appealed to this court, and alleged that the decision sustaining the demurrer was erroneous, but the court here, inasmuch as the claim is not one "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," concurs in opinion with the Court of Claims and

AFFIRMS THE DECREE DISMISSING THE PETITION.

ROGERS *v.* RITTER.

Where a court on the preliminary examination of a witness can see that he has that degree of knowledge of a party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject, though he have never seen the party write nor corresponded with him.

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

Rogers brought ejectment against Ritter in the court below to recover a lot of land in San Francisco, known by the name of Yerba Buena. The plaintiff having given in evidence various deeds, and rested, the defendants offered a writing, dated Yerba Buena, December 5th, 1845, purporting to be a petition by one Briones for the grant of the lot, under which was written an instrument dated December 7th, 1845, purporting to be a grant of the lot by "the citizen José de la Cruz Sanchez, *justice of the peace* of the jurisdiction." The "grant" was objected to on the ground that the name of Sanchez was forged. To prove its genuineness, the defendant called three witnesses. One *Sears*, who had been clerk in the recorder's office of San Francisco for eight years, and having the especial charge of the records; *R. C. Hopkins*, who had resided in California for fourteen years, had had charge of the Spanish archives in the office of the Surveyor-General of the United States for California for nine years, "whose business called upon him to investigate questions of the genuineness of documents," and who "thought that he had a facility from his profession of detecting writing which was not genuine;" and one *Fisher*, who had been in California for fourteen years, and was secretary, interpreter, and custodian of the archives for over four years, and until its expiration, of the land commission of the United States, which sat in California under the act of March 3d, 1851.

In order to lay a foundation for his competency each witness, as called, was requested to state whether he was acquainted with the handwriting of Sanchez, and to give his

means of knowledge. Each and all answered that they were familiar with it, and told how they knew it.

Sears had frequently seen it in his office, and had, many times, made certified copies of the papers to which it was attached, for the use of the courts, and knew it to his own satisfaction. In speaking of it and the handwriting of another person, he said, "I have seen so many instruments and papers passing through my hands that these signatures (naming them) are like household implements with us." But he had not corresponded with Sanchez nor actually seen him write.

Hopkins had examined the correspondence of Sanchez, while justice of the peace, with the governor, and other papers in the archives to which his signature was affixed, quite often, and conceived himself, therefore, well acquainted with it; "I think," was his testimony, "no one living is so familiar with these California archives as I am." But he had not corresponded with Sanchez nor actually seen him write.

Fisher testified that he thought that he would know the signature of Sanchez, because he had the custody, during the whole term of the board of land commissioners, of all the depositions taken by them, and acted as interpreter for those who could not speak the English language. The party making the depositions was required, as the witness testified, to sign them after one of the commissioners had administered the oath. Then they passed into Fisher's hands, as secretary, who indorsed them and put them among the papers of the case. Sanchez's testimony with many others, was taken, and, although Fisher could not swear he had actually seen him write his name, he believed he had, and, at any rate, he should know his signature from having seen it to the depositions.

The Circuit Court, after the witnesses had stated the manner in which they formed their knowledge of the handwriting of Sanchez, allowed them—exception being duly taken—to testify whether his signature to the grant in controversy was genuine or not. And they testifying that they believed it to be genuine, the grant was allowed to go to the

Argument in favor of the evidence.

jury, no objection being taken to it from the fact of its purporting to be made by a "justice of the peace of the jurisdiction," A. D. 1845.

Verdict and judgment having gone for the defendant the case was brought here.

It was one incident of the trial that Sanchez himself, who was alleged to have made the grant, swore that though he had been "a justice of the peace of the jurisdiction" in 1845, he had never made this grant nor any grant of the lot in controversy; as it was another that Hopkins, who was examined to rebut the evidence of Sanchez, testified that he "knew it to be generally the case, or sometimes the case, that in regard to the genuineness of the signatures and acts of officers of the old Mexican government, the true test is not what they will swear to, but the testimony of experts."

Messrs. M. Blair and F. A. Dick, for the plaintiff in error; plaintiff also below.

1. The so-called grant purported to be by a "justice of the peace of the jurisdiction." It is a fact shown by various laws of Mexico, by the history of the Departmental Assemblies of California, and by the acts of the governors of California, and by judicial decision,* that no such officer had power to grant land after the end of the year 1843. It was a right of the alcaldes of the city of San Francisco. The grant, therefore, even if genuine, should have been excluded from the jury.

2. The court below erred in admitting what was but the opinion of Sears, Hopkins, and Fisher, the defendant's witnesses, as evidence that the signature of Sanchez was genuine. The "knowledge" of the signatures which these witnesses had was acquired, not from having seen Sanchez write, nor from having corresponded with him, but from seeing writing supposed to be his, and from nothing more. The testimony was, in truth, but a comparison of handwrit-

* Cohas v. Raisin, 3 California, 449; Hubbard v. Barry, 21 Id. 325.

ings, and did not render opinions of the persons so comparing the handwriting, legal evidence.*

There should the less willingly be a departure from ancient rules of caution, as Sanchez swears that the signature is not genuine.

Mr. Justice DAVIS delivered the opinion of the court.

The objection to the grant, which, supposing it genuine, is insisted on in the first place, in this court, by the counsel of the plaintiff in error, presents a question which in the state of the record this court is not called upon to decide; for it does not appear that the objection was taken in the court below. It is true that the grant was attacked there, but on an entirely different ground. The main controversy concerning it was, whether or not it was genuine. Its validity, if genuine, does not seem to have been questioned. We are not, therefore, required to travel through the various laws of Mexico, the acts of California governors, and the proceedings of Departmental Assemblies to determine at what period of time the powers of justices of the peace, acting as alcaldes, to grant building lots within their jurisdiction, ceased.

It is insisted, in the second place, that comparison of handwriting is in no case legal evidence, and as it was admitted to prove the genuineness of the disputed paper, the judgment should, on that account, be reversed. It is certainly true that the ancient rule of the common law did not allow of testimony derived from a mere comparison of hands, and equally true that there has been a great diversity of opinion, in the different courts of this country, in relation to this species of evidence. But in England this rule of the common law, as it respects civil proceedings, has been abrogated by the legislature, so that in the courts there, at the present day, in civil suits, the witness can compare two

* 2 Phillips's Evidence, 595–613, and notes, 480, 481, and 483; 2 Starkie on Evidence, 512–518; 1 Greenleaf on Evidence, §§ 577 and 578; Strother *v.* Lucas, 6 Peters, 767; Greaves *v.* Hunter, 2 Carrington & Payne, 477; Goldsmith *v.* Bane, 3 Halsted, 87; Thatcher *v.* Goff, 11 Louisiana, 94, 98.

writings with each other, in order to ascertain whether they were both written by the same person.* It is, however, not necessary for the purposes of this case to discuss the subject in all its bearings, nor to depart from the rule laid down by this court in *Strother* v. *Lucas*,† that evidence by comparison of hands is not admissible when the witness has had no previous knowledge of the handwriting, but is called upon to testify merely from a comparison of hands. The witnesses who testified in this case had previous knowledge of Sanchez's handwriting. It is true this knowledge was not gained from seeing him write, nor from correspondence with him, but in a way equally effectual to make them acquainted with it. Sanchez was for many years, under Mexican rule in California, in official position, acting as justice of the peace, transacting the duties of alcalde, corresponding with the governor, and exercising for a time the power conferred upon him to grant small parcels of land to deserving persons.‡ Necessarily, in the course of the administration of the duties of his office, he had occasion frequently to attach his signature to papers of importance. These papers, after the United States took possession of the country, were deposited in the recorder's office of San Francisco, and the Surveyor-General's office, where the Mexican archives are kept. Sanchez also, as did most of the native Californians and Mexicans who had been in public life, appeared before the United States land commission, which sat in San Francisco to determine the validity of Spanish grants, and gave his depositions. These depositions, with the other papers of the commission, at the expiration of it, were taken to the office of the Land Commissioner at Washington. As no question was raised on the trial of the genuineness of these various writings—Sanchez was present and interposed no objection—they must be considered, if not as having been acknowledged by him, at least as having been proved to the satisfaction of the court.

In this condition of things, Sears, Hopkins, and Fisher

* 2 Taylor on Evidence, §§ 1667–8. † 6 Peters, 763.

‡ Colonial History of San Francisco, by Dwinelle.

were called upon to testify upon the subject of the disputed signatures; and the inquiry is, did the court err in its ruling on this point? Obviously, the evidence is not obnoxious to the objection that it is a mere comparison of hands; that is, a comparison by a juxtaposition of two writings, in order to enable a witness, without previous knowledge of the handwriting of the party, to determine by such comparison whether both were written by the same person.

The witnesses in this case were conversant with the signature of Sanchez, and swore to their belief, not by comparing a disputed with an acknowledged signature, but from the knowledge they had previously acquired on the subject. The text-writers all agree, that a witness is qualified to testify to the genuineness of a controverted signature if he has the proper knowledge of the party's handwriting. The difficulty has been in determining what is proper knowledge, and how it shall be acquired. It is settled everywhere, that if a person has seen another write his name but once he can testify, and that he is equally competent, if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not, for in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another, besides having seen him write or corresponded with him. There is no good reason for excluding any of these modes of getting information, and if the court, on the preliminary examination of the witness, can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject.

This was done in this case, and it is manifest that the three witnesses told enough to satisfy any reasonable mind that they were better able to judge of the signature of Sanchez, than if they had only received one or two letters from him, or saw him write his name once.

JUDGMENT AFFIRMED.

VILLA *v.* RODRIGUEZ.

1. A deed, absolute on its face, made by nephews and nieces, with their mother, to an uncle—a debt to the uncle from them being at the time of the deed secured by mortgage on part of the premises—held to be but a mortgage; this against a lessee of the grantee, with a right of purchase, who had made large expenditures on the land, in apparent expectation of purchase; in the face, too, of some proof that the deed was meant to make an absolute transfer, with a view to sale, leaving a trust upon the *proceeds* of the sale above the amount of the original mortgage debt.
2. A vendee cannot defend as a *bonâ fide* purchaser without notice, against an unrecorded mortgage, where his rights lie in an executory contract; nor where he has a right to call for no deed but that of a "quit-claim."

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

George Alexander filed a bill in the court below against Jacinto Rodriguez and George Steele with three others, his brothers, to redeem a ranch of land near San Luis Obispo, in California, known as the Rancho Corral de Piedra, from an instrument which he averred to be a mortgage upon the land; an instrument whose history was much disputed, but which seemed essentially thus:

In 1852, José Maria Villavicencia, called for brevity Villa, being owner of the ranch in question, having at the time seven children, to wit, five sons and two daughters—most of the children being yet minors—conveyed it to them. He died in the following year, leaving these children and their mother, his wife, surviving him. The mother, with these children, lived upon the ranch, and having her brother, Jacinto Rodriguez, an active business man, "of superior intelligence," living in the city of Monterey. The widow was extremely poor, and her children were reared as laborers. She could write her name, but not much more. Two of her daughters, at a later date, got to be educated, and one, at least, of the sons. Before December, 1860, she became involved in debt and borrowed money of her brother Jacinto, for which she and three of her children (four others being still minors, and one other being absent), gave him, on the

4th December, of the same year just named, a mortgage for $4000, bearing 24 *per cent. per year* interest, for 5 years, and providing that the same should be *compounded every six months;* and in case he should sue upon it, he should *also be allowed counsel fees* at 5 per cent.; and should he pay taxes on the land, all amounts so paid should bear the same interest, and become a part of the mortgage debt; all payable, according to the California usage, in gold coin. On the 13th November, 1862, Rodriguez paid an additional sum of $1172, to redeem the land from a tax sale, which the widow's failure to pay the taxes on it had brought about.

In the winter of 1863–4, no rain fell in California, and a drought so severe was the consequence, that the crops failed and the cattle starved. The people were suffering and disheartened. Property could not be sold. The cattle of this family perished during this season, and they had nothing laid by, nor any property except a few horses. In this state of things, Rodriguez called upon his sister and her children. His visit, as stated in his own words, was under the following circumstances:

"I had a mortgage on the ranch. I remarked to my sister that it was time to settle our business, because the mortgage could not last a lifetime. She told me to come whenever I pleased to make a settlement. I went subsequently to her house, and told her and several of the children that I had come for the settlement of our affairs. Then she and the rest of the family—for they were all there except one, who was not in the country at the time—said that they had consulted together and had determined to *sell* me the ranch; to convey it to me on account of the money in the mortgage which they owed me. They told me they had determined to do that, because, if I put it up for sale, some other person would certainly buy it, and then they would never get it; and that they preferred that I should finally be the owner, because I was the one who had saved them on a former occasion, when they were about to lose the ranch on another mortgage. Then I told them, 'If you are all agreed to convey to me your rights, I will accept your proposition with great pleasure, and will take no steps to sell the ranch.' They told me, 'Yes,' that they were determined to do

that, and that they did it with great pleasure. Then I told them, 'It is well, but here is a thing I have to say to you: there is Antonio (this was the youngest son), who is not yet of age; if, when he comes of age, he makes a conveyance to somebody else, that will give me some trouble.' He said that I might confide in him; that he would do nothing of the kind, that he had been benefited by the use of these moneys as well as the rest of the family. I said, 'It is very well if that is so; I trust to you.' Then I said, 'Very well, I shall cause the conveyance to be drawn up in order to close the mortgage. I shall bring the recorder here,' &c., and the whole family told me go and get the *titulo* made out, and that they would be sure and comply with what they had said."

At this time, as the reader will have noted, Rodriguez had his money secured on only three-sevenths of the property.

By the laws of California, mortgaged land and the mortgage on it both pay taxes. In this case, therefore, Rodriguez was paying taxes on his mortgage and the land was also paying taxes. Accordingly, among the motives which he gave for his wanting a deed was this one:

"When I came and settled my affairs with my sister, I said that it did not suit me to pay taxes twice. If they did not pay the taxes on the ranch, I had to pay them."

Accordingly, on the 29th April, 1864—three years and five months after the mortgage had been given having passed—and the original debt of $4000, with the $1172 paid in 1862 to redeem the land from the tax sale, amounting now, at the rates of interest fixed, to about $10,000—all the children except the one who was "not in the country at the time"—including the youngest, the "Antonio" above referred to and not yet of age—conveyed the ranch by a deed on its face absolute, to Rodriguez. *The consideration expressed in the deed was the discharge of the grantees from all debt and the cancellation of the mortgage then held by the grantee.* The mortgage, which secured the greater part of this debt, was immediately discharged on the county records. Antonio, the minor child, conveyed anew, when coming of age, February 17th, 1865. The other child, who had been out of the

country when the already-mentioned deed was made by the widow and other children, conveyed May 20th of the year above stated. The consideration paid to this last was $100 in gold.

Rodriguez being now thus vested with the shares of the widow and whole seven children, on the 22d July, 1866, demised the ranch by a "lease and agreement of sale" to George Steele and the three others, his brothers, for five years, from the 1st August, 1866, with a right of purchase by them at the end of the term, or within five days afterwards, for $25,000, gold; and he covenanted "that he would, by a sufficient deed, *release and quit-claim* to the lessees or their heirs and assigns, free from all incumbrances created by him, *all right and title* which he *then* had to the premises, or which he *might thereafter acquire* from the United States, or from any of the heirs of José Maria Villavicencia."

The Villa family were informed of this lease in a general way, both before and after its execution.

Under this contract the Steeles went into possession of the property, began the construction of improvements, stocked the land with cattle, and established dairies. The Villa family remained on the ranch in the old ranch house, with certain lands around it, which gave them the means of pasturing their horses. The males of the family were employed by the Steeles in hauling timber, in fencing the land, and in building houses of the Steeles, and generally in the construction of the improvements to be made under the covenants of the lease.

About this time the Villa family were advised by some persons more educated than themselves, that the deed made to their uncle, if attacked in law, might be set aside and they become again possessed of the ranch (now grown very valuable), subject to paying the money advanced by their uncle. Accordingly, five of the children, and the widow, conveyed to a sixth one (Fulgencio), without valuable consideration, all their right in the ranch. At this time Fulgencio was in the employ of the Steeles; but substituting one of his brothers in his place, he left them, proceeded to

Statement of the case.

San Francisco, and on the 26th day of December, 1867, executed to one George Alexander a deed conveying all his right, title, and interest in the said lands. The consideration, as set forth in the deed, was $35,000. But the real money consideration paid was $1000, with a promise that, should Alexander succeed in recovering the premises, the family should receive $35,000 and a conveyance of 350 acres of land, including the ranch house. Alexander, being thus vested with a paper-title to six-sevenths of the land, filed the bill below against Rodriguez and the Steeles, to be declared owner of that portion of the land, subject to the debt which first rested on it.

The bill set forth that the Villa family being poor, and both they and Rodriguez, desirous of avoiding the payment of taxes upon land and mortgage both, had an account concerning the moneys due upon the mortgage, and for the money advanced to effect the redemption from the tax sale; that there was found to be due upon the mortgage, for principal and interest, $8610, and for the moneys advanced to effect the redemption, $1172, with interest from November 12th, 1862, and that it was then agreed, in order to avoid the payment of taxes, both upon the lands and mortgage, that the widow and children should convey the lands to Rodriguez, by deed of conveyance purporting to convey the same in fee, but that such deed should in fact be, and was intended to be a mortgage upon three-sevenths, for the security and payment of the debt of $8610, and upon five-sevenths for the repayment of the $1172, and interest, as aforesaid; and that the mortgagors should have the right to redeem the lands upon the repayment of the said several sums, and interest thereon; that the grantors accordingly remained in possession of the premises, described, as owners; that the deed was, at the time of its execution, intended by all the parties to be, and was, in fact, a mortgage to secure the payment of the two above-named sums, respectively, and that the same was true of the conveyances subsequently made by the two other children.

The bill set forth further, that the Steeles, in 1866, had

taken possession of all the lands so granted, except an adobe dwelling-house, situated on them, and about fifty acres of land surrounding it, and had since then continued, and now were in possession of the same, and had used and occupied the same for agricultural and dairy purposes; that the value of this use and occupation had been, and was $3500 a year, and that upon a fair settlement of the rents and profits, nothing would be found to be due Rodriguez, either upon the mortgage debt, or upon the other sum advanced, or otherwise.

Rodriguez and the Steeles answering, denied that the deeds were intended to be a security, and alleged that the transaction was a *bonâ fide* sale for full value; that the widow and children had been in possession only of a small part (twelve acres), and of this but as tenants of Rodriguez; that the use and occupation of the whole tract—it being a wilderness—was not worth more than $100, except in virtue of great outlays by the Steeles, $14,000 at least; and that with these, it did not exceed $500 a year; that the rent of $3500, agreed on, had been punctually paid to Rodriguez; that the widow and children had seen the Steeles put into possession, and the improvements made without any objection; conversing with the Steeles daily, and the Villa children working for them on and about the very premises; and that the Steeles were to be regarded purchasers *bonâ fide*, without notice.

The evidence (which included Rodriguez's account of the matters already given) consisted, with that of others persons, of the testimony of one Charles Dana, the county clerk, who went with Rodriguez to take an acknowledgment of the deed by the widow and the five children. Dana said:

"In the course of a conversation, which was wholly unsolicited, Mr. Rodriguez stated to me, *that his object in getting the family to execute the deed was to secure his money, and save the property for the benefit of his sister and her family*, while if it remained in their hands he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting to him, as he intended to deal justly

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by his sister. He mentioned also by their so doing, he would avoid paying taxes on the mortgage, while as it then stood, they paid on the premises and he on the mortgage. Then he generally mentioned that they would not have cause to regret the steps they had taken. That he would save the property for them, and save himself at the same time. There was a short conversation between Rodriguez and Mrs. Villa, in my presence, and that of the rest of the grantors. Mrs. Villa asked Rodriguez whether the instrument was in strict accordance with the private conversation which had taken place between them, and the agreements which they had made. He answered that it was in accordance with all the agreements and understandings which had been had between the two. Then Mr. Rodriguez requested me to read the deed, which I did. Mrs. Villa, when the reading was over, stated that it did not mention any of the agreements they had made. Rodriguez, to the best of my recollection, stated that it did; that they ought not to distrust him, as he was taking all these steps for their interest. Thereupon they executed the deed, and I took their acknowledgments. At the time when the deed was executed, I observed that the family were not very willing to sign the deed unless under the agreements and conversations which had taken place between them and Mr. Rodriguez, and then the remarks which I have said, I distinctly recollect, were made."

The widow, herself, said:

"The agreement that we made with my brother, when he obtained the signatures, was that it was to be a security for his money. With this understanding, I informed my children of the conversation that took place with my brother. He told me not to distrust him."

The son, Antonio, said:

"My mother stated that my uncle said he would take no advantage of us, but wanted merely to get his money, and that we should not distrust him."

Another one of the children:

"I signed the paper because my uncle came to the ranch and had a talk with my mother, and requested her that she should speak to us, that we might sign."

A third and fourth, with four other witnesses—ten in all—supported this account of the transaction. One of the witnesses, named Cappe—a letter, however, of whom to Rodriguez, treating him as being so far absolute owner as to be able to dispose of the property, was produced—said:

"Mr. Rodriguez came from Monterey, and came to see me, and said he wanted to know what lawyer he could employ to make some papers. I told him Mr. Van Ness. Then we went to see Van Ness next day. He told me that he wanted to have a deed made from his sister and all her children, to secure him for his debt which they owed to him, because he was paying taxes for the property and the mortgage, being, both the property and the mortgage, the same thing, and he paying the taxes twice, and by having a deed made to him, the boys would not be in debt any more."

So this Van Ness, who, however, had drawn the deeds for an absolute conveyance, and had been for two years trying to purchase the land from Rodriguez:

"Mr. Rodriguez had said to me and written to me several times, that his object was to save the valuable portion of the property for his sister and her children, and that if he could dispose of two leagues lying back towards the mountain, that sum would cancel his debt, and leave all that the family would require."

To return to the statement of Rodriguez himself. He said:

"I told them, 'I don't wish to speculate upon you, because you are my relations, and you have treated me well; and if I can sell this ranch for enough to reimburse myself for my outlays, as well as interest, *I will return you the surplus money, if any;* and, also, if I can sell a portion of the ranch, or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch; but if I cannot sell it, I will lose the money.'"

Rodriguez himself asserted in the most positive manner that the instrument was not meant to be a mortgage of the land itself, but was meant to put the title completely in him.

He acknowledged that he had promised to return the surplus. His testimony ran thus:

Question. Was there any agreement between you, that the deed should be a mortgage?

Answer. No, sir; as far as the mortgage was concerned, *I had one already.* I wanted the title of ownership.

Question. Did you say anything in that conversation to Mr. Dana about giving the surplus to the family?

Answer. I stated at the ranch, and again stated to my sister, *afterwards*, that I would return the surplus money; but it was no *obligation* of mine. It may be that I said so to Charles Dana *at the time.* I told him I was much pleased with having settled my business, and also with being *the owner of that ranch;* that if I had not interfered with that business they would have been deprived of this ranch many a year ago.

Pedro Rodriguez, a brother of Jacinto, testified:

"In 1864, towards the end of May, my sister told me she had sold the ranch to Jacinto. They were all present except José and Fulgencio. During the whole time they expressed that they sold it with *great pleasure.* In 1864, my sister told me she wanted to look her a house somewhere in San Luis Obispo, to dwell in, so that whenever Jacinto should require the ranch, she could be ready to leave there with the same *pleasure* that she had took in selling the ranch."

Desidero Rodriguez, also a brother, testified that his sister told him of having sold the ranch to Jacinto:

"She stated to me that she lived on the ranch through the favor of my brother, and that whenever he had any use for it she would leave the same; quit the house on it *with much pleasure*, and go and live even under a tree."

José Rodriguez, a third brother, stated that he had heard a conversation between the family two or three days before the deed was made, and that they all said that they were going to convey their rights to Jacinto; that they *did so with much pleasure;* and that after the execution, he heard them all say, that they were living on the ranch "with his per-

mission; that at any hour, whether in the daytime or at night, they had to quit it."

The actual quantity of land conveyed was 20,135 acres. Its value in 1864, when the deed was made, was perhaps $20,000, and in 1866, when leased to the Steeles, hardly less than $30,000.

By a statute of California, "to regulate the interest of money," passed March 13th, 1850,* it is thus enacted:

"3856. § 1. Where there is no express contract in writing, fixing a different rate of interest, interest shall be allowed at rate of 10 per cent. per annum, for all moneys after they become due on any bond, bill, promissory note or other instrument of writing.

"3857. § 2. Parties may agree in writing for the payment of any rate of interest whatever, on money due or to become due on any contract.

"3858. § 3. The parties may, in any contract in writing, whereby any debt is secured to be paid, agree that if the interest on such debt is not punctually paid it shall become a part of the principal, and thereafter bear the same rate of interest as the principal debt."

The conclusion of the court below, from all the evidence in the case, was that the deed and the testimony of Rodriguez disclosed the true nature of the transaction, viz., that the land was conveyed not in security for, but in satisfaction and extinguishment of the precedent debt; but under the expectation, founded on Rodriguez's assurances, that any surplus of the price at which it might be sold over and above the amount necessary to reimburse Rodriguez, would be by the latter appropriated to the benefit of the family.

Whatever trust, therefore, was created, referred itself, according to this view, to the proceeds, and did not attach itself to the land or in any way impair the right of Rodriguez to dispose of it.

A decree being made accordingly Alexander appealed to this court.

* 1 General Laws of California, 559.

Argument for the Steeles.

Messrs. M. Blair and F. A. Dick, for the appellant:

The evidence is overwhelming to show that the parties regarded the deed as a continued security for the debt, and that the expectation was that Rodriguez would treat the land as a security and not as his absolute property. To what else than making the transfer a mortgage could the private conversations and understandings, spoken of by Dana, refer to? But whether the instrument was in fact meant as a mortgage equity will, under circumstances like the present, intervene and make it so. It is the case of a sharp, intelligent, trading city brother, dealing with a poor and uneducated widowed sister and his young nephews and nieces, on a farm as yet a wilderness,—his debtors, his supposed beneficiaries,—in a short, cruel way, unknown even to a money-lender.

The principles laid down in *Morris* v. *Nixon*,* in this court—a leading case, but less strong than ours is—that where confidential relations exist between a debtor and creditor, and a conveyance is made by the debtor to the creditor, it will be treated as a mortgage, if the consideration of the deed is the debt, and this is the construction in equity of such a transaction. The rule does but iterate what the Leading Cases in Equity declare to be a well-settled rule of equity.†

Messrs. Brent and Crittenden, contra:

The question is not whether the instrument is a mortgage or not; but conceding that it is a mortgage, the question is *of what* is it a mortgage? The decree below declares that the deed was a transfer with power to sell, a deed, with a view to a claim on the surplus of proceeds when the tract should be sold; in other words, that it was a mortgage on *proceeds*, and not a mortgage on the land as a thing. *We* have not appealed. It is the other side who appeals; seeking to reverse the decree below, and to have the mortgage declared to have been one on the land as a *res;* and not on it as a source of money

* 1 Howard, 118; and see **Russell** *v.* Southard, 12 Id. 139; and **Wharf** *v.* Howell, 5 Binney, 499

† Vol. 2, p. 644.

by sale. That the view taken by the court below was a true view of the nature of the deed; that the "private conversations," "agreements, and understandings" between Rodriguez and his sister, were to *this* effect, and not to the making of the instrument a mortgage on the land as a thing, all the testimony shows. The view of the court below is consistent with almost all the testimony, and is the only view that is. It is entirely consistent even with the testimony of Dana, relied on as conclusive to show a mortgage of the *res;* and consistent with what the counsel of the other side assert that the testimony is overwhelming to show; namely, "that the parties regarded the deed as a continued security for the debt, and that the expectation was, that Rodriguez would treat the land as a security, and not as his *absolute* property." The question, here and now, we repeat, is not whether there was a mortgage, but *on what* the mortgage was; on land or the proceeds of land? If the view taken by the court below be not absolutely consistent with the testimony of some of the Villas, it is to be remembered that these persons testify under the pressure of great interest, and under the greatest temptation, so to shape their testimony, as to get the $35,000 dependent on success. What a lure in such a case to perjury. The view which would look on the matter in the way that we here—on this appeal—contend for, looks on a natural and a fair arrangement. The debt to Rodriguez was a real one; he had advanced his money, gold coin, of course. Monstrous on the Atlantic coast, the rate of interest was not unusual in California, where a frightful taxation on the *mortgage*, as well as a less one on the land, reduced the net interest to reasonable sums. Rodriguez was in trade. He had need of his money. Perhaps he had himself borrowed it, and if he borrowed he probably borrowed at the rates that he lent. *He* had redeemed the land. He says: "Convey the property to me. I sponge your debt. We will avoid double taxes. I will sell the land and repay myself; and if I sell for more than you owe me, you shall have the surplus; if I cannot sell it, I will lose the money." What was there unconscionable in this? It was a family trans-

action, to be sure; and with needy relatives. But can a man have nothing to do with needy relatives, under penalty of being regarded in everything that he does do, as a robber? If he cannot *give* them money, is he to let them perish because he cannot lend it to them? because any arrangements, however advantageous then, will not stand, if afterwards—in years, and by accidents which could not have been foreseen—the property rises in value, and others, strangers, not he, grow rich? The property had to be sold. The Villas could not pay the taxes. Rodriguez had redeemed once, and now was paying double taxes. Who better could sell to advantage than he? And could he not better sell with a title in his own name, than agent of a widow and parcel of children; some liable to marry, die and leave minors, or otherwise embarrass the title? Could he have sued any of the Villas after this transfer for the money lent or advanced to them? No one will assert that he could. If he could not, the transaction was not a mortgage, though it may well be a transfer with a power to sell, leaving a trust on surplus proceeds.

So far as Rodriguez is concerned, it is the same thing whether the instrument is declared a mortgage or an absolute conveyance with a claim on surplus proceeds. But to the Steeles, the difference is enormous. A mortgage takes all their immense improvements. Now the reason why a lease with a right to purchase in fee was made, instead of a conveyance in fee and a mortgage, is sufficiently inferable from what is shown as to the laws of California. It was to avoid double taxation on the same property. The transaction was quite lawful. But if the Steeles are not *bonâ fide* purchasers without notice—which we might assert that they were—certainly they have great equities; equities almost equal to that class of persons. Their vendor came to them with a perfect paper title. No mortgage was on record. They were suffered to take possession without a word of protest, or any intimation of the rights now set up. They were permitted to make the valuable improvements under the eyes of the Villas, the real complainants here. Several

Recapitulation of the case in the opinion.

of the sons entered into their employ, and a lease was finally procured from them for the house and grounds the family were occupying. For more than a year the rights now set up, if suspected to exist, were entirely concealed.

The appellant was the purchaser of a litigious claim. He paid a mere nominal consideration in cash, and offered to ignorant and illiterate witnesses, the strongest temptation to fraud and perjury. He should not be favored in a court of equity.*

Reply: The Steeles were speculators, not purchasers in any sense; certainly not purchasers *without notice.* For they held under an executory contract,† and could ask at best for but a quit-claim deed.‡

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 California. The appellant was the complainant in the court below. The decree was against him.

He seeks to redeem the premises in controversy according to the prayer of his bill. The defendant, Rodriguez, claims an indefeasible estate in them as regards the complainant and those from whom he derives title. The other defendants claim under a contract of purchase made with Rodriguez. The validity of the complainant's title, if his grantor had anything to convey, is not questioned. Nor is the original title of his grantor and of those who conveyed to him denied. But the defendants insist that the title of all those parties was vested absolutely in Rodriguez by deeds duly made and recorded before the conveyances to the complainant and his grantor were executed. The complainant insists that Rodriguez, after, as before, the legal title was conveyed to him, held the premises only as security for a debt. This is the hinge of the controversy between the parties.

* Orton *v.* Smith, 18 Howard, 264–5.

† 2 Leading Cases in Equity, 96.

‡ May *v.* Le Claire, 11 Wallace, 217.

Recapitulation of the case in the opinion.

The entire tract, of which the premises in controversy form a part, was conveyed by José Maria Villavicencia on the 13th of April, 1852, to his seven children. He died in 1853. The widow and five of the children conveyed to Fulgencio, also one of the children, on the 16th of December, 1867. On the 26th of the same month Fulgencio conveyed to the complainant. By virtue of this conveyance he claims six-sevenths of the tract. That proportion is his if his title be valid.

The widow is the sister of the defendant, Rodriguez. On the 4th of December, 1860, she and three of the children, the other four being under age, executed to Rodriguez, for money then borrowed, a note for four thousand dollars, payable a year from date, and bearing interest at the rate of two per cent. a month, payable at the end of each six months thereafter; the interest, "if not so paid, to be added to the principal and draw interest at the same rate, compounding in the same manner." A mortgage upon the entire tract was given at the same time by the makers of the note to secure its payment. The mortgage contained a provision, that in default of the payment of the interest as stipulated, the principal should become due and payable at the option of the mortgagee, and that the mortgage might thereupon be foreclosed and the premises sold to satisfy the mortgage debt, and that out of the proceeds of the sale the mortgagee should be authorized to retain, besides his debt and costs, a counsel fee of five per cent. upon the amount found to be due. The mortgage contained a further provision that the mortgagee might pay all taxes and incumbrances on the property, and that the amount of such advances should be secured by the mortgage, and should also bear interest at the rate of two per cent. per month. Rodriguez subsequently paid $1172 to redeem the property from a sale for taxes. On the 29th of April, 1864, the widow and five of the children conveyed to him by a deed absolute in form. It is recited in the deed that the debt secured by the mortgage then amounted to about $10,000. On the 17th of February, 1865, one of the children, who was a minor when this

deed was executed, and hence had not joined in it, also conveyed to Rodriguez. Nothing was paid to the grantor. On the 20th of May, 1865, the other and seventh child, who had then become of age, executed a like conveyance. The consideration paid was $100.

On the 22d of July, 1866, Rodriguez demised the premises so conveyed to him to his co-defendants, Edgar W., Isaac C., and Rensselaer E. Steele. The defendant, George Steele, subsequently became interested in this contract by an arrangement with the lessees. The leasehold term was for five years from the 1st of August, ensuing its date. Rodriguez stipulated that at the end of the term or within five days thereafter the lessees might purchase by paying him $25,000 in gold, and upon such payment being so made he covenanted that he would, by a sufficient deed, release and quit-claim to the lessees or their heirs and assigns, free from all incumbrances created by him, all the right and title which he then had to the premises or which he might thereafter acquire from the United States or from any of the heirs of José Maria Villavicencia.

The lessees and their assignees insist that they are *bonâ fide* purchasers without notice.

This proposition cannot be maintained. The contract gave them the option—it did not bind them—to buy at the time specified. That time had not arrived when this bill was filed. *Non constat* that they would then exercise their election affirmatively and pay the stipulated price. But this point is not material. The doctrine invoked has no application where the rights of the vendee lie in an executory contract. It applies only where the legal title has been conveyed and the purchase-money fully paid.* The purchaser then holds adversely to all the world, and may disclaim even the title of his vendor.†

This contract calls for a quit-claim deed. The result would be the same if such a deed had been executed and full pay-

* Nace *v.* Boyer, 30 Pennsylvania, 110; Boone *v.* Chiles, 10 Peters, 177, 211.

† Croxall *v.* Shererd, 5 Wallace, 289.

ment made, without notice of the adverse claim. Such a purchaser cannot have the immunity which the principle sought to be applied gives to those entitled to its protection.* This contract may, therefore, be laid out of view. It is no impediment to the assertion of the complainant's rights, whatever they may be. It does not in any wise affect them.

The law upon the subject of the right to redeem where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a *cestui que trust* to his trustee is drawn in question. To give validity to such a sale by a mortgagor it must be shown that the conduct of the mortgagee was, in all things, fair and frank, and that he paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. Where confidential relations and the means of oppression exist, the scrutiny is severer than in cases of a different character. The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved, require that such should be the law.†

The terms exacted for the loan by Rodriguez were harsh and oppressive. The condition of the widow and orphans

* May *v.* Le Claire, 11 Id. 232; Oliver *v.* Piatt, 3 Howard, 363.

† Morris *v.* Nixon, 1 Howard, 118; Russell *v.* Southard, 12 Id. 139; Wakeman *v.* Hazleton, 3 Barbour's Chancery, 148; 4 Kent's Commentaries, 143; Holmes *v.* Grant, 8 Paige, 245; 3 Leading Cases in Equity, 625.

might well have touched his kindred heart with sympathy. It seems only to have whetted his avarice. Two per cent. a month—and this, if not paid as stipulated, to be compounded—was a devouring rate of interest. It was stipulated that the further advances should bear interest at the same rate. He demanded an adjustment when, from the failure of the crops and other causes, the property was greatly depressed, and he knew the widow and her children had no means of payment. The alternatives presented were an absolute conveyance of the property or a foreclosure and sale under the mortgage. He was anxious to procure the deed, and exulted when he got it. The debt and advances, with the interest superadded, were much less than the value of the property. The note and mortgage were executed by three of the children and the widow—the deed by the widow and five of the children. The other two children conveyed at later periods. The consideration of the conveyance by the four children not parties to the note and mortgage was such that if an absolute title passed, their deeds must be regarded as deeds of gift of their shares of a valuable estate. Dana, who took the acknowledgment of the deed executed by the widow and five children, testifies that the widow inquired whether the deed contained all the agreements between her and Rodriguez. Dana translated it to her. She complained that the agreements were omitted. Rodriguez insisted that they were in the deed, and added "that they ought not to distrust him, as he was taking all these steps for their interest." The widow and children then executed the deed. Dana, speaking of a subsequent conversation with Rodriguez, on the same day, "which was altogether unsolicited," says: "he stated to me that his object in getting the Villavicencia family to execute the deed aforesaid was to secure his money, money which he had loaned or advanced to them, and save the property for the benefit of his sister and her family, while if it remained in their hands he might lose his money, and his sister and her children would lose the whole property. He said they had done wisely in trusting him, as he intended to deal justly by his sister." Rodriguez was exam-

ined as a witness. Referring to a period shortly preceding the execution of this deed, he says: "Afterwards I had with them further conversation, and told them, I don't wish to speculate upon you, because you are my relations, and you have treated me well. If I can sell the ranch for enough to reimburse myself for my outlays as well as interest, I will return you the surplus money, if any; and, also, if I can sell a portion of the ranch, or enough to reimburse myself for my advance, I will do the same, and return to you the unsold portion of the ranch, but if I have bad luck and cannot sell it, I will lose my money." Elsewhere, in the same deposition, he says: "I stated at the ranch, and again stated to my sister afterwards, that I would return the surplus money, but it was no obligation of mine. It may be that I said so to Charles Dana at that time."

He made the same admissions to other persons who are in no wise connected with this litigation. Their testimony is found in the record. It is unnecessary to extend the limits of this opinion by accumulating and commenting upon it. The widow and five of the children, all who have been examined, testify that they understood the deeds to be only security for the debt. This explains the transaction as to those who were not parties to the note and mortgage. There is no other way of accounting for their conduct. The testimony of Rodriguez alone is sufficient to turn the scale against him. He cannot repudiate the assurances upon which his grantors were drawn in to convey. To permit him to do so would give triumph to iniquity. The facts indisputably established bring the case clearly within those principles by the light of which, in determining the rights of the parties, the judgment of this court must be made up. The complainant stands in the place of those from whom he derives title. He is clothed with their rights, and is entitled to redeem six-sevenths of the premises upon paying that proportion of the mortgage debt and interest. The former must be held to include the amount advanced, as well as that represented by the note, and the latter be settled by the terms of the contract and the law of California. The

rents, issues, and profits, and improvements made upon the premises must also be taken into the account.

THE DECREE IS REVERSED, and the cause will be remanded to the Circuit Court with directions to enter a decree and proceed

IN CONFORMITY TO THIS OPINION.

HANAUER *v.* DOANE.

1. Action will not lie for the price of goods sold in aid of the Rebellion, or with knowledge that they were purchased for the Confederate States government.
2. A promissory note, the consideration of which is wholly or in part the price of such goods, is void, and an action cannot be sustained thereon by a holder who received it knowing for what it was given.
3. Due-bills given for the price of such goods and passed into the hands of a person knowing the fact, will not be a good consideration for a note.
4. It is contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members.

ERROR to the Circuit Court for the Eastern District of Arkansas.

This was an action by Doane against L. & J. Hanauer, to recover the amount of two promissory notes, dated in February, 1867. These notes were originally given by the said L. &. J. Hanauer, under the firm of L. Hanauer & Co., to one Hunter, in settlement of an account between them and the firm of Hunter & Oakes, which had mostly accrued in the years 1860, 1861, and 1862. A portion of this account was for items of private and family use; the residue was partly for supplies and commissary stores for the Confederate army sold by Hunter & Oakes to L. Hanauer, a recognized supply contractor of the Confederate government; and partly for due-bills issued by Hanauer, as such contractor, to

Statement of the case.

other persons in payment of army stores and supplies, and taken up by Hunter & Oakes at Hanauer's request, under a promise to redeem the same.

The question in the case was whether the notes sued on, having been given for the consideration mentioned, were valid.

The defendants asked the court to charge thus:

"1. If the jury find that Hunter & Oakes sold to L. Hanauer a quantity of goods and chattels knowing that the said Hanauer was purchasing them as supplies for the rebel army to carry on the war against the United States, and that the price of the same form a part of the consideration of the notes sued on, then they will find for the defendants.

"2. If they find that L. Hanauer, acting as a purchasing agent for the Confederate States, in rebellion, gave out notes or due-bills for supplies furnished the rebel army with the knowledge of the persons from whom such purchases were made, of the use to which the said supplies were to be put, and that, during the time when the said due-bills were in the course of being issued, the said Hanauer made an agreement with said Hunter & Oakes that the latter should take up said due-bills and charge them to said Hanauer, the said Hunter & Oakes knowing the purpose for which the same were issued, and that the price of said due-bills so taken up forms any part of the consideration of the notes sued on, then they will find for the defendants."

The court refused so to charge, and charged as follows:

"If these due-bills were taken up by Hunter & Oakes, after they were issued to the parties to whom they were payable, and upon the promise of Hanauer that he would redeem them, then, as between Hanauer and Hunter & Oakes, the surrender by Hunter & Oakes to Hanauer of such due-bills so taken up by them, would constitute a good and sufficient consideration for the amount thereof. And this is the law, although you may find that the parties to whom the due-bills were payable knew at the time of making the sale of supplies or property to L. Hanauer that he intended to turn the same over to the rebel army, and that Hunter & Oakes had notice of these facts. To affect the validity of the notes sued on, as to that part of the

consideration made up of these due-bills, you must be satisfied that Hunter & Oakes were interested in furnishing the supplies to the rebel army for which the due-bills were given, or that what they did in the premises was done for the purpose or with the view of aiding in furnishing supplies to the rebel army, otherwise giving aid and comfort to the rebellion.

"Then, as to the other item, comprising a part of the consideration of the notes sued, the account of Hunter & Oakes against Hanauer as supply contractor for supplies sold to Hanauer. It is asserted that Hunter & Oakes knew that the articles mentioned in this account were purchased by Hanauer to be turned over as supplies to the rebel army, and the defendant maintains that this knowledge of the use intended to be made by Hanauer of these goods made the sale illegal, and that the amount of these sales having been included in the notes sued on, they are illegal and void. This is not the law. Bare knowledge, on the part of Hunter & Oakes, that Hanauer intended or expected to turn the goods and property purchased from them over to the rebel army as supplies for said army would not make such sale of goods and property illegal and void. To make the sale of goods from Hunter & Oakes to Hanauer illegal and void, it must appear that Hunter & Oakes had some concern in furnishing the supplies to the rebel army, or that it was part of the contract between Hunter & Oakes and Hanauer that such goods should go to the support of the rebel army, or that the design of Hunter & Oakes, in making such sale, was to aid in furnishing supplies to the rebel army, or otherwise give aid and comfort to the rebellion. But if the goods were sold by Hunter & Oakes in the common and ordinary course of trade, and the only inducement to the sale of the goods on the part of Hunter & Oakes was the price agreed to be paid by Hanauer for the same, then the sale was a legal and valid sale, although Hunter & Oakes knew that Hanauer intended or expected to turn such goods over to the rebel army."

Judgment having gone for the plaintiff, the defendant, Hanauer, brought the case here on exceptions to the charge; the question in this court being, of course, the same one as in the court below, to wit, whether the notes sued on, having been given for the consideration mentioned, were valid.

Opinion of the court.

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

Mr. Justice BRADLEY delivered the opinion of the court.

We have already decided, in the case of *Texas* v. *White*,* that a contract made in aid of the late rebellion, or in furtherance and support thereof, is void. The same doctrine has been laid down in most of the circuits, and in many of the State courts, and must be regarded as the settled law of the land. Any contract, tinctured with the vice of giving aid and support to the rebellion, can receive no countenance or sanction from the courts of the country. Are the notes in suit of this kind? A portion of their consideration was stores and supplies furnished to the army contractor of the Confederate government, and another portion was due-bills issued for the same consideration, and received by Hunter & Oakes with full notice of their character. If either of these portions of the consideration on which the notes were given was illegal, the notes are void *in toto*. Such is the elementary rule, for which it is unnecessary to cite authorities.

On the trial of the cause below, the judge, in charging the jury, instructed them that if Hunter & Oakes took up Hanauer's due-bills for value, at his request and on the faith of his promise to redeem them, made after he had given them out for supplies, these due-bills would constitute a good consideration for the notes. We do not think that this was a correct statement of the law. If Hanauer had borrowed money from Hunter & Oakes to redeem the due-bills himself, the transaction would have been different, and the loan of money would have been legal, although Hunter & Oakes had known for what purpose Hanauer wanted the money. They would have been one degree farther removed from the unlawful transaction. But, instead of this, they became the holders of the due-bills, knowing for what purpose and on what consideration they had been issued; and

* 7 Wallace, 700.

hence their title was no better than that of the original holders. To vitiate this title it was not necessary, as stated by the judge, that Hunter & Oakes should have been interested in furnishing the supplies for which the due-bills were given; nor that what they did should have been done with the view of aiding the rebel cause. If the due-bills were invalid in the hands of the original holders, they were invalid in the hands of Hunter & Oakes. Whether they were invalid depends on the solution of the question whether the sales of supplies to Hanauer, for the use of the Confederate army, was, or was not, an illegal transaction. We think it was. But on this subject it is proper to examine the views of the judge at the trial.

With regard to that portion of the consideration of the notes which consisted of supplies sold by Hunter & Oakes to Hanauer for the Confederate army, the judge instructed the jury that bare knowledge on the part of Hunter & Oakes that Hanauer intended, or expected, to turn the goods over to the rebel army, would not make the sale illegal and void, but that, to make it so, it must appear that Hunter & Oakes had some concern in furnishing the supplies to the rebel army, or intended to aid therein. In this instruction we think the judge erred. With whatever impunity a man may lend money or sell goods to another who he knows intends to devote them to a use that is only *malum prohibitum*, or of inferior criminality, he cannot do it, without turpitude, when he knows, or has every reason to believe, that such money or goods are to be used for the perpetration of a heinous crime, and that they were procured for that purpose. In the words of Chief Justice Eyre, in *Lightfoot* v. *Tenant*,* "the man who sells arsenic to one who, he knows, intends to poison his wife with it, will not be allowed to maintain an action on his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. . . . No man ought to furnish another with the means of transgressing the law, knowing that he

* 1 Bosanquet & Puller, 551, 556.

intended to make that use of them." On this declaration Judge Story remarks: "The wholesome morality and enlarged policy of this passage make it almost irresistible to the judgment; and, indeed, the reasoning seems positively unanswerable."* Can a man furnish another with the means of committing murder, or any abominable crime, knowing that the purchaser procures them, and intends to use them, for that purpose, and then pretend that he is not a participator in the guilt? Can he wrap himself up in his own selfishness and heartless indifference and say, "What business is that of mine? Am I the keeper of another man's conscience?" No one can hesitate to say that such a man voluntarily aids in the perpetration of the offence, and, morally speaking, is almost, if not quite, as guilty as the principal offender.

No crime is greater than treason. He who, being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his acts are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act.

The decision of Chief Justice Eyre, in the case above referred to, has been followed in several other English cases. It was followed by Lord Ellenborough in *Langton* v. *Hughes*,† where a druggist sold drugs of a noxious and unwholesome nature to a brewer, knowing that they were to be used in his brewery, contrary to law, and it was held that he could not recover the price. It was also followed by Chief Justice Abbott, in *Cannan* v. *Bryce*,‡ where it was held that money

* Story's Conflict of Laws, § 253.

† 1 Maule & Selwyn, 593.

‡ 8 Barnewall & Alderson, 179.

lent to a man to enable him to settle his losses on an illegal stockjobbing transaction, could not be recovered back. Said the Chief Justice: "If it be unlawful in one man to pay, how can it be lawful for another to furnish him with the means of payment? . . . The means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object." In that case the lender had no interest whatever in the unlawful transaction, and was only connected with it, as Hunter & Oakes were in this case, by knowing the object for which the money was borrowed. These cases were followed by the Court of Errors of New York, in the case of *De Groot* v. *Van Duzer*.* Chancellor Walworth, in that case, observes that, "those cases in which an independent contract has been held void from a mere knowledge of the fact of the illegal end in view, proceed upon the ground that the party having such knowledge intended to aid the illegal object at the time he made the contract."

There are cases to the contrary; but they are either cases where the unlawful act contemplated to be done was merely *malum prohibitum*, or of inferior criminality; or cases in which the unlawful act was already committed, and the loan was an independent contract, made, not to enable the borrower to commit the act, but to pay obligations which he had already incurred in committing it. Of the latter class was the case of *Armstrong* v. *Toler*;† of the former, those of *Hodgson* v. *Temple*,‡ and others cited in the argument. In *Hodgson* v. *Temple*, where a buyer of spirituous liquors was known to be carrying on a rectifying distillery and a retail liquor shop at the same time, contrary to law, the vendor of the spirits was held entitled to recover the price. Sir James Mansfield said: "The merely selling goods, knowing that the buyer will make an illegal use of them, is not sufficient to deprive the vendor of his just right of payment; but to effect that, it is necessary that the vendor should be a sharer in the illegal transaction."

* 20 Wendell, 390. † 11 Wheaton, 258. ‡ 5 Taunton, 181.

This seems to have been the view taken by the judge who tried this cause below, and which he applied to this case. In our judgment it is altogether too narrow a view of the responsibility of a vendor in such a case as the present. Where to draw the precise line between the cases in which the vendor's knowledge of the purchaser's intent to make an unlawful use of the goods, will vitiate the contract, and those in which it will not, may be difficult. Perhaps it cannot be done by exact definitions. The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members. This is all that we mean to decide in this case

JUDGMENT REVERSED, AND A NEW TRIAL ORDERED.

[See the next case.]

THOMAS *v.* CITY OF RICHMOND.

1. Where the issue of bills as a currency (except by banking institutions) is prohibited, a municipal corporation has no power, without express authority, to issue such bills; and if it does issue them, the holders thereof cannot recover the amount, either in an action on the bills themselves, or for money had and received.
2. Especially is this so, where the receiving, as well as issuing, of unlawful bills is expressly prohibited.
3. A law authorizing and requiring the redemption of such bills, passed by the legislature of one of the late Confederate States in aid of the rebellion, cannot be recognized or enforced.
4. *Semble*, that a bank or other private corporation issuing bills contrary to law, might be compelled to pay the holder in an action for money had and received, although the bills themselves were void, if the receiving of the bills were not expressly prohibited.
5. But if the receiving as well as issuing were prohibited, both parties would be in *pari delicto*, and no action could be sustained for the amount of the bills.

Statement of the case.

6. The law as to the recovery of money paid on an illegal contract stated and defined.

ERROR to the Circuit Court for the District of Virginia, on a suit upon certain notes issued during the rebellion by the city corporation of Richmond; the case being thus:

A statute Virginia passed in 1854, and reproduced in the code of 1860, thus enacts:

"SECTION 15. All members of any association, or company, that shall trade or deal as a bank, or carry on banking without authority of law, and their officers and agents therein, shall be confined in jail not more than six months, and fined not less than $100, nor more than $500.

"SECTION 16. Every free person,* who, with intent to create a circulating medium, shall issue, without authority of law, any note or other security, purporting that money or other thing of value is payable by, or on behalf of, such person, and every officer and agent of such person therein, shall be confined in jail," &c.

"SECTION 17. If a free person pass or *receive* in payment any note or security, issued in violation of either of the two preceding sections, he shall be fined not less than $20 nor more than $100."

"SECTION 19. In every case where a note of a less denomination than $5 is offered or issued as money, whether by a bank, corporation, or by individuals, the person, firm, or association of persons, corporation, or body politic so issuing, shall pay a fine of $10."

By the charter of the city of Richmond,† that city "may contract or be contracted with," and is endowed generally with "all the rights, franchises, capacities, and powers appertaining to municipal corporations." The charter also provides that "the council of the city may in the name and for the use of the city contract loans, and cause to be issued certificates of debt or bonds."‡

* By the express provision of the enactment the word "person" includes corporation.

† Chapter 54 of the code of 1849, p. 282, was followed by the act of March 30th, 1852 (Session Acts, p. 259), and the act of March 18th, 1861 (Ib. 153)

‡ Sessions Acts, 1852, p. 265, § 46; 1861, p. 169, § 75.

Argument for the note-holder.

In this state of things the city of Richmond, in April, 1861, upon the breaking out of the rebellion, passed an ordinance for the issue by the city of $300,000, of corporation notes of $2, $1, 50 cents, and 25 cents; and the notes were accordingly issued; the city receiving in exchange the bank notes of the State then in circulation, between which and gold the difference at the time, compared with what it became subsequently, was small; five per cent. to ten per cent.

On the 19th March, 1862, and the 29th of the same month and year, a so-called "legislature of Virginia," the body being composed of representatives from parts of the State in rebellion against the Federal government, passed an act, by whose language the issue of the sort of notes in question was made valid, and the city obliged to redeem them.

In October, 1868, the rebellion being now suppressed, and the city refusing to pay the notes, one Thomas and others, holders of a quantity of them, brought *assumpsit* against the city of Richmond, in the court below, to recover certain ones which they held. The declaration contained a special count on the notes and the *common money counts*. The defendants pleaded the general issue and the statute of limitations. A jury being waived, the case was tried by the court, which found:

1st. That the notes were void when they were issued, because they were issued to circulate as currency, in violation of the law and policy of the State of Virginia, and,

2d. That the said notes were not made valid or recoverable by the acts of the 19th March, 1862, and 29th March, 1862, or either of them, because the said acts were passed by a legislature not recognized by the United States, and *in aid of the rebellion.*

The court accordingly gave judgment for the defendant. To review that judgment the case was brought here by the plaintiff.

Mr. Conway Robinson, for the plaintiff in error:

1. Under the powers which the city of Richmond had, by its charter, it might receive from those who would lend or

Argument for the note-holder.

advance it, the amount now in question, and might agree to refund it.

2. The amount has been actually received by the city in money or its equivalent. This money the city is under an obligation to refund, and there is a right of action for it as money lent or money received. "It is not the policy of the law," says Alderson, B., "that he who has another man's money may keep it."*

Whether the notes be valid or void, the holders may recover on the money counts.† Under the statute of 9 Anne, c. 16, a note for money lent to game with was void; yet an action was maintained for money lent under a parol contract.‡ In A. D. 1760, where the bill of exchange included £300, lent by the plaintiff to Sir John Bland, at the time and place of play, though by force of the bill the plaintiff could not recover anything (the statute making that utterly void), yet the King's Bench gave judgment for £300, under the common count for money lent.§

Whatever may be the structure of the statute of Virginia in respect to prohibition and penalty about small notes, it is not to be taken for granted that the legislature meant that contracts in contravention of it were to be void in the sense that they were not to be enforced in a court of justice.‖

But if this were otherwise, prior enactments against small notes is repealed, by the act of March 19th, 1862, so far as in conflict therewith; and by the latter there is a release of forfeitures and penalties incurred before its passage; neither is there anything in *Texas* v. *White*,¶ which should prevent the latter act having full effect.

Mr. John A. Meredith, contra, for the city.

* Bousfield *v.* Wilson, 16 Meeson & Welsby, 188; and see Brooks *v.* Martin, 2 Wallace, 81.

† 4 Robinson's Practices, ch. 87, 88, 89, p. 547, *et seq.*

‡ Barjeau *v.* Walmsley, 2 Strange, 1249.

§ Robinson *v.* Bland, 2 Burrow, 1081; and see Sutton *v.* Toomer, 7 Barnwall & Cross (14 English Common Law), 416; Utica Insurance Company *v.* Scott, 19 Johnson, 6; Same plaintiff *v.* Kip, 8 Cowen, 24.

‖ Harris *v.* Runnels, 12 Howard, 84; Sortwell, &c. *v.* Hughes, 1 Curtis, 247.

¶ 7 Wallace, 733.

Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

First. The court finds as a fact that the notes upon which the present action is brought were issued to circulate as currency; and, as matter of law, that this was in violation of the law and policy of Virginia, and that, therefore, the notes were void.

The first question is, whether the issue of notes as currency by the Common Council of the city of Richmond, in April, 1861, was against the law and policy of Virginia. The issue of notes as a common currency, or circulating medium, is guarded with much jealousy by all governments as touching one of its most valuable prerogatives, and as deeply affecting the common good of the people. Almost every State has stringent laws on the subject, and it may be said to be against the public policy of the country to allow individuals or corporations to exercise this prerogative without express legislative sanction. The State of Virginia, like all the other States, had a law of this kind in operation at the time the notes in question were issued. The issue of the notes in question was clearly in violation of this law; and it will be perceived that the 17th section makes the receipt of such notes in payment, as well as the issue and passing of them, a penal offence.

But the charter of the city of Richmond has been referred to for the purpose of showing that the Common Council had power to issue such notes. One of the grants of power relied on is, that the city is made a corporation with power to contract and be contracted with, and generally with "all the rights, franchises, capacities, and powers appertaining to municipal corporations." In a community in which it is against public policy, as well as express law, for any person or body corporate to issue small bills to circulate as currency, it is certainly not one of the implied powers of a municipal corporation to issue such bills. Such a corporation "can exercise no power which is not, in express terms, or by fair implication, conferred upon it."* Another clause

* Thomson v. Lee County, 3 Wallace, 330.

of the charter to which reference has been made authorizes the council to borrow money and to issue the bonds or certificates of the city therefor. But this cannot be seriously urged as conferring the right to issue such bills as those now in suit. Such city securities as those authorized by the charter are totally different from bills issued and used as a currency or circulating medium. The distinction is well understood and recognized by the whole community. A power to execute and issue the one class cannot, without doing violence to language, be deemed to include power to issue the other. We do not hesitate to say, therefore, that the Common Council of Richmond had no power or authority to issue such paper, and that they could not bind the city thereby.

It is contended, however, that although the notes themselves should be deemed void, yet the city received the money therefor, and ought not, in conscience, to retain it; and, therefore, that the action can be maintained on the count for money had and received.

If the defendant were a banking or other private corporation, and had issued notes contrary to law, and had incurred penalties therefor, no penalty being imposed upon the receiver or holder of the notes, this argument might be sound. In the case of *The Oneida Bank* v. *The Ontario Bank*,* in which the defendant had issued post notes contrary to a statute of New York, it was held that the holder could recover the money advanced therefor. "The argument for the defendant against this position," says Chief Justice Comstock, "rests wholly on the idea that Perry, in receiving the post-dated drafts, was as much a public offender as the bank or its officers issuing them. . . . But such were not the relations of the parties. . . . Whatever there was of guilt, in the issuing of the drafts, it was the creature of the statute. . . . By that authority, and that alone, the bank is prohibited from issuing, but not the dealer from receiving; and the punishment is denounced only against the individual banker,

* 21 New York, 496.

or the officers, agents, and members of the association. . . . If the issuing of the drafts was prohibited, and if they were also void, Perry, nevertheless, had a right to demand and recover the sums of money which he actually loaned to the defendant." This is in accordance with the general principles of law on this subject. Lord Mansfield, in *Smith* v. *Bromley*, as long ago as 1760, laid down the doctrine, which has ever since been followed, in these words: "If the act be in itself immoral, or a violation of the general laws of public policy, both parties are *in pari delicto*, but where the law violated is calculated for the protection of the subject against oppression, extortion, and deceit, and the defendant takes advantage of the plaintiff's condition or situation, then the plaintiff shall recover."* In that case the plaintiff had given the defendant money to sign her brother's bankrupt certificate, and she was allowed to recover it back, the law prohibiting any creditor from receiving money for such a purpose. Whilst the general principle has been frequently recognized, the application of it to particular cases has been somewhat diverse. Mr. Frere, in his note to *Smith* v. *Bromley*,† thus sums up the result of the cases: A recovery can be had, as for money had and received (1st) where the illegality consists in the contract itself, and that contract is not executed—in such case there is a *locus pœnitentiæ*, the *delictum* is incomplete, and the contract may be rescinded by either party; (2d) where the law that creates the illegality in the transaction was designed for the coercion of one party and the protection of the other, or where the one party is the principal offender and the other only criminal from a constrained acquiescence in such illegal conduct—in such cases there is no *parity of delictum* at all between the parties, and the party so protected by the law, or so acting under compulsion, may, at any time, resort to the law for his remedy, though the illegal transaction be completed.‡

* 2 Douglas, 696, n. † Ib. 697, a.

‡ See the cases collected in 2 Comyn on Contracts, 108–131; 1 Selwyn's Nisi Prius, 87–100; 3 Phillips on Evidence, 119; 2 Greenleaf on Evidence, § 121, p. 120; Chitty on Contracts, 550, 552, 553, and notes.

Now, in cases of bills, or other obligations, illegally issued by a banking or other private corporation, which has received the consideration therefor, it would enable them to commit a double wrong to hold that they might repudiate the illegal obligations, and also retain the proceeds. Hence, where the parties are not *in pari delicto*, actions are sustained to recover back the money or other consideration received for such obligations, though the obligations themselves, being against law, cannot be sued on. The corporation issuing the bills contrary to law, and against penal sanctions, is deemed more guilty than the members of the community who receive them whenever the receiving of them is not expressly prohibited. The latter are regarded as the persons intended to be protected by the law; and, if they have not themselves violated an express law in receiving the bills, the principles of justice require that they should be able to recover the money received by the bank for them. But if the parties are *in pari delicto*, as, if the consideration as well as the bills or other obligation is tainted with illegality or immorality, as it would be if loaned or advanced for the purpose of aiding in any illegal or immoral transaction, or if the receiving as well as passing or issuing the bills is forbidden by law, then the holder is without legal remedy, and the parties are left to themselves.

But, in the case of municipal and other public corporations, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and peculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being *ultra vires*, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is *in pari delicto* with the officers, and should

have no remedy, even for money had and received, against the corporation upon which he has aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

According to these principles no recovery could have been had against the city, either on the bills themselves or on a claim for money had and received. It was against the law of the State to issue them. It was a penal offence in both the person who paid and the person who received them, and they were issued by a municipal corporation which had no power, and which was known to have no power to issue them.

It was insisted further, however, that the legislature, in March, 1862, passed laws which authorized, and even required, the city to redeem these bills. But,

Secondly. The court found that these laws were passed by a legislature not recognized by the United States and in aid of the rebellion, and, therefore, that these notes were not made valid thereby.

The fact thus found, that the laws referred to were passed in aid of the rebellion, is conclusive on the subject. We have already decided, in *Texas* v. *White*,* and just now in the case of *Hanauer* v. *Doane*,† that a contract made in aid of the rebellion is void, and cannot be enforced in the courts of this country. The same rule would apply, with equal force, to a law passed in aid of the rebellion. Laws made for the preservation of public order, and for the regulation of business transactions between man and man, and not to aid or promote the rebellion, though made by a mere *de facto* government not recognized by the United States, would be so far recognized as to sustain the transactions which have taken place under them. But laws made to promote and aid the rebellion can never be recognized by, or receive the sanction

* 7 Wallace, 700.

† The preceding case; *supra*, 342.

of, the courts of the United States as valid and binding laws. To recognize them as such would be derogatory to the dignity and authority of the government of the United States, and would be setting too light an estimate upon so great an offence.

JUDGMENT AFFIRMED.

SMITH *v.* SHEELEY.

1. Where a party having an inchoate title to land gave a power to "sell and convey" it, declaring, however, in the power, subsequently, that the attorney was authorized "to sell and convey such interest as I have and such title as I may have, and no other or better title," and that he would not hold himself "personally liable or responsible" for the acts of his attorney in conveying the land, "beyond quit-claiming whatever title I have," and the party afterwards acquired complete title, and the attorney conveyed by quit-claim for full consideration, which consideration passed to the principal, *Held*, that the grantor could not, six years afterwards, disavow the act of his attorney and convey the land to another person.
2. Although under the act of Congress of July 1st, 1863, a bank created by a Territorial legislature cannot legally exercise its powers until the charter creating it is approved by Congress, yet a conveyance of land to it, if the charter authorize it to hold land, cannot be treated as a nullity by the grantor who has received the consideration for the grant, there being no judgment of ouster against the corporation at the instance of the government.

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

In February, 1857, Mitchell being an *occupant* of part of a lot in the now city of Omaha—a site which at that time was still part of the public lands—gave to Redick a power of attorney to "sell and convey" it. The instrument, after this grant of power, went on:

"And the said Redick is hereby authorized and empowered to sell and convey such interest as I have in the said lots of land, and such title as I may have to the same, and no other or better title. And it is hereby understood, and these presents

Statement of the case.

are upon this express consideration, that I shall not hold myself personally liable or responsible for the acts of my said attorney in conveying any of the aforesaid lots beyond quit-claiming whatever titles I have in said premises, without recourse on me, and to that extent and that only."

In the following March the mayor of Omaha, being empowered by the Territorial legislature of the Territory, and availing himself of the powers given to him under what is known as the Town Site Act of Congress, of May 23d, 1844, "for the relief of the citizens of towns upon lands of the United States," paid a certain sum into the Treasury of the United States and got a grant by patent of 138 acres of the public land, where the town of Omaha now stands, "in trust for the several use and benefit of the occupants of land in the city of Omaha, according to their respective interests." The lot which Mitchell had authorized Redick to convey was embraced in this grant; and in April, 1857, the mayor, reciting the patent to him in trust, as already stated, for the occupants of lands in Omaha, conveyed the lot to Mitchell.

Redick, now, May, 1857, under his old power of attorney, made before the issue of the patent to the mayor, or the deed of the mayor to Mitchell, made a deed of "quit-claim" of the lot in consideration of $1175, which he received, to the "Nehama Valley Bank." This "bank" was one which the Territorial legislature of Nebraska, in February, 1857, had passed an act to incorporate. The terms of the charter gave it "power to issue bills, deal in exchange, and to buy and possess property of every kind." Congress, however, as long ago as 1836, had passed an act* providing—

"That no act of the Territorial legislature of any of the Territories of the United States, incorporating any bank or any institution with banking powers or privileges, hereafter to be passed, shall have *any force or effect whatever, until approved and confirmed by Congress.*"

The act of the Nebraska legislature never was approved or confirmed by Congress.

* Act of July 1st, 1836, 5 Stat. at Large, 61.

In this condition of things Mitchell, in May, 1863, in consideration of $1, as appeared by the instrument, made a deed of quit-claim of the same lot to one Smith, the lot being then worth $2000, and under that title Smith brought ejectment in the court below. Judgment being given against him, he brought the case here on error.

Mr. J. M. Woolworth, for the plaintiff in error:

1. The authority to Redick limited, in express terms, his power to convey such title as Mitchell at the time of making the power had. Mitchell at that time had no title to the lot. He occupied it only. This uncertain and shadowy right he authorized Redick to convey, and no other.

2. The charter of the so-called "Nehama Valley Bank" had not "*any* force or effect whatever." It was therefore void. There was thus no grantee. The deed conveyed nothing, and Mitchell still remained owner. Being owner, his title passed to Smith, who ought to have had judgment.

Messrs. J. I. Redick and C. Briggs, contra:

1. The power is "to sell and convey." The subsequent language was not to confine the power to the then title, but to limit the grantor's responsibility.

2. In *Orchard* v. *Hughes*,* this same act of Congress, of 1836, was set up to avoid paying a debt. The defence was not sustained. The effort here is of as bad a kind.

Mr. Justice DAVIS delivered the opinion of the court.

It is insisted, in behalf of the plaintiff in error, that Redick had no authority to make this deed in Mitchell's name, because the power under which he acted directed him to convey such title as Mitchell then had, which was only a possessory right. It is true that in February, 1857, when the power of attorney was given, Mitchell had not the legal title to the lot, but as the mayor of Omaha conveyed it to

* 1 Wallace, 73.

him a short time afterwards, it is a fair presumption that he was, at the date of the execution of the power, one of the class of persons who were entitled to a deed from the mayor under the provisions of the Town Site Act of 1844. If so, he was to all practical purposes the real owner of the property, and intended that Redick should sell and convey something more than a "mere uncertain and shadowy right," as the plaintiff in error claims.

But, in the state of the proof it is not necessary to look into the power of attorney to see the extent of the authority conferred, because the subsequent conduct of Mitchell renders it an unimportant subject of inquiry. It would be grossly unjust for Mitchell, having acquired the legal title, to let Redick, under a power of attorney executed before the title was obtained, make a deed in his name to the bank, appropriate to himself the money received for the sale of the property, and then, six years afterwards, disavow the act of his attorney on the plea that he had exceeded his authority. The law will not permit this to be done, and estops Mitchell from setting up such a claim.

It is insisted, however, as an additional ground of objection to this deed, that the bank was not a competent grantee to receive title. It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the Territory of Nebraska, but, it is said it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained, but this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it, and in such a case the party who makes a sale of real estate to it, is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase.

If, prior to the execution of the deed, there had been a judgment of ouster against the corporation at the instance of the government, the aspect of the case would be different.

There is no error in the record, and the judgment is

AFFIRMED.

UNITED STATES v. NEW ORLEANS RAILROAD.

1. A mortgage by a railroad company covering all future acquired property, attaches only to such interest therein as the company acquires, subject to any liens under which it comes into the company's possession.
2. If the company purchase property subject to a lien for the purchase-money, such lien is not displaced by the general mortgage.
3. If the company give a mortgage for the purchase-money at the time of the purchase, such mortgage, whether registered or not, has precedence of the general mortgage.
4. This rule fails, however, when the property purchased is annexed to a subject already covered by the general mortgage, and becomes a part thereof; as when iron rails are laid down and become a part of the railroad.

APPEAL from the Circuit Court for the District of Kentucky.

This was a suit instituted by the United States, as the holder of a number of the first and second mortgage bonds of the New Orleans and Ohio Railroad Company, against that company, and one Trimble, trustee of them, to foreclose the mortgages given to secure the said bonds. These mortgages were executed in 1858 and 1860, respectively, and covered all the company's property of every kind, with a stipulation to include also all future acquired property. The trustee of the mortgages and several individual bondholders were made parties, and the bill contained proper allegations as to the impracticability of making all of them parties. After a final decree of foreclosure and sale, and whilst the execution was in the hands of the marshal, it transpired that a portion of the rolling stock, consisting of two locomotives and ten cars, had been sold to the railroad

company by the United States in 1866, and that, simultaneously with the sale, the company gave to the United States a bond for the purchase-money, wherein it was stipulated that the latter should have a lien therefor upon the property sold, and that the company should not sell it or part with it until payment of the price, without the written consent of the United States. Hereupon the respective solicitors of all the parties, complainant and defendant, directed the marshal, in writing, not to sell the said locomotives and cars. The rest of the property was sold, but brought less than the amount of the mortgage bonds.

The parties, then, by their respective solicitors, filed a written statement of the facts in relation to said locomotives and cars, adding to what is above stated the further fact that the bond given for the purchase-money thereof was not recorded, and that its contents were unknown to all the bondholders of the railroad company except Mr. Trimble, the trustee of the mortgages. Upon this statement the question whether the United States had a superior equity in this property to that of the bondholders under the mortgages was submitted to the court for its decision, and the court decided that they had a superior equity, and made a decree to that effect. This was the decree appealed from.

Messrs. Carlisle and McPherson, for the appellant:

1. The court below has undertaken to adjudicate the question of property as between the United States on one part and the other bondholders on the other part, without any pleadings upon which the decree could be based, and without any such proceedings, however irregular, as would answer the purpose of proper pleadings and process, by giving the bondholders an opportunity to litigate the question. It has thus been acting in a case where it had no jurisdiction.

2. It has been settled in this court that a railroad company can mortgage not only its acquisitions *in esse* or *presenti*, but those *in posse* or *futuro* as well. A mortgage of property to be acquired, was enforced to the displacement of a vendor's lien in the recent case of *Galveston Railroad Com*

pany v. *Cowdrey*.* The mortgage here was of that sort; and on the authority of that case should displace the lien of the United States.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The appellants contend, first, that the court had no authority to make the decision; that the proceeding was wholly irregular, without proper pleadings, and *coram non judice*. This objection hardly comes with a good grace from the appellants, who all joined in submitting the question to the court. But the jurisdiction was undoubted. A court of equity, in a suit for the foreclosure of a mortgage, clearly has cognizance of all questions relating to priority of lien on the property in litigation, as between the parties to the suit and those whom they lawfully represent. The mode in which the jurisdiction shall be exercised is not so much a matter of substance as of form. Ordinarily a reference to a master before the final decree would be the formal method to pursue, but where, from oversight or other cause, this has been omitted, the parties may certainly agree (as was done here) to submit the matter to the court, upon a statement of facts, after the decree.

The appellants contend, in the next place, that the decision upon the facts was erroneous; that the mortgages, being prior in date to the bond given for the purchase-money of these locomotives and cars, and being expressly made to include after-acquired property, attached to the property as soon as it was purchased, and displaced any junior lien. This, we apprehend, is an erroneous view of the doctrine by which after-acquired property is made to serve the uses of a mortgage. That doctrine is intended to subserve the purposes of justice, and not injustice. Such an application of it as is sought by the appellants would often result in

* 11 Wallace, 459.

gross injustice. A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money. And in such cases a failure to register the mortgage for purchase-money makes no difference. It does not come within the reason of the registry laws. These laws are intended for the protection of subsequent, not prior, purchasers and creditors.

Had the property sold by the government to the railroad company been rails, as in the case of the *Galveston Railroad Company* v. *Cowdrey*, or any other material which became affixed to and a part of the principal thing, the result would have been different. But being loose property, susceptible of separate ownership and separate liens, such liens, if binding on the railroad company itself, are unaffected by a prior general mortgage given by the company, and paramount thereto.

In the case before us, the United States, at the time of making the sale, reserved a lien on the property, and imposed a condition of non-alienation until the price should be paid. Taken all together the transaction amounts to a transfer *sub modo*, and the lien must be regarded as attaching to the property itself, and as paramount to any other liens arising from the prior act of the company.

DECREE AFFIRMED.

THE SPRAY.

1. In appeals involving mere question of fact, where the District and Circuit Courts have taken the same view, this court, affirming the decree, contents itself with an announcement of its conclusions, without extended comment on the testimony.
2. A vessel racing in order to enter a harbor before another and preoccupy a loading-place condemned for a collision resulting.

APPEAL from the Circuit Court for the District of California, in a case of collision; the facts being thus:

On the morning of the 4th of March, 1868, the schooners Lane and Spray were proceeding along the coast of California, the Lane bound for Mendocino harbor and the Spray for Little River, a very small harbor, or as it was called in the evidence, a "hole in the coast," about three miles further to the southward. Resort is had by vessels to this place only for the purpose of getting lumber, and the wharfage is so bad that but one vessel can load at a time; considerable detentions as regards vessels not reaching the wharf being the consequence. The Lane was considerably in advance of the Spray. The master of the Lane did not enter Mendocino harbor, as he intended, because of a signal on shore placed there to warn vessels that it would be dangerous to enter the harbor at that time, and accordingly he ran down the coast with the intention of going into Little River. Having accomplished about two-thirds of the distance between the harbors, and finding he was too far in-shore to weather the ledge of rocks which forms the northerly side of the entrance to Little River harbor, he jibed his mainsail and stood off-shore. In doing this his main sheet parted, and thereupon he lowered his mainsail, hoisted his foresail, and stood off under his foresail until he could repair the damage. As soon as this was effected he lowered his foresail, wore his vessel around, and stood directly in for the harbor, under mainsail and jib. At this time he was distant from the shore about one and a half miles, and directly off the entrance to the harbor, and the Spray was distant from

the Lane at least five miles, and running three or four times as fast. The master of the Spray, who, it appeared, mistook the Lane for a vessel called the Ellen Adelia, and which he knew was going, as he was himself, after lumber, did not change her course on account of the Lane, and in passing the outer edge of the ledge of rocks, if not over the reef itself, the Spray, owing to the ground-swell made by the breakers, collided with the Lane, striking the vessel with her stem, about midships. The course of the vessels and their position with reference to each other will be better understood by stating that, after the Lane headed in to the harbor, she sailed on the side of a right-angled triangle, the Spray upon its hypothenuse, and they met where these joined.

The District Court, considering that the collision was caused by an attempt on the part of the Spray to cross the track and get ahead of the Lane, when the latter was too far in advance of her to do so, condemned the Spray, and the Circuit Court affirmed the decree. From that decree this appeal came.

Mr. T. T. Crittenden, for the appellant; Mr. C. E. Whitehead, contra.

Mr. Justice DAVIS delivered the opinion of the court.

This case has been twice adjudged against the appellant. The question presented by the record is purely one of fact, and it is not only clear that the lower courts have done the appellants no wrong, but that the weight and effect of the evidence does not admit of controversy. In such a state of case we do not feel called upon, in order to vindicate our judgment, to make any extended comment on the testimony, nor would it serve any useful purpose to do so. We shall, therefore, content ourselves with stating the conclusions we have reached concerning the case.

It is proved that the Lane was in the channel, pursuing the usual course of vessels entering the harbor, while the Spray took an unusual course to effect her object. In doing this her master jeoparded his own boat, and through the ground-swell caused by the breakers, the Spray was thrown

into the Lane, and produced the injury. But her master had no right, in his eagerness to get ahead of the Lane, to run his boat into breakers, which rendered her unmanageable. It is conceded that the Lane, being in advance, had the prior right to enter the harbor, but it is urged that her conduct in standing off-shore and lowering her mainsail justified the master of the Spray in adopting the conclusion that she did not entertain the purpose of entering the harbor. It may be true, that while the boat was in this condition, a watchful seaman would have been deceived as to her intention, but this cannot be said after she wore round and headed directly for the harbor. This change of course was a notification of the actual purpose of the Lane, and was effected time enough for the master of the Spray, if observant, to have avoided the collision. Instead, however, of going further out into the open sea, as he should have done after this change of course, he continued in the same track he was pursuing, regardless of his own safety or the rights of others. It is a little singular that he should have been in such a hurry to reach the harbor if in good faith he believed the Lane was bound further down the coast. But the theory that he thought the schooner ahead was not going into the Little River is an afterthought. It is clear from the evidence that he supposed this vessel was the Ellen Adelia, and that he knew she was bound for the same port as himself. And it is equally clear that he wanted to get there in advance of her, if he could, so as to obtain the first load. It seems that the principal objects of the boats engaged in the Little River trade is to obtain lumber, and that they are often detained there a considerable length of time for want of proper facilities for loading. Indeed, so limited are these facilities that only one vessel can be loaded at a time, and necessarily the one which arrives first is served first. With knowledge of this condition of things, and for the purpose of securing the prior right, the master of the Spray ventured upon dangerous ground in order to cut across the schooner, and must suffer the consequences of his own recklessness.

JUDGMENT AFFIRMED.

Statement of the case.

SHOEMAKER ET AL. *v.* KINGSBURY.

1. When contractors for building a railroad, running a construction train, consent to take a passenger for hire on their train, they are private carriers for hire, and are only bound to exercise such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances.
2. The passenger in such case takes upon himself the risks incident to the mode of conveyance.
3. Where an accident occurs to a passenger carried on such a train, by the car in which he was carried being thrown off the track, the contractors are not responsible, unless the accident is directly attributable to their negligence or unskilfulness in that particular; that is to say, in the management and running of the train. Accordingly, an instruction that it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill, *of good habits*, and in every respect qualified and suitably prepared for the business in which they were engaged, and that they acted on this occasion with reasonable skill, and with the utmost prudence and caution, was held erroneous, in that it turned the attention of the jury from the question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident.

ERROR to the Circuit Court for the District of Kansas.

Suit for damages for personal injuries happening on a rail car; the case being thus:

In 1867, Shoemaker and another were contractors for building the Eastern Division of the Union Pacific Railway in Kansas; and in October of that year they ran a construction train over a portion of the road, carrying material for it. To this train was attached what was called a "caboose car"—a car for the accommodation of the men connected with the train, who had their "sleeping bunks" in this car, and who stored their tools there, as also the lamps used on the cars. The road was not yet delivered over to the Pacific Railway Company, and the contractors did not wish to carry passengers. Persons, however, were sometimes carried on the caboose car, and sometimes fare had been charged for their passage, but not always.

In this state of things, one Kingsbury, a sheriff in Kansas, and a deputy marshal, wanted to make an arrest on the line of the road, and he applied for passage as far as to a place called Wilson's Creek, asking the conductor to stop the train there, in order that he might make the arrest. He was accordingly taken on the train, and the train stopped until he had made the arrest.

A part of the fare charged was paid by Kingsbury on the cars, and the balance afterwards. The train ran from Ellsworth to Walker's Creek in Kansas. In going towards Walker's Creek the train was made up and ran in the usual way of making up and running railway trains, the engine being in front, with the caboose and flat-cars attached in regular order. But on the return from Walker's Creek, as there was, as yet, no turntable on the road, the usual order for making up such trains was reversed, and both engine and tender were backed over the road, a distance of more than fifty miles: the tender being ahead, the engine next, the caboose and other cars attached, and following in regular order. When about three miles from Ellsworth, on this return trip, both the engine and tender were thrown from the track and upset. At the time this accident occurred, Kingsbury was riding in the caboose car with the conductor of the train, and either jumped out or was thrown out, which of the two did not exactly appear. Whichever of the two things was true he was hurt, and for the injuries which he received he brought the action below.

The accident was occasioned by the engine running against a young ox, which leaped on to the track about twenty feet in front of the advancing train, from grass or weeds five or six feet high, growing on the sides of the road. The train was running at its usual rate of speed. The accident occurred just after dark; but it was a moonlight night, and the engineer testified that he could have seen an animal two hundred yards distant on the track; that the animal was only about twenty feet from the engine when first seen. He continued his testimony thus:

"As soon as I saw the animal I shut off the steam, and seized

the lever to reverse the engine, and had it about half over when the engine went off the track. Something struck me on the head and I did not know anything more. I was injured. I did what I thought was best to be done to stop the train. The whistle lever was in the top of the cab. I did not whistle for brakes. I had no time to do so after I saw the animal and before the engine went off the track. The train could have been stopped in about one hundred and fifty yards. When danger appears, the first thing to be done is to reverse the engine and then sound the whistle for brakes. Both could not be done at the same time. In order to reverse and blow the whistle two motions are necessary—first, to cut off the steam, and then take hold of the lever to throttle valve and move it over. It takes both hands to reverse. The whistle is sounded by a lever in the top of the cab. Brakemen would know, by shutting off steam and reversing, that something was the matter. It would take about ten seconds to do all this. I did it as quick as I could. I could have done nothing more than I did do."

There was no fence on the sides of the road. The plaintiff had been several times before over the road and knew its condition, and the manner in which the trains were made up and run.

The court, among other instructions, gave the following as a fifth to the jury, to which the defendants excepted:

"*When it is proved that the car was thrown from the track, and the plaintiff injured, it is incumbent on the defendants to prove that the agents and servants in charge of the train were persons of competent skill,* OF GOOD HABITS, *and in every respect qualified and suitably prepared for the business in which they were engaged,* AND that they acted on this occasion with reasonable skill, and with the *utmost* prudence and caution; and if the disaster in question was occasioned by the *least* negligence, *or want of skill* or prudence on their part, then the defendants are liable in this action."

There was no evidence in the case in relation to the skill, habits, or qualifications of the agents and servants of the defendants, except what arose from the fact that the engineer had been employed on a railroad about four years, and had been engineer for more than two years, and that the fireman had been on a railroad for about eighteen months.

Argument for the carriers.

Verdict and judgment having gone for the plaintiff, the defendants brought the case here on error.

Messrs. A. P. Usher and William T. Otto, for the plaintiffs in error:

Even if these two defendants, contractors only for building the Union Pacific Railroad, had been general carriers of passengers for hire—and "common carriers" of freight and baggage—had been, in short, the Union Pacific Railroad Company itself—and offering, like railroad companies generally, to carry everybody who applied to them to be carried, and all freight and baggage offered—the first part of the instruction—the part italicized and ending with the words, "were engaged"—would have been erroneous. The instruction must be taken in reference to the facts of *this* case. The question was one of foresight, care, and skill. None other can arise in the case even of general carriers of passengers. Their obligation is distinguished from that of "common carriers" or general carriers of *goods* for hire. This distinction is universally received,* and the question is always one as to the application of this rule under the special sort of carriage, as whether by horse coaches or rail cars, sailing vessels or steamers; the case in regard to all vehicles impelled by steam, being, of course, vastly different, we admit, in application from those impelled by feeble agents.

In *Boyce* v. *Anderson*,† this court, Marshall, C. J., delivering its judgment, decides "that the doctrine of common carriers does not apply to the carrying of intelligent beings:"

"The carrier," says the Chief Justice, thus speaking, "is undoubtedly answerable for any injury sustained in consequence of his negligence or want of skill, but we have never understood that he is responsible further."

And a judgment below, given on an instruction that the carriers were "responsible for negligence or unskilful conduct, but not otherwise," was affirmed. A similar view is taken in *Stokes* v. *Saltonstall*.‡

* See 1 Smith's Leading Cases, 6th edition, note to Coggs *v.* Bernard.

† 2 Peters, 150.

‡ 13 Id. 191.

Argument for the carriers.

The question was then one of nothing but foresight, care, and skill, and the instruction must be taken in reference to the case. No want of either foresight, care, or skill was attempted to be inferred, by showing want of good habits—the court probably meaning by the words, want of ebriety—though the words go far beyond the matter of ebriety, and may have been naturally understood by the jury as doing so. How, then, is the matter of the "good habits" of the company's servants properly brought into issue? If the car was thrown from the track by an inevitable accident, how could the defendants be made liable, even if the "habits" of their servants were not "good?" If it was thrown from it by a specific act of negligence, what would "habits" even the most exemplary avail as a defence? The court had no right to require evidence of the defendants on this subject. Assuming that which we deny, to wit, that the defendants were general carriers of passengers, the instruction ought to have been, "Did they, taking into account the mode of transportation, provide, as far as human care and foresight could go, for the safety of the plaintiff? And did their servants in charge of the train exercise the highest degree of skill and judgment on the occasion of the accident? Was the accident solely their fault, or was it unavoidable?" The affirmative of all these issues was upon the plaintiff. But the instruction disposed of all consideration as to the cause of the accident, and declares the defendants in fault from the fact of it.

But the defendants were not general carriers of passengers any more than they were "common carriers" of goods. They were but contractors to build a road. Carriage of any body or any thing was neither their principal and direct business nor an occasional and incidental employment. For the purpose of building the road, they had a "caboose car," and having occasion to go forward and back themselves, for a short time before delivering the road to the Union Pacific Railroad Company, whose road it was, they let the defendant ride on it. That was all. If they took reasonable care, under the circumstances—which included going through a

dreary, uninhabited wilderness, tender going foremost, engine moving backwards, it was enough. The rule which the court applied in the second part of its charge was not applicable to *such* carriers. They were not bound to the "*utmost* prudence and caution," and liable for the "*least* negligence or want of skill," however much general carriers of passengers, sometimes in ordinary parlance called "common carriers of passengers," may be.

Moreover, in this case,—even had the carriers been general carriers,—the instruction, in the way in which it was given, was calculated, like all the rest of the instructions, to mislead; and the jury would have found for the plaintiff, though the accident had been caused wholly by his own fault.

The instruction, in short, was wrong from beginning to end.

Messrs. George Earle and G. W. Paschall, contra:

The defendants did make the carriage of passengers an occasional and incidental employment. That is enough to constitute them general carriers of passengers, for in the case of goods it would make the party a "common carrier."* The latter part of the instruction was right.

Then, as to the first part. It does not indeed follow, even as a *primâ facie* inference, because a man who has just been in a rail car is found greatly hurt, that the railroad company is responsible for his injury. The injury may have been caused by his own act, and if the car is in its right place and everything regular, the presumption would be that it was so caused. But when you show that the car is *off the track*, that the train had been running, tender first, engine hind-part before, and everything *topsy-turvy*, and that a man is hurt, you raise every presumption against the company; and they are bound to show just what the court below said they were. When you show an engineer running through his whole route with a train stern foremost, the operation followed by running on an ox, and this followed by a *de-*

* See 1 Smith's Leading Cases, note to Coggs *v.* Bernard.

raillement and injury to a passenger, you raise a question of sobriety; for, *primâ facie*, no engineer if sober would so run. The instruction was in exact conformity with the law as decided by this court in *Stokes* v. *Saltonstall*, cited on the other side.

Reply: In *Stokes* v. *Saltonstall*—the case of an injury by upsetting a stage coach—it was testified that the driver was grossly intoxicated; and the instructing of the jury here, in the language of that case, shows the danger of applying what was said in one state of facts, to another state, that has no resemblance to it.

Mr. Justice FIELD delivered the opinion of the court.

From the whole evidence in this case it is plain that the defendants were not common carriers of passengers at the time the accident occurred, which has led to the present action. They were merely contractors for building the Eastern Division of the Union Pacific Railway, and were running a construction train to transport material for the road. The entire train consisted, besides the engine and its tender, of cars for such material and what is called in the testimony a "caboose car." This latter car was intended solely for the accommodation of the men connected with the train; it contained their bunks and mattresses; they slept in it, and deposited in it the lamps of the cars, and the tools they used. It was not adapted for passengers, and, according to the testimony of the conductor, the defendants did not wish to carry passengers, although when persons got on to ride the defendants did not put them off, and sometimes, though not always, fare was charged for their carriage.

The plaintiff, who was sheriff of a county in Kansas, and deputy marshal of the district, desired to arrest a person on the line of the road, and, to enable him to accomplish this purpose, he applied to the conductor for passage on the train as far as Wilson's Creek, and requested that the train would stop there until the arrest could be made. His wishes were granted in both respects, and for the services rendered he

paid at the time a portion of the fare charged, and the balance subsequently.

In the rendition of these services for the plaintiff, the defendants were simply private carriers for hire. As such carriers, having only a construction train, they were not under the same obligations and responsibilities which attach to common carriers of passengers by railway. The latter undertake, for hire, to carry all persons indifferently who apply for passage; and the law, for the protection of travellers, subjects such carriers to a very strict responsibility. It imposes upon them the duty of providing for the safe conveyance of passengers, so far as that is practicable by the exercise of human care and foresight. They are bound to see that the road is in good order; that the engines are properly constructed and furnished; that the cars are strong and fitted for the accommodation of passengers, and that the running gear is, so far as the closest scrutiny can detect, perfect in its character. If any injury results from a defect in any of these particulars they are liable.

They are also bound to provide careful and skilful servants, competent in every respect for the positions to which they are assigned in the management and running of the cars; and they are responsible for the consequences of any negligence or want of skill on the part of such servants.

They are also bound to take all necessary precautions to keep obstructions from the track of the road; and, although it may not be obligatory upon them, in the absence of legislative enactment, to fence in the road so as to exclude cattle, it is incumbent upon them to use all practical means to prevent the possibility of obstruction from the straying of cattle on to the track as well as from any other cause. As said by the Supreme Court of Pennsylvania, in speaking of the duty of railway companies in this particular:* "Having undertaken to carry safely, and holding themselves out to the world as able to do so, they are not to suffer cows to endanger the life of a passenger any more than a defective

* Sullivan v. Philadelphia and Reading Railroad Company, 30 Pennsylvania State, 234.

rail or axle. Whether they maintain an armed police at cross-roads, as is done by similar companies in Europe, or fence, or place cattle-guards within the bed of their road, or by any other contrivance exclude this risk, is for themselves to consider and determine. We do not say they are bound to do the one or the other, but if, by some means, they do not exclude the risk, they are bound to respond in damages when injury accrues."

It is evident that the defendants in this case were not subject to any such stringent obligations and responsibilities as are here mentioned. They did not hold themselves out as capable of carrying passengers safely; they had no arrangements for passenger service, and they were not required to make provisions for the protection of the road such as are usually adopted and exacted of railroad companies. They did not own the road, and had no interest in it beyond its construction. It was no part of their duty to fence it in or to cut away the bushes or weeds growing on its sides.

The plaintiff knew its condition and the relation of the defendants to it when he applied for passage. He had been previously over it several times, and was well aware that there were no turntables on a portion of the route; a fact, which compelled the defendants to reverse the engine on the return of the train from Walker's Creek. He, therefore, took upon himself the risks incident to the mode of conveyance used by the defendants when he entered their cars. All that he could exact from them, under these circumstances, was the exercise of such care and skill in the management and running of the train as prudent and cautious men, experienced in that business, are accustomed to use under similar circumstances. Such care implies a watchful attention to the working of the engine, the movement of the cars and their running gear, and a constant and vigilant lookout for the condition of the road in advance of the train. If such care and skill were used by the defendants, they discharged their entire duty to the plaintiff, and if an accident, notwithstanding, occurred, by which he was injured, they were not liable. They were not insurers of his

safety, nor responsible for the consequences of unavoidable accident.

The question should have been put to the jury whether the defendants did in fact exercise such care and skill in the management and running of the train at the time the accident occurred. They were not responsible to the plaintiff, unless the accident was directly attributable to their negligence or unskilfulness in that particular.

The evidence in the case shows that the accident was occasioned by the tender and engine running against a steer. The train was proceeding at its usual rate of speed when the steer suddenly, from a mass of high weeds or grass growing on the sides of the road, leaped upon the track directly in front of the advancing train, at a distance from it of about twenty feet. This distance was so short, and the movement of the animal was so sudden, that it was impossible to arrest the train, and a collision followed which threw the engine and tender from the track. The plaintiff, on the happening of the collision, either leaped from the "caboose car," in which he was at the time sitting, or was thrown from it, it is immaterial which, and was injured.

The fifth instruction given by the court turned the attention of the jury from the simple question at issue for their determination, and directed it to the skill, habits, and attainments for their business of the agents and servants of the defendants, as well as to their conduct on the occasion of the accident. It held proof that the agents and servants were possessed of competent skill, of good habits, and in every respect qualified and suitably prepared for the business in which they were engaged, as essential as proof that they acted on the occasion with skill, prudence, and caution. And it made the occurrence of the accident presumptive evidence that they were destitute of such skill, habits, and qualifications.

We are of opinion that the court erred in this instruction, and that it misled the jury. On this ground the judgment of the court below must be

REVERSED AND THE CAUSE REMANDED FOR A NEW TRIAL.

Statement of the case.

KNOX *v.* EXCHANGE BANK.

1. A party to an action who has received his discharge in bankruptcy pending the action has no further interest in the suit, and therefore cannot bring a writ of error to a judgment rendered against him before receiving such discharge.
2. The assignee of the bankrupt is the proper party to bring error in such case.
3. This court cannot entertain jurisdiction of a case from a State court, because the *judgment* of that court impairs or fails to give effect to a contract.
4. The judgment must give effect to some State statute, or State constitution, which impairs the obligation of a contract, or is alleged to do so by the plaintiff in error, or the case for review here does not arise.
5. It is not sufficient in such case that the party in his pleading or the counsel in argument assailed such statute on that ground. And it must appear that the State court rested its judgment on the validity of the statute, either expressly or by necessary intendments.
6. Hence, if the judgment of the court would have been the same without the aid of the special statutory provisions assailed by the plaintiff in error, there is no case for review in this court.

Two separate matters here reported arose upon a motion to dismiss a writ of error to the Supreme Court of Appeals of Virginia. The case was thus:

The Exchange Bank of Virginia was, by its charter, authorized to issue notes of circulation, which were made a valid tender to the bank in payment of any debt due to it. After the war of the rebellion was over a law was passed, February 12th, 1866, authorizing the insolvent banks of the State to make general assignments for the benefit of their creditors. The Exchange Bank, being in that condition, made such an assignment, and the assignee sued Knox & Brothers, and also J. S. Knox, upon a negotiable note. The pleas were *nil debet*, tender and offset, and these were the issues. In the progress of the case the defendants brought into court and tendered notes of the bank sufficient to cover the debt, interest, and costs to that date, which they pleaded in payment.

The Court of Appeals of Virginia, in the judgment which the present writ was designed to bring before this court,

held that this could not be done, and gave judgment accordingly. From that judgment the case was brought here under an assumption that it was within the 25th section of the Judiciary Act, which provides that a final judgment of the highest court of a State, "where is drawn in question the validity of *a statute* . . . . of any State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of such, its validity may be re-examined and reversed" in this court.

Mr. Claughton, for the defendant in error, in April, 1871, moved to dismiss the case as not within the section; *Messrs. Brent and Wattles, contra*, opposed the motion, on the ground that the original provision in the charter of the bank making its notes receivable for debts due to it was a contract; and that under the case of *Furman* v. *Nichol** in this court, that contract had been impaired. They inferred that the case thus did come within the section. The conclusion of the court below, they argued, could have been reached only in one of two ways: 1st, on an assumption that the provision in the charter which made the notes a tender in payment of debts due it, made no contract, or else—and this was what the counsel suggested as more probable—that the act of February, 1866, authorizing the general assignment, had been construed as repealing the provision of the charter; and that, in either view, a statute was drawn in question, and construed adversely to the objection of unconstitutionality set up. It was in vain to say, they argued, that it was not the validity of the act of the 12th of February that was complained of by the plaintiffs, but the construction placed upon it by the State court. That was the exact argument made use of in *Bridge Proprietors* v. *Hoboken Company*,† where, on p. 144, the court say:

"If this *construction* is one which violates the plaintiff's contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and

* 8 Wallace, 44. † 1 Wallace, 144

Opinion of the court on a preliminary point.

that this court will not be discharging its duty to see that no State legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases."

To the same effect was the opinion of this court in *Furman* v. *Nichol.*

After this argument, however, on examining the record, to see if the motion to dismiss the case as not within the 25th section was well made, the court observed that in the same entry which recorded the judgment of the Court of Appeals against the defendants in the case, it was recited that they produced in court their certificates of discharge by a court of bankruptcy, obtained after the suit which this court was now considering, was instituted; and that thereupon the Court of Appeals received such certificates, and made an order that no execution should issue on the judgment without a previous order of the court to that effect, made after reasonable notice to them to appear and show cause against it.

Without, therefore, passing on the grounds taken by Mr. Claughton for the dismissal, the court dismissed the writ on other ground, the ground, namely, that the plaintiffs in error had no interest in the matter in suit, and were not proper parties to bring a writ of error to this court. Mr. Justice MILLER, in behalf of the court, delivering its opinion thus:

"1. It is clear that the plaintiffs in error have no interest in the suit. They are by law discharged from the judgment. If it be said that they are subject to be brought in by notice, and have an execution issued against them, we answer that the record shows that they are not now liable, and if such a judgment should be rendered against them, it is from that judgment, and not the present one, which is not final, that the writ of error should be taken.

"2. It is quite clear that the assignee in bankruptcy of the plaintiffs in error is the proper party to bring the writ of error, and he alone can do it. He would not be bound by the decision against the bankrupts in this court, nor would the defendant in error be prevented from filing his claim against the assignee in bankruptcy.

"The case of *Herndon* v. *Howard*,* settles this question.
"For *these* reasons the writ of error is dismissed."

This order was made last April, just before the summer recess of the court. And now, at the meeting in October and therefore during the term, the assignee in bankruptcy came forward and made application to reinstate the case, and to be substituted for the bankrupts as plaintiffs in error. This brought up the question of his right to be so substituted, and if that was decided to exist, the question of the merits of the original motion to dismiss the case as not within the 25th section.

Mr. Justice MILLER delivered the opinion of the court.

In the case of *Herndon* v. *Howard*, it was decided that the proper course when a party to a writ of error had been declared bankrupt and an assignee duly appointed, was for the assignee in bankruptcy to make application to reinstate it and to be substituted for the bankrupt as plaintiff in error. The application, here, being made during the term, while the matter is still within our control, we see no objection to the substitution asked for, if the case is one which ought to be reinstated.

The motion on which the writ of error was dismissed last spring was based on the allegation that no question is found in the record which would give this court jurisdiction to review the judgment of the State court. As it would be useless to set aside the order of dismissal merely to try that question again, on which the parties were fully heard, we must now inquire if that objection is well taken.

It is now argued by the plaintiff in error that the original provision in the charter of the bank making its notes receivable for debts due to it was a contract; and that the obligation of that contract has been impaired. We have decided in the case of *Furman* v. *Nichol*, that such a law does constitute a contract, which attaches to the notes in the hands of any one to whom they may come, and we agree that if the

* 9 Wallace, 664.

trustee of the bank is to be considered as occupying, for the purposes of this suit, the place of the bank, that the judgment of the Court of Appeals was erroneous.

But we are not authorized by the Judiciary Act to review the judgments of the State courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held. As this court said in *Railroad Company* v. *Rock*,* it must be the constitution, or statute, of the State which impairs the obligation of a contract, or the case does not come within our jurisdiction.

What statute of Virginia is supposed to affect unfavorably the contract under which these notes were issued?

It is rather insinuated than fully declared, that the court gave such effect to the act of February, 1866, under which the bank made its assignment. But nothing in the record shows that the court based its judgment on any such proposition. Nor is there anything in that statute which by any possibility can be said to impair the force given to those notes by the charter of the bank. The latter statute merely authorized, in general terms, the insolvent banks to make assignments of all their effects for the benefit of all their creditors. This is a right which they probably had before. But whether they did or not the statute contains no expression from which the intent to affect the value of the notes of the bank as payment for its debts can be inferred.

In the case of *Nichol* v. *Furman* the State of Tennessee passed a law by which the notes of the bank receivable by its charter for taxes were no longer to be so received; and this court held that this latter statute impaired the obligation of the contract found in the charter. But there it was the statute which worked the injury and it was the judgment of

* 4 Wallace, 181; see also Railroad Company v. McClure, 10 Wallace, 511.

the State court holding the statute valid which gave this court jurisdiction.

So in the case of *Bridge Proprietors* v. *Hoboken Company*. The legislature of New Jersey had passed a law authorizing the company to erect a railroad bridge at a certain point where the complainants alleged that they had an exclusive privilege for bridging the stream under a statute passed many years before. If the first statute gave this exclusive right it was clear that the second statute impaired that right, and so impaired the obligation of the contract. This we held to be a proper subject of inquiry by this court. But in the present case there can be no pretence that the statute which authorized the assignment by the bank impaired the obligation of the contract to receive its notes for its debts, nor does the right or claim of the trustee to refuse the notes in payment rest on this statute, or on any construction given to it by the court.

We are of opinion that nothing in the record before us shows jurisdiction in this court, and the motion to reinstate is, for this reason,

OVERRULED.

NOTE.

At the same time with the preceding case was adjudged another, in which the principle established by the first case is illustrated in somewhat different circumstances. It was the case of

NORTHERN RAILROAD *v.* THE PEOPLE.

In this case the doctrines of the preceding one are affirmed, and a writ is dismissed, though the plaintiff in error, both in the pleading and in the argument in this court, assailed a State statute as violating the Constitution of the United States; it appearing that the defendant in error claimed nothing under that statute, and that the validity or invalidity of it was not involved in the judgment rendered by the State court.

Mr. J. Hubley Ashton moved to dismiss, for want of jurisdiction, a writ of error in this suit, one from the Supreme Court of New York; the case being this:

Statement of the case.

The Revised Statutes of New York declare* that:

"Whenever any incorporated company shall have remained *insolvent* for one whole year, or for one year shall have refused or neglected to redeem its notes or other evidences of debt, or shall for one year have *suspended* the ordinary business of such incorporation, such company shall be deemed and adjudged to have *surrendered* the rights, privileges, and franchises granted by any act of incorporation, and shall be adjudged to be *dissolved*."

The New York Code of Procedure (tit. xiii, chap. 11, § 430), authorizes the attorney-general, in the name of the people, to bring an action for the purpose of vacating the charter of a corporation, (1) whenever it shall have forfeited its franchises by *non-user*; (2) whenever it shall have done or omitted any act amounting to a *surrender* of such franchises.

If, in any such action, it shall be adjudged that a corporation has, by neglect, abuse, or surrender, forfeited its franchises, judgment shall be rendered that it be excluded from such corporate franchises, and that it be dissolved.†

If a defendant, a natural person, or corporation, shall be adjudged guilty of usurping any franchises, the court may adjudge that such defendant be excluded therefrom, and, in its discretion, fine such defendant.‡

And upon such judgment the court may restrain the corporation, and appoint a receiver.§

With these statutory provisions in force an information was filed May 28th, 1867, in the Supreme Court of Lawrence County, New York, in the name of *The People* v. *The Northern Railroad Company*, one Lovering and others, stating in substance that the said company was a corporation under an act of the legislature of the State of New York, passed May 14th, 1845; that as early as 1854 it had become insolvent, and suspended its ordinary and lawful business; and that in October, 1854, it had surrendered its property by deed to trustees for its second mortgage bondholders, that the road was worked by these trustees till August, 1856; that in 1856 a sale under foreclosure of a second mortgage was made of the road, and that it was purchased by the second mortgage trustees in trust for the second mortgage bondholders; that the legislature of New York passed, in March, 1857, an act *recognizing the previous dissolution of the*

* Banks & Brother's ed., vol. 2, p. 600.
† Ib., sec. 442.
‡ Ib., sec. 441.
§ Ib., sec. 444.

Northern Railroad Company, and authorizing the second mortgage bondholders, who were in possession of the property by their trustees, under the deed of surrender of October, 1854, and under the sale in the foreclosure suit made in 1856, to form a new corporation "in place of the Northern Railroad Company, *dissolved*;" and that by an amended act, passed in April, 1864, provision was made for the due incorporation of the second mortgage bondholders. The information then charged that the defendants, with other persons unknown, usurped and used, without lawful warrant or charter, the franchise of being the said Northern Railroad Company. It was then prayed that the court might decree that the Northern Railroad Company had remained insolvent for more than one whole year; that it had for more than one year neglected to pay its notes, and that it had surrendered its franchises and is dissolved; and that it be forever excluded from all corporate rights.

The answer of the defendants, which one of the courts below characterized as "stuffed with irrelative and redundant matter," did not deny the preceding facts. It contained, however, this passage:

"And the defendants further say that at the time of the passage of the above and foregoing act, the said Northern Railroad Company was a company, in law and in fact, an existing railroad company, never having been dissolved, and were and are the owners in fact of said corporate property, and had then and now have the legal title thereto; and that the *legislature had no right or power to authorize the said second mortgage bondholders to form a corporation for and to take the property and effects of this defendant, the Northern Railroad Company*, or of said other defendants, the stockholders of said company, *without due process of law.*"

After the answer had been filed, the attorney-general moved the court for judgment *on the complaint and answer* at special term. The defendants resisted the motion, on the ground that they were issues of fact to be tried by a jury. The court, however, decided that all the material facts averred in the complaint were admitted by the answer; and that, as there were no issues of fact to be determined by the court or jury, judgment, as matter of local practice, could properly be rendered on the complaint and answer.

The *judgment* of the court at special term was:

"That the Northern Railroad Company has surrendered and

forfeited the franchises granted by any acts of incorporation, and is hereby dissolved," &c.

Exception was taken to the decision, "that prior to the passage of the act of March 31st, 1857, the said Northern Railroad Company had surrendered to the people of this State its franchise of being a corporation."

The decision of the court at general term affirmed the judgment of forfeiture, but did not found it in any way on the act of 1857.

The Court of Appeals,* which affirmed this judgment of dissolution and forfeiture, held that the court, at special term, had a right to render judgment on the complaint and answer, as there were no issues of fact to be tried; that the admitted facts showed that the company had forfeited its charter; that no sufficient excuse therefor was alleged in the answer; and that the individual defendants, having acted with knowledge of the previous forfeiture, were liable to be fined under the New York code.

To remove this judgment of the Court of Appeals to this court a writ of error was taken in June, 1870. Such writs are authorized in certain cases by the 25th section of the Judiciary Act of 1789, already quoted in the preceding case.

Messrs. W. M. Evarts and J. Hubley Ashton, in support of the motion:

The court adjudged that *prior* to 1857 the company had, on the admitted facts, done and omitted acts amounting in law to a surrender and forfeiture of its franchises to the State, and that by the act of March 31, 1857, the State had *accepted* this previous surrender of its charter. No question touching the constitutionality of the act of 1857 was, therefore, decided by the court at special term. Nothing whatever was determined about that act, except incidentally that it was in effect an acceptance by the people of a previous surrender of its charter by the company, in virtue and by operation of the general law of the State.

This appears:

1. By the terms of the judgment.
2. By the character of the exception.

* The People *v.* Northern Railroad Company, 42 New York, 227.

The judgment was affirmed at general term and in the Court of Appeals. We have the opinion of this latter court in the official State reports. But it is not based on the constitutionality of the act of 1857. That act did not purport to dissolve the company, nor did any of the courts treat it as so doing. The company had by its own doings, and previous to the passage of that act, worked a surrender of its charter. It had done so under other and general laws. The fact that the act is inserted in the answer, along with other "irrelative and redundant" matter, don't help the case, in this court, of the plaintiff in error.

Mr. C. Cushing, contra:

The point was distinctly presented to the State court, in the pleadings on which of course the judgment is given, that the legislature "had no right or power" to pass the act of March 31, 1857. The point thus appeared "on the face of the record." The effect of the objection was to raise the question that the act was in violation of the clause of the Constitution which prohibits a State from passing any "law impairing the obligation of contracts." We do not assert that the question was decided by the State court in *ipsissimis verbis*, but we submit it was necessarily decided in order to induce the judgment rendered.

Mr. Justice MILLER delivered the opinion of the court.

The principles announced in the preceding case of *Knox* v. *Exchange Bank* govern the present one.

We are unable to see that the judgment of the State court, declaring the dissolution of the Northern Railroad Company, rested in any manner on the act of the New York legislature of March, 1857. It is true that that company, the plaintiff in error in the case, both in the pleading which it filed and in argument, here assails that statute as taking property without due process of law, and impairing the obligation of contracts; but, as the defendant in error claims nothing under that statute, and as the validity or invalidity of that statute is in no way involved in the judgment of dissolution rendered by the State court, there is no question here of which this court has jurisdiction.

WRIT DISMISSED.

Motion to take testimony—Opposition to the motion.

THE WESTERN METROPOLIS.

Where it appeared by affidavits filed by the appellant, who was claimant below, in a collision case, that it was probable that two witnesses for the libellant received, before testifying, a promise from him for the payment of a sum of money in the event that the case should be decided in his favor, and that the appellant ascertained the fact after the appeal, the court ordered a commission, under the 12th rule, to take the testimony of such witnesses relative to said agreement.

ON motion.—John Low, Jr., had libelled the steamer Western Metropolis, in the District Court at New York, for damages sustained by a collision between that steamer and the schooner Triumph, owned by the libellant.

The District and Circuit Courts decreed in his favor, and the owner of the steamer appealed to this court.

Mr. Hubley Ashton, counsel of the appellant, now filed an affidavit of that party, stating that since the taking and perfecting of the appeal he had learned that two of the witnesses for the schooner in the District Court, the master and the mate of that vessel, had received from the libellant, John Low, Jr., before giving their testimony, an agreement for the payment of a sum of money on the contingency and in the event that the case should be decided in favor of the libellant and he should receive the damages claimed.

On this affidavit a motion was made, on behalf of the appellant, that a commission be issued under the 12th rule of this court,* to take the testimony of the master and mate of the Triumph as to the alleged agreement.

The application, it was contended, was brought by the affidavit of the appellant within the rule laid down in the case of *The Mabey*.†

On the hearing of the motion, *Mr. E. C. Benedict, for the*

* This rule declares that "in all cases where further proof is ordered by the court, the depositions which shall be taken shall be by a commission, to be issued from this court, or from any Circuit Court of the United States."

† 10 Wallace 419.

appellee, filed counter-affidavits of Low and the witnesses, denying that the agreement referred to was given for the purpose of influencing the testimony of the witnesses, but merely for the purpose of securing their attendance and compensating them for the time and money expended in attending to give their evidence.

At a subsequent day the CHIEF JUSTICE announced the order of the court,

GRANTING THE MOTION.

PARKER *v.* LATEY.

Writ of error to a Circuit Court in an ejectment dismissed, where the record stated that the land for which the suit was brought was "of the value of $500 and over."

ERROR to the Circuit Court for the District of Nebraska.

Parker brought ejectment against Latey to recover possession of a certain tract of land situate in the city of Omaha, in the State of Nebraska, described in the declaration, and there stated to be of "the value of $500 and over." Verdict and judgment were for the defendant, and the plaintiff sued out this writ of error.

Mr. J. J. Redick, for the defendant in error, moved to dismiss the case for want of jurisdiction; the Judiciary Act giving jurisdiction to this court on writs of error to Circuit Courts only "where the matter in dispute exceeds the sum or value of $2000."

Mr. Justice CLIFFORD delivered the opinion of the court.

Objection is made by the defendant that the matter in controversy does not exceed two thousand dollars, and upon an examination of the record the objection appears to be well founded. Enough must appear to show affirmatively

that the jurisdiction exists, and as it does not in this case, the writ of error must be

DISMISSED.

COOLEY *v.* O'CONNOR.

1. A certificate signed by only two of the direct tax commissioners appointed under the act of Congress of June 7th, 1862, that land charged with the tax, had been sold to the United States, is admissible in evidence in an action brought to try title to the land.
2. It is error to rule such a certificate void.
3. In trespass to real property brought to try the title, a freehold or a mere possessory right in the defendant may be given in evidence under the general issue.
4. The act of Congress contemplates a certificate of sale, though the United States becomes the purchaser.
5. Whether the advertisement of sale was such as the law required is a mixed question of law and fact, and it must be submitted to the jury.

ERROR to the Circuit Court for the District of South Carolina; in which court Mrs. O'Connor brought suit against Cooley and others, for trespass on a lot of ground which she alleged to be hers, and to try title to the same. The case was thus:

On the 5th August, 1861, Congress passed an act to provide increased revenue from imports to pay the interest on the public debt, &c., apportioning the taxes authorized among the several States.

South Carolina being in insurrection at the time, and not paying her quota under the act, Congress on the 7th of June, 1862, passed another act, which provided by its first section that:

"When in any State, or in any portion of any State, by reason of insurrection or rebellion, the civil authority of the government of the United States is obstructed, so that the provisions of the act of August 5th, 1861, for assessing, levying, and collecting the direct taxes therein mentioned cannot be peaceably executed, the said direct taxes, by said act apportioned among

the several States and Territories respectively, shall be apportioned and charged in each State wherein the civil authority is thus obstructed, upon *all the lands and lots of ground therein respectively situated*, except such as are exempt by any law of the State or United States, as the said lands were enumerated and valued under the last assessment and valuation thereof, made under the authority of said State or Territory previous to the first day of January, 1861," &c.*

The act then directed the appointment of *three* commissioners, for each of the States in insurrection, to execute its provisions; and it required this board to advertise for sale the parcels or lots, the taxes upon which were not paid within sixty days after the amount of the tax had been fixed, in a newspaper in the town, parish, district, or county where the property was situated, and also by posting notices in at least three public places in the town, parish, district, or county. In this advertisement or notice of sale, they were required by its 14th section to state "the amount or quota of said direct tax assessed against each tract or parcel of land . . . *together with a description of the tract to be sold.*" The act required them further, in case the tax charged by the first section upon the lands, and apportioned to each lot, was not paid, to sell at public sale, those lots on which the tax remained unpaid after giving the already mentioned notice. It then provided that purchasers at such sales, after paying the purchase-money, should be entitled to receive from the commissioners their certificate of sale; and it enacted that the "certificate shall be received in all courts and places as *primâ facie* evidence of the regularity and validity of said sale, and of the title of the said purchaser or purchasers under the same."

On the 3d of March, 1865,† Congress passed another act declaring:

"That a *majority* of a board of tax commissioners shall have full authority to transact all business, and to perform all duties required by law to be performed by such board, and no proceed-

* 12 Stat. at Large, 422. † 13 Stat. at Large, 502.

ing of any board of tax commissioners shall be void or invalid in consequence of the absence of any *one* of said commissioners."

Under the act of the 7th June, 1862, three commissioners were appointed for South Carolina, who, after having made assessments, exposed the delinquent property to public sale, and on the 13th day of March, 1863, all of them having been present on that day, sold the lot now in dispute to the United States. A certificate of such sale was afterwards made out, signed by *two* of the commissioners, dated March 13th, 1865 (the act of the 3d of March, 1865, just above set out, being now in force), and given to the purchasers. It set forth that at a sale made under the act of Congress above noted, held pursuant to notice at Beaufort, in the State of South Carolina, on the 13th of March, 1863, the tract or parcel of land, the title to which was now in controversy, was sold to the United States for the sum of $125, the receipt of which it acknowledged. The defendants were mere tenants of the United States.

Whether this tax sale was valid and effective to divest the ownership of Mrs. O'Connor, and to vest the property in the United States, was the single subject of contest in the court below.

The declaration in the act was the ordinary one in trespass, *quare clausum fregit;* with an indorsement that "the action was brought to try title as well as for damages." The *locus in quo* was described as "in the town of Beaufort, and county aforesaid, containing eighty feet front, more or less, and in depth running from north to south, down to low-water mark, three hundred feet, more or less; butting and bounded north on Bay Street, south on the river, and east on the lands of the plaintiff; west on lands of the plaintiff." Plea, "Not guilty." The defence set up was, that the defendants entered and held the property as tenants of the United States, and that the United States had become owners by virtue of the tax sale already mentioned.

On the trial the plaintiff introduced evidence tending to show that for many years before the rebellion, she had owned

the lot described in the declaration, and owned it when the rebellion broke out; that in November, 1861, in consequence of the Federal fleet having arrived off Beaufort, and of her being informed of an order from the commander of the rebel forces, she with nearly all the other inhabitants of Beaufort, except colored persons, left the place; that after leaving Beaufort she resided in Columbia until it was burnt in 1865; that she never saw any advertisement nor received any notice, nor in any way became aware that any tax had ever been placed on her property by the government of the United States, until the close of the rebellion in 1865, when she discovered that her house and lot had been sold, and was in the possession of strangers.

The United States gave evidence tending to prove that when the three commisssioners appointed for South Carolina, entered upon their duties at Beaufort, they searched for records of the titles to lands there, through the town and parish, and also for the records of the assessment and valuation of the lots as the same were enumerated and valued under the last assessment and valuation thereof, made under the State of South Carolina previous to the 1st of January, 1861; that they could not find either the records (of titles) or the records of the State assessment and valuation, the same having been either destroyed, concealed, or lost; that the town and parish of Beaufort were at the time occupied by United States soldiers and a few colored people; that none or but few of the owners of the lands were present, having left the town prior to the entrance of the United States troops. But that they did find an old assessment-roll of the town of Beaufort and parish of St. Helena, and the comptroller-general's report of the State for the years 1857 or 1858. The old assessment-rolls and the comptroller-general's report for the State, in default of better evidence, were used as evidence in making up the judgment of the commissioners, although they were very indefinite, giving the names of the taxpayers and describing the property or land simply as so many "acres," without locating the same, and the lots in the town of Beaufort were described only as "town

lots," without any other description. The commissioners then proceeded to obtain all the evidence in their power as to the assessment and valuation of the lots of land both in the town of Beaufort and in the parish of St. Helena, and to value and assess the same in their own judgment upon such evidence. They found an old plat of the town of Beaufort of the date of 1799, by which it appeared that the town had been laid off into lots and blocks. But they found that many of the streets described were not opened, and also that additions had been made to some parts of the town, and that these parts were not on the plat. The commissioners finally all resolved that said plat should be used as a basis of description for their assessment-rolls, and ordered a survey of the additions to the town to be made, and thus made a new plat of the town of Beaufort. In the plat thus made by the commissioners the blocks throughout the town were designated by numbers, and the lots in each block by letters of the alphabet.

The commissioners then proceeded to value the property, using said plat as a basis for description, according to their best judgment, and the best evidence they could obtain.

The defendants gave evidence tending to show that the commissioners had made such advertisement and given such notices, so far as mode, time, and number of advertisement were concerned, as the act of Congress required. But it appeared that in these the description of the lot in controversy was thus made:

"The following is a description of said lands forfeited as aforesaid, together with the amount of the quota of said tax and penalty charged upon each of said tracts or lots of land respectively:

TOWN LOTS AND LANDS IN THE PARISH OF ST. HELENA.

Lots.	Blocks.	Quota of Tax.	Penalty.	Amount.
E	61	$56 00	$28 00	$84 00"

The tax sale certificate already mentioned on page 393, having been offered by the defendants in evidence, the plain-

tiffs objected to it on the ground that it had not been specially pleaded. The court, however, overruled the objection, and admitted the certificate. Being thus in proof, the court ruled it defective and void, because signed but by two commissioners.

The court also instructed the jury, *as a matter of pure law and expressly taking the consideration of the matter from them*, that the advertisement was "not such a notice as the law required." Having read the 14th section to the jury, and referring to the advertisement, the court proceeded:

"It does not give notice, either directly or by implication; that is, inevitable notice, so as to make the owner aware that his particular property had been assessed, and was up for sale. If it had said that the whole town of Beaufort was up for sale, and by blocks and squares, a person was advertised that his house was in that block or square, somewhere described by a particular figure and letter, then it would be his duty to make inquiry. But neither directly or indirectly, by necessary implication, is this notice such as the law requires."

The court added:

"A notice published within military lines, is as it were a notice only in a fortified camp. That notice, in point of fact, could not be well supposed to reach the citizen."

The jury found for the plaintiff, and judgment being given accordingly, the United States brought the case here.

Messrs. W. W. Boyce and M. P. O'Connor, in support of the ruling below:

1st. The proceedings of the commissioners are not according to the course of common law, but a special jurisdiction and authority conferred by statute. It should appear, therefore, upon the face of the proceedings, that all has been done which the law required should be done. The certificate is thus fatally defective.*

2d. In an action of trespass to try title, the defendant

* Young *v.* Lorain, 11 Illinois, 636, 637; Thatcher *v.* Powell, 6 Wheaton, 119.

cannot justify under plea of the general issue. In such action any matter done by virtue of a warrant should be specially pleaded. A mere license to enter and occupy a close cannot be given in evidence under the general issue in an action of trespass to try title.

3d. The act of Congress does not contemplate any certificate of purchase when the United States become purchasers. Practically, then, no injury was done to the defendants below by refusing to receive the certificate, as they could have recovered if their own evidence had not shown that the sale was void, by reason of failure in the tax commissioners to pursue the requirements of the law in the sale.

4th. That the so-called "description," even if it had been seen a hundred times, could, as a matter of fact, have given no notice to Mrs. O'Connor that it was *her* property which was to be sold, no one can deny. The commissioners get an old plot of the town, which designated streets, numbers of lots, and names of owners, and, without seeking information from any source, they proceed to survey and map out the town anew after their own fashion, and by the new plot, incomprehensible to every one but themselves, advertise and sell every lot in Beaufort. This notice would have been no notice to Mrs. O'Connor if she had been on the spot. And if there can be a notice less than none, this was so under *Dean* v. *Nelson*,* where it was held "that notice to parties within Confederate lines was not obtained by publication within Union lines." A "description," which the 14th section of the act expressly requires, means something more than "lot E, block 61," on a plot that no one but the commissioners ever saw. Description is the delineating a thing by a mention of its properties; in describing land, its length, breadth, and situation should be indicated. The property had metes and bounds, and is described by them in the declaration in this case. The worthlessness of the notice was so gross, so palpable in our case, that the court assumed it to be a question of law, as perhaps what amounts to a "description" truly is.

* 10 Wallace, 158.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

When the certificate of sale was given in evidence by the defendants below, the Circuit Court ruled it to be void, because it was signed by only two commissioners, and this decision of the court is now assigned for error. It is obvious that the ruling was hurtful to the defendants. Had the certificate been admitted it would, by force of the statute, have amounted to *primâ facie* evidence as well of the regularity and validity of the sale as of the title of the purchasers. It would, therefore, have cast upon the plaintiff the burden of showing affirmatively that the sale was irregular and invalid, and that the title was not in the United States. And we think it was erroneously excluded. It is true that when an authority is given jointly to several persons they must generally act jointly, or their acts are invalid. This is a general rule for private agencies, though it is not universal in its application. But the rule is otherwise when the authority is of a public nature, as it was in this case. The commissioners were public agents, clothed with public authority. They were created a board to perform a governmental function, and it is a familiar principle that an authority given to several for public purposes may be executed by a majority of their number.* In one of the cases cited in the note† it was held that two of three trustees of a school district might issue a warrant for the collection of a tax, and that the presence of the third trustee at the issuing thereof would be presumed until the contrary was shown. The authorities cited are enough to show that the certificate of sale was not void or inoperative because signed by only two of the commissioners.

* Commonwealth ex rel. Hall *v.* Canal Commissioners, 9 Watts, 471; Jewett *v.* Alton, 7 New Hampshire, 253; Caldwell *v.* Harrison, 11 Judges Alabama, 755; Williams *v.* School District, 21 Pickering, 82; Doe *v.* Godwin, 1 Dowling & Ryland, 259; The King *v.* Beeston, 3 Term, 592; McCoy *v.* Curtice, 9 Wendell, 19.

† McCoy *v.* Curtice, 9 Wendell, 19.

Opinion of the court.

In addition to this there is also the act of Congress of March 3d, 1865,* in force when this certificate was given, under which, certainly, the validity of the certificate of sale is beyond doubt.

It has been argued, however, on behalf of the defendant in error, that inasmuch as the plea was only that of the general issue, the defendants were not at liberty to set up that the United States were the owners, and that they entered as tenants or licensees of the United States. It is doubtless true that a license from the plaintiff, or a justification under an incorporeal right, or an excuse of the trespass founded on fault of the plaintiff, or an entry by authority of law, with or without process, must be pleaded specially to an action of trespass. The reason is that these defences all admit the trespass and the possession of the plaintiff. But in trespass to real property, a freehold, or mere possessory right in the defendant, may be given in evidence under the general issue, though it is often advisable to plead *liberum tenementum*.† And there is a double reason for this when, as in this case, the action is brought by a plaintiff out of possession professedly to try the title. The action has then the nature of an ejectment, the plaintiff, if recovering at all, recovering possession as well as damages.

It has been further argued that the act of 1862 does not contemplate a certificate of sale in cases where the United States becomes the purchaser, but we are clearly of opinion that it does as fully as in any other.

The second assignment of error is, that the court instructed the jury the advertisement of sale was not such a notice as the law requires. The act of Congress required the board of commissioners to advertise for sale the parcels or lots, the taxes upon which were not paid within sixty days after the amount of the tax had been fixed, in a newspaper published in the town, parish, district, or county where the property was situated, and also by posting notices in at

* Quoted, *supra*, at the foot of p. 392.

† Proprietors of Monumoi Beach *v.* Rogers, 1 Massachusetts, 160; 1 Chitty's Pleading, 437 and 440.

least three public places in the town, parish, district, or county. The evidence given at the trial tended to prove that such advertisement had been made, and that such notices had been posted; nor was this contested. But the court held, and so instructed the jury, that the notice was not such as the law required. The reasons assigned for this ruling were that the advertisement did not state that the whole town of Beaufort was to be sold, and that, being a notice published within military lines, it was like a notice only in a fortified camp, and could not, in fact, be supposed to reach a citizen. We think, however, that neither of these reasons, nor any other not referred to, justified the court in ruling, as a legal conclusion, that the notice given in this case was not such as the law required. Whether the demands of the statute respecting notice of sale had been complied with was a mixed question of law and of fact, and it should have been submitted to the jury. Undoubtedly the advertisement must have been such as to inform persons who read it what property was intended to be exposed for sale. Any description that gave such information was sufficient. Whether the advertisement gave it or not depended not alone upon its contents. It was necessary to compare the description with the property described, and that was the province of the jury.

JUDGMENT REVERSED and a venire de novo awarded.

BARTH *v.* CLISE, SHERIFF.

1 When a sheriff, in obedience to a writ of *habeas corpus*, makes a proper return and brings his prisoner before the court which issued the writ, the safe-keeping of the prisoner while he is before it is entirely under the control and direction of the court to which the return is made. The sheriff is accordingly not responsible for escape of the prisoner while thus in the custody of the court, and before a remand or other order placing new duties on him.

Statement of the case in the opinion.

2. Where the record shows that the case of a plaintiff is inherently and fatally defective, a judgment against him will not be reversed for instructions however erroneous.

ERROR to the Circuit Court for the District of Wisconsin.

Mr. G. W. Lakin, for the plaintiff in error; Mr. M. H. Carpenter and M. M. Cothren, contra.

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

The plaintiff in error sued Edward Brinkman, as survivor of his late partner, Smid, in the Circuit Court of Grant County, to recover a large sum of money alleged to be due from Brinkman, as such survivor, to the plaintiffs. After the institution of the suit the plaintiffs applied to the county judge of Grant County for a writ of *ne exeat* against Brinkman. The writ was accordingly issued and placed in the hands of Clise, the defendant in this action, as the sheriff of that county for execution. Pursuant to the writ, Clise arrested Brinkman, who, failing to give bail as required, was held in custody. A writ of *habeas corpus* was issued by the Honorable John T. Mills, the circuit judge of that circuit, directed to the sheriff of Grant County, whereby he was commanded to have before the judge, at Dodgeville, on the day therein specified, the body of Brinkman, with the cause of his imprisonment. Clise complied with this order. While the argument upon the writ of *habeas corpus* was in progress, Clise put Brinkman in the charge of Judge Dunn, one of his counsel, and absented himself. Before the argument was concluded, Brinkman fled to Canada and has not returned. The judge refused to take any further action in the case in the absence of Brinkman, and thus the proceeding terminated.

This action was brought by the plaintiffs in error against Clise for the escape of Brinkman. The cause was put at issue by the pleadings of the parties and was tried by a jury. A verdict was found and judgment rendered for the defend-

ant, Clise. The plaintiffs thereupon sued out this writ of error. It appears by the bill of exceptions found in the record that in two instances upon the trial evidence objected to by the plaintiffs was admitted and exceptions duly taken. The plaintiffs also excepted to the several instructions given by the court to the jury. It is insisted that each of these exceptions involves an error which is fatal to the judgment.

In the view which we have found ourselves constrained to take of the case it is unnecessary to consider either of them.

The bill of exceptions purports to contain *all the testimony.* The facts that the *habeas corpus* was issued and that the sheriff obeyed it by making the proper return and taking Brinkman before the judge who issued it, are fully proved. The testimony is uncontradicted. There is no controversy between the parties upon the subject.

By the common law, upon the return of a writ of *habeas corpus* and the production of the body of the party suing it out, the authority under which the original commitment took place is superseded. After that time, and until the case is finally disposed of, the safe-keeping of the prisoner is entirely under the control and direction of the court to which the return is made. The prisoner is detained, not under the original commitment, but under the authority of the writ of *habeas corpus.* Pending the hearing he may be bailed *de die in diem*, or be remanded to the jail whence he came, or be committed to any other suitable place of confinement under the control of the court. He may be brought before the court from time to time by its order until it is determined whether he shall be discharged or absolutely remanded.* We have not overlooked the statute of 31 Car. II. This doctrine has been recognized by this court.†

* The King *v.* Bethel, 5 Modern, 19; Bacon's Ab., Title "Habeas Corpus," B. 13; Anonymous, 1 Ventris, 330; Sir Robert Peyton's Case, Ib 346; Hurd on Habeas Corpus, 324.

† In re Kaine, 14 Howard, 134.

Opinion of the court.

The statute of Wisconsin upon the subject is in accordance with the common law. It provides:

"Until judgment be given upon the return, the officer before whom such party shall be brought may either commit such party to the custody of the sheriff of the county in which such officer shall be, or place him in such care or under such custody as his age and other circumstances may require."*

The entire responsibility for the safe-keeping of the prisoner under this statute rests with the officer before whom the prisoner is brought pursuant to the writ.

When Clise, as sheriff, produced the body of Brinkman before Judge Mills, Clise's duties as the custodian of Brinkman ceased, and this cesser could be terminated only by an order of the judge clothing him with new duties and responsibilities. No such order was made. The flight of Brinkman was, therefore, in no sense an escape from the custody of Clise. His custody by Clise, in the absence of an order from the judge, would have been false imprisonment. The act of Clise in putting Brinkman in the charge of Dunn was simply a nullity. He had no authority at that time to do any act or to give any direction touching the subject.

The plaintiffs in error, according to their own showing, had not the shadow of a right to recover in this action against Clise. Conceding, for the purpose of this opinion, that the court below erred in all the particulars complained of, the errors have done them no harm. Opposite rulings could not have helped them. Their case was inherently defective. The defect was incurable and inevitably fatal. When such a defect exists, whether it be or be not brought to the attention of the court below or of this court by counsel, it is our duty to consider it and to give it effect.† This is decisive of the case before us. The defendant in error is entitled to have the judgment affirmed, and it is

AFFIRMED ACCORDINGLY.

* Revised Statutes of Wisconsin, 908, § 23.

† Garland *v.* Davis, 4 Howard, 131; Roach *v.* Hulings, 16 Peters, 319; Patterson *v.* The United States, 2 Wheaton, 222; Harrison *v.* Nixon, 9 Peters, 483; Slacum *v.* Pomery, 6 Cranch, 221.

INSURANCE COMPANY *v.* SLAUGHTER.

1. A condition in a policy of assurance, by which the policy was made void in case the assured kept gunpowder, phosphorus, saltpetre, and benzine on the premises, held, under the punctuation of the policy, to mean "in quantities exceeding a barrel;" this being a more reasonable construction than one which made the policy void if there was *any* quantity, however small, of these articles, on the premises.
2. When insurance companies restrict, by conditions subsequently stated, the liability which the policy in its body appears to create, they should set forth these restrictions in terms which cannot admit of controversy, and should print these restrictive clauses in type large enough to arrest the attention of the assured. Nonpareil criticized as not being so.

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

The Phœnix Insurance Company of Hartford insured goods owned by one Slaughter, in a certain storehouse described in the policy. The policy was on one side of a sheet of paper sixteen inches long by ten wide; the upper seven being left blank for the name of the person insured, and a description in writing of the property insured. Four printed lines, in the type known as minion,* but leaded so as to be sufficiently legible, declared that "the company agreed to make good as to the assured his loss to the amount insured, to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proofs of the same made by the assured and received at this office, *in accordance with the terms of this policy hereinafter mentioned.*"

Then followed, in a smaller type, not leaded, eight paragraphs, covering the rest of the sheet, and making a solid body of finely printed matter, most of the matter being provisions in favor of the company; some of them restricting the liability apparently incurred in the body of the instrument, and not a few making the policy entirely void. There was abundant room on the sheet, if less blank space had

* A smaller type than that in which the syllabuses of this book are printed.

been left, to have printed all these terms of the policy in a larger type.

The fourth subdivision of these terms ran thus, the size of the type and leading being here reproduced. The commas and semicolons were the same as here given, though here, for the benefit of the reader's eye, the pointing in some places is made more conspicuous than on the policy itself:

"If the assured shall have or shall hereafter make any other insurance of the property hereby insured, or any part thereof, without the consent of the company written hereon; or if the above-mentioned premises shall be occupied so as to increase the risk, or become vacant and unoccupied for a period of more than thirty days, or the risk be increased by any means whatever within the control of the assured, without the consent of this company indorsed hereon; or if the property be sold or transferred, or any change take place in title or possession whatever, by legal process, judicial decree, voluntary transfer, or conveyance; or if this policy shall be assigned, either before or after a loss, without the consent of the company indorsed hereon; or if the assured is not the unconditional and sole owner of the property; or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, mortgagee, lessee, or otherwise, is not truly stated in this policy; *or if gunpowder, phosphorus, saltpetre, naphtha, benzine, benzoin, varnish, benzole, petroleum, or crude earth oils are kept on the premises, or if camphene, burning-fluid, refined coal or earth oils are kept for sale, stored, or used on the premises in quantities exceeding one barrel at any one time, without written permission in, or indorsed* upon, this policy; then, and in every such case, this policy shall be void."

The goods having been destroyed by fire, Slaughter sued the company, which set up as a plea that "the plaintiffs, contrary to the terms and provisions of the policy, without the written permission, or permission indorsed on it by the company, did keep gunpowder on the premises, and in the said storehouse described where the goods so insured were kept."

The plaintiffs demurred, and the demurrer being sustained, and judgment given against the company, it brought the case here.

Whether or not the plea was good, and the judgment rightly given, depended of course upon the proper construction of the part above italicized of the portion of the conditions of the policy in which it was found. It was contended by the insurance company that keeping gunpowder in the store *in any quantity* vacated the policy, while the assured insisted that the policy was not defeated if they did not keep more than *one barrel* at a time. Which was the right conclusion was the matter to be now decided.

No counsel appeared for the insurance company, the plaintiff in error. Messrs. W. P. Harris and W. J. Withers, argued the case on briefs for the other side, and characterizing the defence

as made merely for delay, asked damages under the 23d Rule of court.*

Mr. Justice DAVIS delivered the opinion of the court.

If the clause of the policy out of which the difference of opinion between the parties to this suit arises, were detached from other parts of the instrument, there might be some question as to its proper grammatical construction. But such is not the case. It is the last clause in the fourth subdivision of the conditions embraced in the body of the policy, and in this subdivision a number of causes are set forth which shall operate to avoid the policy. These causes are all embraced in separate clauses, each class being separated from the others by a semicolon. If there were in the clause in dispute a semicolon where the word premises is first used, it may be, in view of the punctuation adopted in reference to the other clauses, that this clause would be complete in itself, and exclude wholly from the premises gunpowder, saltpetre, and the other articles in the same class. But in the absence of the semicolon, it is manifest that no greater restriction can be applied to gunpowder and saltpetre than to camphene and burning fluid, and that, therefore, the words "in quantities exceeding one barrel at any one time," are applicable alike to all the materials which are specified in the clause in controversy. This construction is fortified by the nature of the forbidden articles. Saltpetre is not a dangerous substance; and yet, according to the view of the counsel for the plaintiff in error, it is prohibited altogether, while a barrel of camphene and burning fluid, which are inflammable, can be stored with impunity. A construction that would lead to such a result cannot be adopted, unless the language employed leaves no other alternative.

Besides, if the contract is as contended for, it would impeach the good faith and fair dealing of the insurance company, for it would be deceptive, and calculated to mislead those who are not well informed on matters of this kind.

* See *supra*, 166.

It is well known that the agencies of this company are located in all parts of the country, and that, in many places where they are established, housekeepers generally keep on hand, for their own use, in small quantities, gunpowder, saltpetre, benzine, and perhaps other interdicted articles. It would never occur to this class of persons, on making application at one of these agencies for insurance, that they were forbidden to keep these things in their houses, and unless their attention was particularly called to the subject, which would be an unusual occurrence, they would take out their policies in the belief that they could keep and use the substances required for their necessities as they had been in the habit of doing; and, if they should happen to read over the schedule of conditions annexed to the policy, usually printed in the smallest type, not being accustomed to a critical examination of the structure of sentences, they would naturally conclude, as saltpetre and gunpowder are classed together, and as saltpetre is comparatively harmless, while camphene and burning-fluid are quite dangerous, that the restriction at the end of the enumerated articles was intended to be applied to all of them alike.

This, too, is the rational construction of the clause in question, and we cannot suppose the company which framed this policy intended it to be interpreted differently.

If insurance companies do not mean to take risks on property where gunpowder, saltpetre, and the like substances are kept, even for ordinary use, then good faith to the assured requires that they should declare their intention in terms which cannot admit of controversy; and, in order to avoid just cause of complaint, it would be better for them to employ type, in relation to this important subject, large enough to arrest the attention of an interested party.

In our opinion the Circuit Court did not err in sustaining the demurrer to the third plea, and the judgment of that court is, accordingly, affirmed.

The motion for damages is disallowed.

THORP *v.* HAMMOND.

1. When a vessel is sailing in close proximity to other vessels, the fact that her hands are engaged in reefing her mainsail is no sufficient excuse for failure to keep a lookout, or to take such precautions as are needful to avoid collisions.
2. One of several general owners, who sails a vessel on shares, under an arrangement between himself and the other owners, whereby he in effect has become the charterer, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges are taken out, and paying the other half to the general owners, is to be considered the owner "*pro hac vice*," and, as such, is liable personally for a tortious collision with another vessel.
3. Though sued jointly with the other general owners, in a libel which does not describe him as owner *pro hac vice*, a decree may be made against him alone.

APPEAL from the Circuit Court for the Southern District of New York, in a libel *in personam*, for a collision between vessels at sea. The case was thus:

By an act of Congress of March 3d, 1851, it is enacted—

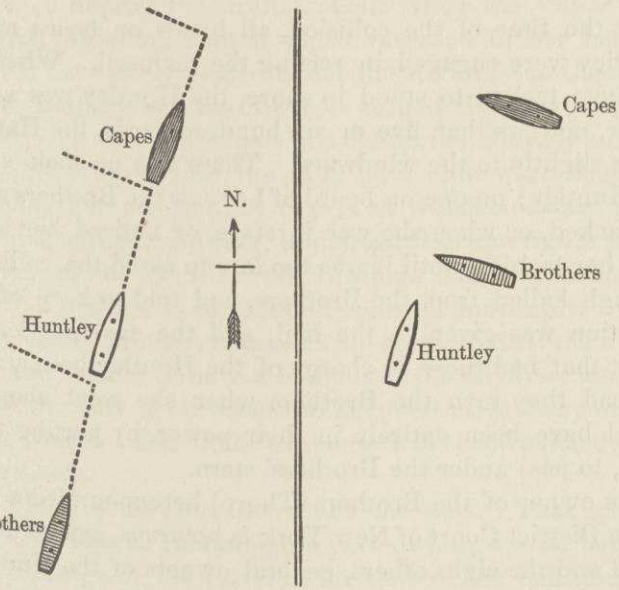
"*Section* 3. That the liability of the owners of any vessel for any loss, damage, or injury by collision, occasioned without the privity of such owners, shall in no case exceed the amount or value of the interest of such owners respectively in such vessel and her freight then pending.

"*Section* 5. That the *charterer* of any ship or vessel, in case he or they shall *man, victual, and navigate* such vessel at *his or their own expense*, shall be deemed the owner of such vessel, within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owners thereof."

With this statute in force, three schooners—the Capes, the Huntley, and the Brothers—were sailing towards New York, along the New Jersey coast, not far from Sandy Hook. There was nothing special in the ownership of the first and last named of the vessels. The Huntley, however, was owned by one S. S. Hammond and eight others as general owners, Hammond alone sailing her; he doing this on

shares, hiring, paying, and victualling his own crew; paying half the port charges, retaining half the net freight afterwards, and paying to the general owners the remaining half.

The collision, which was the cause of this suit, occurred on a winter morning of 1860. All three vessels were heavily laden, and were sailing close-hauled, having the wind about north-northwest, blowing fresh and fitfully. The general direction of their courses was about the same. The vessels were near each other, the Capes in advance, and perhaps somewhat the most out toward sea, the Huntley next, and the Brothers last and nearest to the shore. After sailing thus from eight in the morning until after nine, the wind having veered more northwardly, all the schooners tacked toward the northeast, thus standing off shore. When the Huntley tacked to stand out she lowered her mainsail in



order to take in reefs, but the Capes and the Brothers continued to carry the same sail they had carried before. In consequence of this the Brothers passed the Huntley, though on the leeward side, at the distance of about one hundred yards, running at the speed of seven or eight knots, while

the speed of the Huntley, carrying her foresail and jib and falling to the leeward, was only four or five. All the vessels ran on the off-shore tack some fifteen or twenty minutes, which carried them about two miles out to sea. The Capes then went about and stood in shore on her starboard tack, the Brothers following very soon after. Whether the Brothers had beaten out her tack when she thus came about was not clear upon the evidence, though the weight of testimony perhaps tended to show that she had. However this fact was, before the Brothers could gather headway after tacking, the Huntley—running freely on the off-shore tack, four or five knots an hour, foresail and jib set—ran into her, head on, striking her abaft the main rigging, and causing her to sink in about half an hour. The diagrams on p. 409 will perhaps better illustrate positions at different times.

At the time of the collision, all hands on board of the Huntley were engaged in reefing the mainsail. When the Brothers tacked to stand in shore, the Huntley was astern of her, not less than five or six hundred yards, the Huntley being slightly to the windward. There was no look-out on the Huntley; no one on board of her saw the Brothers when she tacked, or when she was in stays, or noticed her at all after her tacking until it was too late to avoid the collision. Though hailed from the Brothers, and told to keep off, no attention was given to the hail, and the evidence left no doubt that had those in charge of the Huntley been watchful, had they seen the Brothers when she went about, it would have been entirely in their power, by porting their helm, to pass under the Brothers' stern.

The owner of the Brothers (Thorp) hereupon filed a libel in the District Court of New York *in personam*, against Hammond and the eight others, general owners of the Huntley, averring that the Brothers had been negligently run into and sunk by the Huntley, in consequence of the mismanagement of those on board the Huntley and in charge of her. The libel, which averred nothing about the ownership of the Huntley, except that she "was *owned by and in possession*

of the respondents," claimed $12,000 damages, as the value of the Brothers.

The owners of the Huntley set up as defence:

I. That they were, in fact, only her *general* owners, and that she was commanded, sailed, and exclusively managed by Hammond, under an agreement made between him and them; that he was to have entire control and management of her as charterer on and for his own account; that he was the owner *pro hac vice* at the time of the collision, and, under the act of Congress of March 3d, 1851, alone responsible for the catastrophe.

II. That the entire value of the Huntley did not exceed $5000, and that her freight was but $424.

III. That on the merits the Brothers was in fault herself.

1. In not beating out her tack.

2. In improperly turning about when the Capes turned about, whereby, with a slight variation of her helm, she could have easily passed under the stern of the Capes.

3. In that when the Brothers turned about on the inshore tack, and whose direction was across the Huntley's bow, the Brothers knew that the Huntley's crew were engaged in reefing her mainsail, by reason of which she was in a crippled condition, and that, in disregard of the rights and condition of the Huntley, the Brothers had placed herself in such a position as to render a collision inevitable. The respondents brought witnesses to show that it was a custom of the sea not to have a lookout in the daytime, and that it was the duty of all vessels to keep out of the way of a reefing vessel. But their evidence was contradicted by the libellants.

The District Court dismissed the libel. That court considered that as Hammond, a part owner, was on board, and had charge of the vessel at the time of the collision; as he had the exclusive possession and control of her, and manned, victualled, and navigated her at his own expense, he was to be deemed a charterer, within the meaning of the act of Congress, of March 3d, 1851, which exempted the owners from personal liability. And that as Hammond, the cap-

tain, was sued merely as a part owner, and not as the charterer, wrong-doer, or active cause of the disaster, and as his liability was placed, by the libel, on the same ground as that of the other owners, the suit necessarily stood or fell as to all the respondents. The court therefore thought the statute a bar to the suit in this form, and dismissed the libel. This decree being affirmed by the Circuit Court, the case was brought here on appeal.

Mr. McMahon, for the appellants:

I. As respects the effect of the act of Congress of March 3d, 1851:

1st. Hammond is not to be regarded as charterer, or owner *pro hac vice;* for he did not navigate the Brothers at his own expense. Earnings were divided.

2d. It is not to be tolerated, even under the act of Congress, that a person—the accredited and presumptive agent of the general owners—whether part owner or not, who navigates a vessel ostensibly as her master, shall screen his general owners from liability for torts, under pretence that he was in a position as to them that would relieve them of their general liability.*

3d. In admiralty, parties who are injured by a collision have been allowed to maintain their libel *in rem*, and also their libel *in personam*, against different vessels and different persons doing the injury complained of. In these actions some defendants have been discharged, and others held liable. Our case needs less than this.†

II. As to merits. The case is clear against the respondents. The alleged custom on which the defence rests is disproved, and would have been bad if proved.

Mr. R. H. Huntley, contra:

I. The libellants cannot recover, because they have sued the general owners of the colliding vessels *in personam;*

* The Druid. Newton. 1 W. Robinson, 399.

† Newell *v.* Norton and ship, 3 Wallace, 266; Smith *v.* The Creole and Sampson, 2 Wallace, Jr., 485.

whereas the vessel was not in their employ, was not managed or controlled by them, was not victualled or manned by them, and was not sailed by their agent, nor by a person in their employ. This is doubtless so on principles of common and admiralty law; but is made undeniably true by the act of Congress.

Although Hammond, the charterer, is made a party to the suit, yet he is so made as one of several owners, and not as charterer or special owner. He is not sued because he had charge of the vessel, or because he controlled her, but because he happened to have an interest in her as a general owner. Now as a general owner he is, under the act of Congress, not liable; and as a special owner he is not sued. No recovery can therefore be had against him in this libel.

As to the suggestion that the respondent, Hammond, should be held solely liable in this action, it is sufficient to say that the libellants have not asked that such liability be decreed in either of the courts below; no amendment has been suggested by them, and they are here upon the same pleadings on which they originally based their claim.

II. As to the merits. As we understand the evidence, the Brothers had not beaten out her tack. If this is so *she* was clearly the cause of the collision. She should have gone on; she would not have struck the Capes, but would have gone astern of her; neither would she have come across our bows, which she did. The Brothers was under full sail and perfectly manageable, while the Huntley was under head sails only, and was reefing. In such position she was crippled, and was to be considered and treated as a favored vessel.

No special lookout is kept in daylight on a little schooner, or while reefing. This we think our witnesses show. The helmsman and every man on deck is a lookout. The Huntley was reefing her mainsail, and this act required all her men. The Brothers knew both facts.

Mr. Justice STRONG delivered the opinion of the court.

It is plain, as respects the merits of this suit, that the col-

lision was the result of gross carelessness in the management of the Huntley. Knowing, as the master did, that there were two schooners in close proximity to his own; knowing also, as he must have known, that they were beating out their tacks, and would probably soon come about and put in shore, there can be no excuse for his failure to keep watch of their movements and to notice the change of course by the Brothers in season to port his helm and thus pass under her stern. That the hands on the Huntley were engaged in reefing the mainsail certainly did not relieve her from all obligation to observe the commonest precautions against inflicting an injury upon a neighboring vessel ahead, especially when the movements of that vessel were precisely what ought to have been anticipated.

The respondents, however, insist that it is a custom of the sea not to have a lookout in the daytime, or while reefing, and they have produced witnesses to prove such a custom. But the evidence falls far short of showing that such a custom exists generally, and if it were proved, it would not be a reasonable one, sufficient to justify the absence of a lookout in such a case as this when the Huntley was in close proximity to two other vessels, both beating to the windward, and one of them at least expected soon to cross her bow.

It has not been claimed that the collision was the result of inevitable accident, without fault, but the respondents contend that it was due to the mismanagement of the Brothers, rather than to that of the Huntley. Their argument is that the Brothers was under full sail and perfectly controllable, while the Huntley, being under head sails only, with her hands engaged in reefing, was a crippled vessel, and therefore one to be favored. Hence it is inferred that it was the duty of the Brothers to keep out of the way. It may be conceded that when two vessels are approaching each other, the one crippled and the other in good manageable condition, it is the duty of the latter, if possible, to give way to the former. But the Huntley can in no sense be said to have been a crippled vessel. She was running freely on her

off-shore tack, four or five knots an hour, with her foresail and jib set. She obeyed her helm perfectly, and though she may not have been able to come about as easily as she would had her mainsail been set, there was not the slightest difficulty in the way of her taking care of herself and avoiding collision with other vessels. The most obvious manœuvre, that of porting her helm, was not embarrassed at all by the fact that her mainsail was not spread.

It is further urged that the Brothers had not beaten out her tack when she came about, and, hence, that her putting her helm down and turning in shore when she did was a fault which, by throwing her in the way of the Huntley, caused the disaster. Was it, however, a fault? It is by no means clear, from the evidence, that the Brothers had not beaten out her tack fully. On the contrary, the evidence that she had, appears to us to preponderate. But, whether she had or not, it is fully proved that her coming about when she did was rendered proper, if not necessary, by the fact that the Capes changed to the starboard tack. The Capes was the leading vessel, and while it is possible that the Brothers might have ported her helm and gone astern of her, it is obvious that the safer course was to tack when the Capes tacked. And there was no reason to apprehend that the Huntley, following astern at the distance of five or six hundred yards, and very little, if at all, at the windward, would be embarrassed by her tacking. She had passed the Huntley close on the latter's lee side, at a distance of not more than one hundred yards, and the Huntley, carrying on her foresail and jib, had been constantly falling off to the leeward. Abundant sea-room was, therefore, left for the following vessel. It required only that the Huntley's helm should be ported half a point to carry her safely past the Brothers. We think, therefore, the whole fault of the collision is justly chargeable to the Huntley.

It remains to inquire, whether the respondents, or any of them, are personally responsible for the injury. They were all general owners of the schooner at fault at the time when

the collision occurred, but the evidence shows that she was commanded, sailed, and exclusively managed by S. S. Hammond, one of them, under an arrangement made between him and the other owners, whereby he had in effect become the charterer of the vessel, to be employed on his own account, without the management, control, restraint, or possession of the other owners. He sailed the vessel on shares, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying to the general owners the other half. It is clear, therefore, that he must be considered as having been the owner "*pro hac vice.*" This accords with the authorities generally.* Notwithstanding this, however, and though Hammond was the special owner, it has been contended on behalf of the libellants that all the general owners are liable for the *torts* committed by the schooner while she was thus let to charter. The Circuit Court was of opinion that they are not, and this court is equally divided upon the question.

But we are all of opinion that the owner *pro hac vice* is liable, and that he may be charged in this proceeding. The court below held that he had been sued merely as a part owner, not as the charterer, wrong-doer, or active cause of the disaster, and that as his liability was placed by the libel on the same ground as that of the other owners, the suit must stand or fail as to all the respondents, and they held the act of March 3d, 1851, a bar to the suit in the form in which it had been brought. The court, therefore, dismissed the libel. This, we think, was an error. The act of March 3d, 1851, enacts, by its 5th section, that the charterer or charterers of any ship or vessel, in case he or they shall man, victual, and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of the act. The previous section had declared what shall be

* Hallet *v.* The Columbian Insurance Company, 8 Johnson, 272; Webb *v.* Peirce, 1 Curtis, 104; Thomas *v.* Osborn, 19 Howard, 22. See also act of Congress of March 3, 1851, § 5, 9 Statute at Large, 636.

the liability of owners for collisions. Hammond, therefore, is to be regarded as the owner, because the charterer, and as such responsible for the tortious acts of the vessel. If the other general owners are not, he is. The libel, it is true, avers that all the respondents were owners at the time of the collision. It does not set forth whether they were general or special owners. Such an averment was unnecessary, for it is immaterial to their liability whether they were one or the other, if they had the possession and control of the vessel. It is ownership which determines the liability, and an averment of the mode in which ownership was acquired would be superfluous. Had Hammond been sued alone, as he might have been, the libel need not have averred more respecting his ownership than is averred now. It would have been of no importance to set out whether he became owner by purchase of the schooner, or by bequest, or by charter-party, for his liability would have been as fixed in each case as in the others. Nor does the libel in this case charge general ownership, as distinguished from ownership *pro hac vice*, or ownership as defined by the statute. There is nothing, then, in the structure of the libel which stands in the way of a recovery against Hammond as owner, unless it be that others are also sued with him. And surely that is no bar to a recovery against him. The libel is for a tort, and tortfeasors are jointly and severally responsible. At common law, when several are sued, there may be a recovery against one alone, or against more than one, and less than the whole number. We know of no reason for a different rule in admiralty, and it is in accordance with admiralty practice to decree against one of several respondents to a libel for a tort, and to discharge the others.*

Our opinion, therefore, is, that even if the libel was rightly dismissed as to all the respondents except Hammond, the libellants are entitled to a decree against him.

DECREE REVERSED, and the record remitted with instruc-

* Newell *v.* Norton and Ship, 3 Wallace, 257; Smith *v.* The Creole and Sampson, 2 Wallace, Jr., 485.

tions to order a reference to ascertain the damages, and to decree that the libellants recover against Hammond.

WARD v. MARYLAND.

A statute of Maryland required all traders resident within the State to take out licenses and to pay therefor certain sums regulated by a sliding scale of from $12 to $150, according as their stock in trade might vary from $1000 to more than $40,000. The statute also made it a penal offence in any person not being a permanent resident in the State to sell, offer for sale, or expose for sale, within certain limits in the State, any goods, wares, or merchandise whatever, other than agricultural products and articles manufactured in Maryland, within the said limits, either by card, sample, or other specimen, or by written or printed trade-list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do, for which license (to be renewed annually) a sum of $300 was to be paid. *Held*, That the statute imposed a discriminating tax upon non-resident traders trading in the limits mentioned, and that it was *pro tanto* repugnant to the Federal Constitution and void.

ERROR to the Court of Appeals of the State of Maryland; the case being this:

The Constitution of the United States, in one place, thus ordains:

"ARTICLE IV. Sec. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Also thus, in another:

"ARTICLE I. Sec. 8. The Congress shall have power to regulate commerce among the several States."

With these provisions in force, as fundamental law, the State of Maryland passed two general laws regulating the subject of traders.* One part of the enactment regulated traders resident within the State, and another sought to reg-

* Code of Public Law, article 56, title "License."

ulate traders not so resident, but seeking to do business there, and both parts required the party trading or seeking to trade to take out and pay for a license.

These were the sections relating to

TRADERS RESIDENT OF MARYLAND.

§ 41. No person within this State other than the grower, maker, or manufacturer, shall barter or sell any goods, chattels, wares, or merchandise, without first obtaining a license in the manner herein prescribed.

§ 42. When any person, body politic or corporate, shall propose to sell or barter anything mentioned in the preceding section except spirituous or fermented liquors, he shall apply to the clerk of the Circuit Court of the county in which he may reside for a license therefor.

§ 43. Upon such application, the applicant shall state to the clerk, on oath, the amount of his stock of goods, generally kept on hand by him, or the concern in which he is engaged, at the principal season of sale.

§ 44. If the amount of the applicant's stock in trade does not or will not exceed $1000, the sum of $12 shall be demanded and received by said clerk from said applicant before granting the license.

§ 45.	If more than	$1,000	and not more than		$15,000,	the sum of	$15.
§ 46.	"	"	1,500	"	"	2,500,	"	18.
§ 47.	"	"	2,500	"	"	4,000,	"	22.
§ 48.	"	"	4,000	"	"	6,000,	"	30.
§ 49.	"	"	6,000	"	"	8,000,	"	40.
§ 50.	"	"	8,000	"	"	10,000,	"	50.
§ 51.	"	"	10,000	"	"	15,000,	"	65.
§ 52.	"	"	15,000	"	"	20,000,	"	80.
§ 53.	"	"	20,000	"	"	30,000,	"	100.
§ 54.	"	"	30,000	"	"	40,000,	"	125.
§ 55.	"	"	40,000	or over		40,000,	"	150.

These were the sections relating to

TRADERS NOT RESIDENT OF MARYLAND.

§ 37. No person, not being a permanent resident in this State, shall sell, offer for sale, or expose for sale, within the limits of the city of Baltimore, any goods, wares, or merchan-

dise whatever, other than agricultural products and articles manufactured in the State of Maryland, within the limits of the said city, either by card, sample, or other specimen, or by written or printed trade-list or catalogue, whether such person be the maker or manufacturer thereof or not, without first obtaining a license so to do.

§ 38. Such license shall be issued to the person or copartnership applying for the same on the payment of $300, and shall run one year from date.

§ 39. No person, whether a resident or not of the city of Baltimore, and licensed to sell therein, shall suffer or permit any person not a permanent resident of the State of Maryland, or the agent or representative of any person or persons not residents of the State of Maryland, and not in his regular employ or service, to sell any goods, wares, or merchandise by sample, card, or other specimen, or by written or printed trade-list under his name or the name of his firm or partnership, or at the store, counting-room, or warehouse in his occupation or used as his place of business.

§ 40. Any person offending against either of the three last preceding sections, shall be liable to indictment, and upon conviction shall be fined not less than $400 for each offence.

The reader will thus observe that the highest price which any trader resident within the State was ever called on to pay, in order to trade there, was $150, while every trader not so resident, who sought to trade within the State, was charged twice that sum.

In this state of constitutional and of statutory law, one Ward, a citizen of the United States and of New Jersey, resident in New Jersey, sold by sample, horse harness, within the limits of Baltimore, without any license and contrary to the above-quoted statute of Maryland. He was accordingly, for the purpose of having the validity of the Maryland act judicially tested, indicted in the Criminal Court of Baltimore, the facts being agreed on. The indictment contained two counts, one for selling and the other for offering to sell by sample goods (to wit, horse harness) other than agricultural products and articles manufactured in Maryland. The defence was that the statute of Maryland was unconstitu-

tional and void, the two clauses of the Constitution already quoted being relied on as those to which the Maryland statute was repugnant. The Criminal Court adjudged the statute valid and fined Ward $400. This judgment being affirmed in the Court of Appeals of Maryland the case was now here for review.

Mr. W. M. Evarts, for the plaintiff in error:

I. The regulation attempted by State authority is flatly repugnant to the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." It is a direct discrimination between citizens of Maryland and citizens of other States in respect of an ordinary and extensive branch of mercantile dealing.

1. It makes that which is lawful within the State of Maryland for all persons resident therein, unlawful for citizens of other States, unless upon onerous conditions, not imposed upon its own citizens, or persons resident within it.

2. It punishes the refusal to submit to their conditions by indictment and fine.

3. It makes the discrimination rest upon the very fact which alone determines, in the case of citizens of the United States, whether a person is or is not a citizen of one State or another, to wit, *permanent residence in a State.*

II. The provisions of the act, in their application to the case of the defendant below, are "a regulation of commerce between the States," and of that nature to be on their face repugnant to that power, as intrusted to Congress by the Constitution.

It is indeed the doctrine of this court that this clause of the Constitution does not exclude *all* occupation by State legislation of the ground covered by it, in the absence of legislation by Congress within the premises of the State legislation.* But such a regulation by a State as is here

* Gilman v. Philadelphia, 3 Wallace, 713; Crandall v. State of Nevada, 6 Id. 42.

attempted,—a regulation by a State of the manner in which trading within it may be carried on by citizens of other States, and in respect of merchandise to be introduced from other States,—touches the main affirmative power of regulation of ordinary active commerce between the States. The deposit of the power with the general government is inconsistent with any *such* authority in a State, and the absence of legislation by Congress is equivalent to a declaration that this direct and active trade in commodities between the States shall remain free from all regulation.

The recent cases in this court seem to assume that if the subject of State taxation and regulation, presented therein, had been of *commerce*, the legislation complained of would have been beyond the authority of the State.*

Mr. I. D. Jones, Attorney-General of the State of Maryland, contra:

I. The statute does not violate that provision of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens of the several States."

There is nothing in the law which prohibits or restrains non-resident merchants, manufacturers, or traders or their agents, from bringing their goods here and selling them in the same mode, and under the same license, as residents of the State. A custom, however, has grown up with manufacturers in the large manufacturing cities and States, of sending agents through other States and cities with samples, or lists of their goods, and selling by retail or wholesale large quantities of merchandise. It is thus sold free from the local taxation, which affects like goods in the hands of resident traders. Such sales by runners are of course a great detriment to the trade of resident traders, who take out licenses, pay rent, and are subjected to local taxes. The tax is, therefore, a tax upon a particular business or trade, carried on in a particular mode within the limits of the State

* Paul *v.* Virginia, 8 Wallace, 168; Liverpool Ins. Co. *v.* Massachusetts, 10 Id. 567; Ducat *v.* Chicago, Id. 410.

by a particular class of persons, and not a tax upon goods or merchandise imported into the State either from foreign countries or from other States. The doctrine contended for by the plaintiff in error would give the non-resident commercial traveller, or "runner," superior advantages over the regular trader.

II. The law is not in conflict with any act of Congress regulating "commerce among the several States." The power has been considered and treated as a concurrent power, to a certain extent, ever since the adoption of the Constitution of the United States; and like the concurrent powers of taxation and bankruptcy, the States may exercise it in cases where Congress has left it "in its dormant state."* There being no regulation of Congress upon the same subject, the statute is not void as a regulation of commerce.

III. The law is, in short, a part of the license system of Maryland. Licenses are a mode of taxation upon certain business and occupations carried on within the State, whereby it raises revenue to support its government; it is a law to regulate contracts in a particular mode of traffic within its own territory, passed in the exercise of the State's right to regulate all persons, property, occupations, contracts, and transactions, within its own limits, in matters not prohibited to the State by the Constitution of the United States, or not subject to regulation by Congress, or in cases of concurrent powers, not regulated by act of Congress made in pursuance of the Constitution, and with which the State law is in conflict.

Mr. Justice CLIFFORD delivered the opinion of the court.

Power to re-examine final judgments of the State courts rendered in criminal prosecutions, as well as those rendered in civil suits, is conferred upon the Supreme Court when it appears that the judgment was rendered in the highest court of law in which a decision in the case could be had, and

* Willson v. The Blackbird Creek Marsh Co., 2 Peters, 245; Cooley v. The Board of Wardens, 12 Howard, 299; Crandall v. Nevada, 6 Wallace, 35.

Restatement of the case in the opinion.

that there was drawn in question the validity of a statute of a State, on the ground of its being repugnant to the Constitution of the United States, and that the decision of the State court was in favor of the validity of the statute.*

Persons not permanent residents in the State are prohibited by the laws of Maryland from selling, offering for sale, or exposing for sale, within a certain district of the State, any goods whatever, other than agricultural products and articles manufactured in the State, either by card, sample, or other specimen, or by written or printed trade-list or catalogue, whether such person be the maker or manufacturer or not, without first obtaining a license so to do. Licenses may be granted by the proper authorities of the State for that purpose, on the payment of three hundred dollars, "to run one year from date."

Both residents and non-residents of that district are also forbidden to suffer or permit any person, not a permanent resident of the State, and not in their regular employment or service, to sell any goods in that way under their name or the name of their firm, or at their store, warehouse, or place of business.

Offenders against either of those prohibitions are made liable to indictment, and, upon conviction, may be fined not less than four hundred nor more than six hundred dollars for each offence.†

Ward, the defendant, is a citizen of New Jersey, and not a permanent resident of Maryland, and the record shows that he, on the day therein named, at a place within the prohibited district, sold to the persons therein named, "by specimen, to wit, by sample," certain goods other than agricultural products or articles manufactured in the State, without first obtaining a license so to do, and that he was indicted for those acts in the proper criminal court, and was arraigned therein and pleaded not guilty to the indictment. Apart from the plea of not guilty is the further statement

* 1 Stat. at Large, 85.

† Sessions Acts, 1868, p. 786.

in the record, that the defendant "puts himself upon the judgment of the court here, according to the act of Assembly in such cases made and provided," and that the attorney for the State doth the like.

All matters of fact having been agreed, the parties submitted the case to the court, to the end that the judgment of the court might be obtained, whether the statute of the State was or was not constitutional and valid. Judgment was rendered for the State, and the criminal court sentenced the defendant to pay a fine of four hundred dollars, and costs, and the court below, upon appeal, affirmed the judgment.

Adjudged constitutional, as the State law was by that decision, the defendant, as he had a right to do, sued out a writ of error, and removed the record into this court for re-examination.

Congress possesses the power to regulate commerce among the several States as well as commerce with foreign nations, and the Constitution also provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, and the defendant contends that the statute of the State under consideration, in its practical operation, is repugnant to both of those provisions of the Constitution, as it either works a complete prohibition of all commerce from the other States in goods to be sold by sample within the limits of the described district, or at least creates an unjust and onerous discrimination in favor of the citizens of the State enacting the statute, in respect to an extensive and otherwise lucrative branch of interstate commerce, by securing to the citizens of that State, if not the exclusive control of the market, very important special privileges and immunities by exemption from burdensome requirements, and onerous exactions imposed upon the citizens of the other States desirous of engaging in the same mercantile pursuits in that district.

Attempt is made, in argument, to show in behalf of the State, that the statute in question does not make any such

discrimination against the citizens of the other States, as is supposed by the defendant; that the citizens of the State are in fact subjected to substantially the same requirements and exactions as are imposed upon the citizens of other States, but it is too clear for argument, in a judicial opinion, that the articles of the code referred to as establishing that theory do not support the proposition, nor do they give it any countenance whatever. Those enactments forbid resident traders, other than the grower, maker, or manufacturer, to barter or sell any goods or chattels without first obtaining a license in the manner therein prescribed, and they also point out the steps to be taken by the applicant to obtain it, and what he must state in his application for that purpose.

Small traders, whose stock generally kept on hand at the principal season of sale does not exceed one thousand dollars, and are not engaged in selling spirituous or fermented liquors, are required to pay for the license the sum of twelve dollars. If more than one thousand dollars, and not more than fifteen hundred dollars, they are required to pay the sum of fifteen dollars, and so on through ten other gradations, the last of which requires the applicant to pay the sum of one hundred and fifty dollars, where his stock generally kept on hand at the principal season of sale exceeds forty thousand dollars, which is the largest exaction made of any resident trader, not engaged in the sale of spirituous or fermented liquors. Compare one set of the regulations with the other, and comment is unnecessary, as the comparison shows to a demonstration that the statute in question does discriminate in favor of the citizens of the State, and that the opposite theory finds no support from the articles of the code which forbid resident traders from bartering or selling goods or chattels without first obtaining a license for that purpose, as therein prescribed.

State power to lay and collect taxes may reach every subject over which the unrestricted power of the State extends, but the States cannot, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing their inspection

laws; nor can they, without the consent of Congress, lay any duty of tonnage, as they are expressly prohibited from so doing by the Constitution.

Implied prohibitions restricting the power of the States to lay and collect taxes also exist, which are as effectual to that end as those which are express. Undoubtedly the States may tax every subject of value, within the sovereignty of the State, belonging to the citizens as mere private property, but the power of taxation does not extend to the instruments of the Federal government, nor to the constitutional means employed by Congress to carry into execution the powers conferred in the Federal Constitution.*

Power to tax for State purposes is as much an exclusive power in the States as the power to lay and collect taxes to pay the debts and provide for the common defence and general welfare of the United States is an exclusive power in Congress. Both are subject, however, to certain prohibitions and restrictions, but in all other respects they are supreme powers possessed by each government entirely independent of the other. Congress may lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare, but direct taxation must be apportioned among the several States according to their respective numbers, and all duties, imposts, and excises must be uniform.

Articles exported from any State cannot be subjected to any tax or duty, nor is it competent for Congress to tax the salaries of the judges of the State courts, as the exercise of such a power is repugnant to the admitted right of the States to create courts, appoint judges, and provide for their compensation. Subject to those prohibitions and restrictions, and others of a like character, the power of Congress to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defence and general welfare, is without limitation, but the powers granted to Congress are not in every case exclusive of similar powers

* McCulloch v. Maryland, 4 Wheaton, 424.

existing in the States, unless where the Constitution has so provided, or where the nature of the power granted, or the terms in which the grant is made, are of character to show that State legislation upon the subject would be repugnant to the Federal grant, or that the framers of the Constitution intended that the power should be exclusively exercised by Congress.

Outside of the prohibitions, express and implied, contained in the Federal Constitution, the power of the States to tax for the support of their own governments is coextensive with the subjects within their unrestricted sovereign power, which shows conclusively that the power to tax may be exercised at the same time and upon the same subjects of private property by the United States and by the States without inconsistency or repugnancy. Such a power exists in the United States by virtue of an express grant for the purpose; among other things, of paying the debts and providing for the common defence and general welfare; and it exists in the States for the support of their own governments, because they possessed the power without restriction before the Federal Constitution was adopted, and still retain it, except so far as the right is prohibited or restricted by that instrument.*

Possessing, as the States do, the power to tax for the support of their own governments, it follows that they may enact reasonable regulations to provide for the collection of the taxes levied for that purpose, not inconsistent with the power of Congress to regulate commerce, nor repugnant to the laws passed by Congress upon the same subject. Reasonable regulations for the collection of such taxes may be passed by the States, whether the property taxed belongs to residents or non-residents; and, in the absence of any Congressional legislation upon the same subject, no doubt is entertained that such regulations, if not in any way discriminating against the citizens of other States, may be upheld as valid; but very grave doubts are entertained whether the

* Gibbons v. Ogden, 9 Wheaton, 199; Nathan v. Louisiana, 8 Howard, 82.

statute in question does not embrace elements of regulation not warranted by the Constitution, even if it be admitted that the subject is left wholly untouched by any act of Congress.

Excise taxes levied by a State upon commodities not produced to any considerable extent by the citizens of the State may, perhaps, be so excessive and unjust in respect to the citizens of the other States as to violate that provision of the Constitution, even though Congress has not legislated upon that precise subject; but it is not necessary to decide any of those questions in the case before the court, as the court is unhesitatingly of the opinion that the statute in question is repugnant to the second section of the fourth article of the Constitution, which provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.*

Taxes, it is conceded in those cases, may be imposed by a State on all sales made within the State, whether the goods sold were the produce of the State imposing the tax, or of some other State, provided the tax imposed is uniform; but the court at the same time decides in both cases that a tax discriminating against the commodities of the citizens of the other States of the Union would be inconsistent with the provisions of the Federal Constitution, and that the law imposing such a tax would be unconstitutional and invalid. Such an exaction, called by what name it may be, is a tax upon the goods or commodities sold, as the seller must add to the price to compensate for the sum charged for the license, which must be paid by the consumer or by the seller himself; and in either event the amount charged is equivalent to a direct tax upon the goods or commodities.†

Imposed as the exaction is upon persons not permanent residents in the State, it is not possible to deny that the tax is discriminating with any hope that the proposition could be sustained by the court. Few cases have arisen in which

* Woodruff *v.* Parham, 8 Wallace, 139; Hinson *v.* Lott, 8 Ib. 151.

† Brown *v.* Maryland, 12 Wheaton, 444; People *v.* Maring, 3 Keyes, 374.

this court has found it necessary to apply the guaranty ordained in the clause of the Constitution under consideration.*

Attempt will not be made to define the words "privileges and immunities," or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property; to take and hold real estate; to maintain actions in the courts of the State; and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.†

Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, without being subjected to any higher tax or excise than that exacted by law of such permanent residents.‡

Grant that the States may impose discriminating taxes against the citizens of other States, and it will soon be found that the power conferred upon Congress to regulate interstate commerce is of no value, as the unrestricted power of

* Conner *v.* Elliott, 18 Howard, 593.

† Cooley on Constitutional Limits, 16; Brown *v.* Maryland, 12 Wheaton, 449.

‡ State *v.* North et al., 27 Missouri, 467; Fire Department *v.* Wright, 8 E. D. Smith, 478; Paul *v.* Virginia, 8 Wallace, 177.

the States to tax will prove to be more efficacious to promote inequality than any regulations which Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States. Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained to establish justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system.

Evidence to show that the framers of the Constitution intended to remove those great evils in the government is found in every one of the sections of the Constitution already referred to, and also in the clause which provides that no preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, showing that Congress, as well as the States, is forbidden to make any discrimination in enacting commercial or revenue regulations. Strong support to the same view is also derived from the succeeding clause in the same section of the Constitution, which provides that vessels bound to or from a State shall not be obliged to enter, clear, or pay duties in another.

Important as these provisions have been supposed to be, still it is clear that they would become comparatively valueless if it should be held that each State possesses the power in levying taxes for the support of its own government to discriminate against the citizens of every other State of the Union.

Much consideration was given to those clauses of the Con-

stitution in the *Passenger Cases*,* and they were there regarded as limitations upon the power of Congress to regulate commerce, and as intended to secure entire commercial equality, and also as prohibitions upon the States to destroy such equality by any legislation prescribing any conditions upon which vessels bound from one State to another shall be permitted to enter the ports of another State. Congress, said Mr. Justice Grier, has regulated commerce by willing that it shall be free, and it is therefore not left to the discretion of each State either to refuse a right of passage through her territory or to exact a duty for permission to exercise such a privilege.

Viewed in any light the court is of the opinion that the statute in question imposes a discriminating tax upon all persons trading in the manner described in the district mentioned in the indictment, who are not permanent residents in the State, and that the statute is repugnant to the Federal Constitution, and invalid for that reason.

Mr. Justice BRADLEY:

I concur in the opinion of the court, that the act of the legislature of Maryland, complained of in this case, discriminates in favor of residents and against non-residents of the State, and consequently is in violation of the fourth article of the Constitution of the United States, and therefore, *pro tanto*, void. But I am further of opinion that the act is in violation of the commercial clause of the Constitution, which confers upon Congress the power to regulate commerce among the several States; and it would be so, although it imposed upon residents the same burden for selling goods by sample as is imposed on non-residents. Such a law would effectually prevent the manufactures of the manufacturing States from selling their goods in other States unless they established commercial houses therein, or sold to resident merchants who chose to send them orders. It is, in fact, a

* 7 Howard, 400 to 414.

Syllabus.

duty upon importation from one State to another, under the name of a tax. I therefore dissent from any expression in the opinion of the court which, in any way, implies that such a burden, whether in the shape of a tax or a penalty, if made equally upon residents and non-residents, would be constitutional.

JUDGMENT REVERSED, and the cause remanded with directions to the court below to conform its judgment

TO THE OPINION OF THIS COURT.

INSURANCE COMPANIES *v.* BOYKIN.

1. After a loss covered by a policy of insurance, an affidavit by the insured of the time, amount, and circumstances of the loss, accompanying proof that a loss had occurred, was made while he was insane. *Held*,
   (i) That insanity was a sufficient excuse for failure to comply with the condition of the policy requiring such an affidavit.
   (ii) That if the affidavit contained the necessary information as to the time, amount, and circumstances of the loss, it was sufficient, though the insured was insane when it was made.
2. A policy for $10,000 was signed by four companies, each of whom agreed to become liable for one-fourth of the loss to that extent. *Held*,
   (i) That one action could be brought against them all by their consent; the declaration charging the separate promises and praying for separate judgment.
   (ii) That a verdict finding that the defendants did assume in manner and form as in the declaration alleged, and assessing the whole damages at $10,000, was a good verdict in such action.
   (iii) That the judgment rendered in such verdict should have been against each defendant for one-fourth of the damages, and against them jointly for the costs, and that a joint judgment against them all on the whole sum was erroneous and should be reversed.
   (iv) That this court, instead of awarding a *venire facias de novo*, must, under the 24th section of the Judiciary Act, as well as by the common law powers of a court of error, render the judgment which the Circuit Court ought to have rendered on that verdict.

8. Such a judgment was accordingly certified to the Circuit Court, to be there enforced by execution.

ERROR to the Circuit Court for the District of South Carolina, the case being this:

Boykin caused his house to be insured against fire by one single policy in four different insurance companies to the extent of $10,000, "each company," as the policy declared, "acting for itself, and not one for the other or others." The policy contained a provision, that in case of loss the assured should "render a particular account of such loss, signed and sworn to by him, and when and where the fire originated," &c. Boykin did accordingly send an affidavit, in which, after giving the particulars of the loss, he proceeded further to state that he believed the buildings had been set on fire by an incendiary; that he had heard of repeated threats of a person whom he named that he would burn the premises, and that it was in consequence of these threats that he had procured the insurance which he was then seeking to recover. When this affidavit was laid before the insurance companies they refused to pay, and gave notice to Boykin that they considered the policy void.

Boykin then sued all four companies in one action. The declaration being demurred to, the demurrer was sustained. On the back of this declaration there was this statement, signed by the counsel of all four insurance companies:

"This action, by consent of the undersigned, was brought jointly instead of severally."

An amended declaration was then filed containing two counts, both being special upon the policy, setting forth very distinctly the promises of the defendants *as several and not joint*, and averring performance on the plaintiff's part of all things on his part to be performed.

In the course of the trial the bill of exceptions showed the plaintiff offered in evidence certain affidavits, being marked "Exhibit 4." The defendants objected to them. The objection was overruled, and the affidavits read. But they

were not given in the record nor described otherwise than as something "marked Exhibit 4."

Testimony was also given to show that when Boykin made the affidavit above referred to, of the fact and manner of the fire, he was insane. Based on these facts the defendant asked six instructions, the substance of which was that they had a right to proof of loss by an intelligent being, and that if the plaintiff was insane no such proof had been given, and if he were sane then his affidavit showed such fraud as should defeat recovery; the last proposition, however, not being put in the form of a separate point. The court refused the instructions asked for, and charged the jury in its own way, presenting its views fully and elaborately, upon the law and the facts of the case.

To this charge the defendants excepted generally; not specifying any particular part of the charge, nor any particular proposition of it.

The verdict was, "that the said defendants did promise and assume, *as the said plaintiff hath alleged*, and they assess the damages of the said plaintiff at $10,000, with interest from the 20th of March, 1867," the date when the loss was payable. A joint judgment being given accordingly, the four companies brought the case here; assigning for error as to this particular that the action had been sustained, and judgment given against all the companies jointly.

Messrs. Carlisle and McPherson, for the plaintiffs in error; Mr. W. W. Boyce, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. The exception as to the introduction of testimony relates to four affidavits, which are referred to in the bill of exceptions as "Exhibit 4." There is no such exhibit in the record, nor anything else which can be identified as either of these affidavits. We cannot, therefore, determine whether their admission damaged the defence or not, and the assignment of error based on this exception must be overruled.

2. The assignment which alleges error in the charge of

the judge is equally unfortunate. The charge is a very full and elaborate discussion of the law and the facts of the case, and no particular part of the charge, nor any special proposition of law found in it, is excepted to. We have repeatedly held that a general exception to the whole of such a charge is insufficient.

3. The exception to the refusal of the court to charge as requested may, with a little liberality, be held sufficient.

Based on the facts of the case the defendants at the trial asked instructions, the substance of which is condensed in the proposition that they had a right to proof of loss by an intelligent being, and if plaintiff was insane no such proof had been given, and if he were sane then his affidavit showed such fraud as should defeat recovery. The last of these propositions is not denied, but was not asked as an independent instruction. But the first is too repugnant to justice and humanity to merit serious consideration. There are two obvious answers to it. First, the affidavit, whether of an insane man or not, is sufficient in the information which it conveys of the time, the nature, and amount of the loss. Second, if he was so insane as to be incapable of making an intelligent statement, this would of itself excuse that condition of the policy. It is argued that plaintiff, having averred in his declaration that he did give them this information under oath, he cannot now be permitted to show an excuse by his insanity for not doing it. But as already seen his affidavit does literally prove the allegation, and if it contains something more which was the result of insanity, that does not vitiate what is well and truly stated in the affidavit. We are of opinion that all these prayers for instruction were properly rejected.

The remaining assignment of error is that the action was sustained and judgment given against all the defendant companies jointly.

We need not stop to inquire whether the action in this form should have been sustained if objection had been made at the proper stage of the suit, for by an express written agreement found in the record, defendants, by their counsel,

consented that the action should be brought jointly instead of severally. As their liability depended on the same evidence and was founded on the same policy, and as their defence rested on the same issues, to be supported by the same testimony, it was manifestly for their interest to have but one trial, and no reason is apparent to us why this could not be done by consent. But the terms of this consent did not authorize the court to render a joint judgment, by which each company would be bound for the whole loss. This was not their contract, and it may be doubted if their counsel could have bound them by such an agreement if they had intended it. The judgment of the court, therefore, which is against the defendants jointly and not severally for the full amount of the policy, with interest, is erroneous and must be reversed.

But this error does not extend to the verdict. The amended declaration sets forth very distinctly the promises of the defendants as several and not joint, and the verdict of the jury is, "that the said defendants did promise and assume, as the said plaintiff hath alleged, and they assess the damages of the said plaintiff at ten thousand dollars, with interest from the 20th of March, 1867." The verdict of the jury, therefore, finds the amount of plaintiff's damages or loss, and that each of the defendants had promised and assumed to pay one-fourth thereof, which is manifestly a good verdict, responsive to the issues and to the contract of the defendants. The Circuit Court ought to have rendered a judgment that plaintiff recover of each of said defendants, severally, a sum which would have been the one-fourth part of the $10,000, and interest from the time mentioned in the verdict, and a joint judgment against all the defendants for costs. While we are bound, therefore, to reverse the judgment of that court the foregoing statement indicates very clearly the judgment which this court must render under the twenty-fourth section of the Judiciary Act. That section enacts that where a judgment or decree shall be reversed in a Circuit Court, such court shall proceed to render such judgment or pass such decree

as the District Court should have rendered or passed; and the Supreme Court shall do the same in reversals therein, except when the reversal is in favor of the plaintiff or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain; in which case they shall remand the cause for final decision. As the case before us does not come within the exception above mentioned, it is our duty to render the judgment which we have shown that the Circuit Court should have rendered. The process, the pleadings, the trial, and the verdict are without error, and it surely cannot be necessary to set aside this verdict and award a new trial because the judgment which was rendered on that verdict was erroneous. And this was also the rule by which courts of error were governed at the common law. Indeed, it was for a long time denied that a court of error could award a *venire facias de novo*. In the case of *Philips* v. *Bury*, reported at great length in Skinner,* which was an action in the King's Bench and writ of error to the Peers, who reversed the judgment below, the case was carried back and forward several times between the Peers and the King's Bench on the question of which court should render the judgment on the verdict, and it was finally settled that the House of Lords should give the judgment which the King's Bench ought to have given, Eyre, C. J., saying that where judgment is upon a verdict, if they reverse a judgment they ought to give the same judgment that ought to have been given at first, and that judgment ought to be sent to the court below. So in *Slocomb's Case*, Cro. Car.,† on a general verdict where judgment was reversed in the King's Bench, it was, in the language of the reporter, "agreed by all the court, if the declaration and verdict be good, then judgment ought to be given for plaintiff, whereof Jones at first doubted, but at last agreed thereto, for we are to give such judgment as they ought to have given there." In 1 Salkeld,‡ it is said: "If judgment be below for plaintiff and error is brought

* Page 447. † Page 442.

‡ Page 401; see also Butcher *v.* Porter, 1 Shower, 400.

and that judgment reversed, yet if the record will warrant it the court ought to give a new judgment for the plaintiff," which is precisely the case before us. And in *Mellor* v. *Moore*,* on the authority of these and other cases, the court of Exchequer Chamber held that when a judgment is reversed on demurrer in favor of plaintiff, the case is sent down and a writ of inquiry goes, but when it is upon a verdict they should give the same judgment that ought to have been given at first, and that judgment ought to be sent below. In *Gildart* v. *Gladstone*,† on a case from the Common Pleas having been reversed on a special verdict, Lord Ellenborough said: "The court are bound, *ex officio*, to give a perfect judgment upon the record before them."

The provisions of our statute of 1789, already cited, show that the lawyers who framed it were familiar with the doubts which seemed at that time to beset the courts in England as to the precise judgment to be rendered in a court of errors on reversing a judgment, and they in plain language prescribed the rule which has since become the settled law of the English courts on the same subject.

The judgment will be REVERSED and a judgment certified to the Circuit Court for plaintiff against each of the defendants for the one-fourth of amount of the plaintiff's damages, including interest, as ascertained by the verdict, and for a joint judgment against them all for the costs in that court.

Mr. Justice STRONG concurred in the judgment of reversal, but thought there should be a *venire de novo*. He stated his opinion to be that the verdict did not warrant the entry of such judgments as had just been directed.

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* 1 Bosanquet & Puller, 80.

† 12 East, 668.

Syllabus.

HENNESSY *v.* SHELDON.

A judgment affirmed with ten per cent. damages in addition to interest, under the 23d Rule of Court.

ERROR to the Circuit Court for the Eastern District of Texas.

Sheldon, a citizen of New York, sued Hennessy, a citizen of Texas, on two notes. The defendant pleaded the general issue and payment. Judgment was given for the plaintiff, and the defendant took this writ of error and gave bond to cause the writ to operate as a supersedeas. There was no bill of exceptions.

Messrs. Albert Pike and R. W. Johnson, for the defendants in error, asserting that the writ of error was manifestly frivolous, vexatious, and for delay, asked affirmance and damages at the rate of ten per centum under the 23d Rule of court.*

No opposing counsel.

The CHIEF JUSTICE. There is nothing in the record which tends to show error in this judgment, or to repel the conclusion that the writ is prosecuted merely for delay. The judgment must, therefore, be

AFFIRMED WITH TEN PER CENT. DAMAGES.

WALKER *v.* DREVILLE.

1. Notwithstanding the peculiarities of the Civil Code of Louisiana, the distinctions between law and equity must be preserved in the Federal courts in that State; and equity causes can only be brought to the Supreme Court for review by appeal, and cases at law by writ of error.

* See this rule, *supra*, 166.

Statement of the case.

2. As the pleadings in the Circuit Court for that district are by petition and answer, both at law and in equity, the court must look at the essential nature of the proceeding to determine whether it belongs to the one or to the other.
3. A proceeding which is in its essential nature a foreclosure of a mortgage as a mortgage is foreclosed in a court of chancery, is a suit in equity, by whatever name it may be called; and when brought here by writ of error, the writ must be dismissed.

ERROR to the Circuit Court for the District of Louisiana.

Madame Dreville filed her petition in the court below against one Walker, in which she alleged that he, Walker, was indebted to her in the sum of $5492, and she showed how this debt originated; how the note on which it was founded came into her possession; how much of it has been paid, and how much remained due. She further set forth that a mortgage was given by him on certain real estate, which she described, to secure the payment of the note, and she filed as exhibits, with her petition, copies of the note and the credits indorsed on it, and of the mortgage with its acknowledgment and certificate of its record.

She prayed that Walker might be cited to appear before the court, and that after legal proceedings had, be condemned to pay the sum which she claimed with interest and costs and five per cent. lawyers' fees, as stipulated in the mortgage; and that the plantation mentioned in the mortgage be adjudged and decreed to be subject to the payment of said debt, interests, and costs. Then followed a separate prayer for general relief.

There was for answer, first a short general denial of all the allegations of the petition; and afterwards a long supplemental answer, as it was called, in the nature of a cross-bill, setting up usury, and a cross demand, which was called by the court "a reconvention." This latter pleading was by order of the court, afterwards stricken out, apparently on the ground that it was barred by the statute of limitations. This, however, was done after a distinct hearing on that subject.

The final judgment or decree of the court was:

"That plaintiff recover of the defendant the sum claimed,

with interest, costs, and lawyers' fees; with privilege and mortgage on the property described in the notarial act, passed before Ad. Mazurean, notary, a certified copy of which is made part hereof."

Walker brought the case here on error.

The question considered by the court was, whether the case was properly brought here by that means, and whether it should not have come by appeal?

Mr. T. J. Durant, for the plaintiff in error; Mr. Miles Taylor, contra:

Mr. Justice MILLER, having stated the case in the way above given, delivered the opinion of the court.

The pleading, the orders, and the decree of the court, show, we think, so as to need no further argument to a mind familiar with the principles of equity jurisprudence, that the procedure is in its essential nature a foreclosure of a mortgage in chancery. It has all the essential qualities of such a suit, and it has none which is not usual and appropriate in such a proceeding. It is true that there is a personal judgment against defendant, but the ninety-second rule of equity practice prescribed by this court clearly authorizes such a judgment in foreclosure cases. It is the precise mode of foreclosing mortgages adopted in many of the States under their codes, and in all of them, when there is a separate chancery docket, such proceedings are classed among the chancery causes.

We have so often decided that notwithstanding the peculiarities of the Civil Code of Louisiana, the distinctions between law and equity must be preserved in the Federal courts, and that equity causes from that circuit must come here by appeal, and common law causes by writ of error, that we cannot now depart from that rule without overruling numerous decisions and a well-settled course of practice.*

* San Pedro, 2 Wheaton, 132; McCollum *v.* Eager, 2 Howard, 61; Minor *v.* Tillotson, Ib. 392; Surgett *v.* Lapice, 8 Id. 48; Brewster *v.* Wakefield, 22 Id. 118; Thompson *v.* Railroad Companies, 6 Wallace, 134.

Statement of the case in the opinion.

The present case being a proceeding in equity brought here by writ of error, and not by appeal, the writ must be

DISMISSED.

SWAYNE and BRADLEY, JJ., dissented.

SCOTT *v.* UNITED STATES.

There were three points along a river course, the highest A., the next B., the last C. *Held*, that a contract to transport goods from B. to C. and to and from all points between them, when the transportation was to be by water, was not a contract to transport from A. to C., although such transportation necessarily involved (as a greater includes a less) a transportation between B. and C.

APPEAL from the Court of Claims.

Messrs. A. H. Garland, N. P. Chipman, and E. L. Stanton, for the appellant; Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

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

This is an appeal from the judgment of the Court of Claims. The facts of the case, so far as it is necessary to consider them, are as follows:

On the 13th of February, 1866, Henry T. Noble, assistant quartermaster in the volunteer military service of the United States, entered into a contract with the appellant, Scott, whereby the quartermaster "agrees to furnish all the transportation the United States may require from Little Rock, Arkansas, to Fort Smith, Arkansas, and to and from all points between Little Rock, Arkansas, and Fort Smith, Arkansas, when the same is to be furnished by river." Transportation was called for by the United States between Little Rock and Fort Smith, furnished by Scott, and duly paid for

by the government. Upon that subject there is no controversy between the parties. But the United States also shipped troops and stores from St. Louis to Fort Smith and Fort Gibson. The vessels, on their way, touched at Little Rock, but did not discharge there. While they were at Little Rock, Scott, in a written communication to the quartermaster, claimed the right, under his contract, to transport the troops and stores in question from that point to Fort Smith, and had boats ready to perform that service. None of the lading was delivered to him. Had he transported it, the freight, according to his contract, would have amounted to $17,605.66. The Court of Claims held that the transportation thus claimed was not within the contract, and dismissed his petition. Hence this appeal.

We think the decision of the Court of Claims was correct. The soundness of this view of the subject is too clear to require or admit of much discussion. The contract was for transportation between Little Rock and Fort Smith. Transportation from Little Rock to Fort Smith was not the same thing by any means as transportation from St. Louis to Fort Smith or Fort Gibson. Transportation from St. Louis to those places necessarily involved transportation by Little Rock, and thence over a common river route to the higher points of destination, but the voyages were wholly distinct and independent of each other. The greater includes the less, but that does not make them identical. In their totality they are as different as if the partial sameness did not exist. In the transportation between St. Louis and the other points named the part performed above Little Rock was but an ingredient in the mass. There is nothing which requires us to disintegrate it and give to Scott one part more than another. Such elongated transportation is neither within the letter nor the meaning of his contract.

In cases like this it is the duty of the court to assume the standpoint occupied by the parties when the contract was made—to let in the light of the surrounding circumstances—to see as the parties saw, and to think as they must have

thought, in assenting to the stipulations by which they are bound. This process is always effective. When the terms employed are doubtful or obscure there is no surer guide to their intent and meaning. It must have been known to both Scott and the quartermaster that such transportation would be required as that under consideration. It is incredible that they intended to subject the United States to the delay, inconvenience, and expense of the unlivery and reloading of every cargo which came up the river to Little Rock only to feed Scott's contract and meet its demands. He claims a monopoly, without regard to circumstances, of all the government transportation upon the water-way where his contract was to be fulfilled. Fort Gibson is above Fort Smith. As respects all lading to be shipped beyond Fort Smith the same unloading and reloading would be necessary there which had before occurred at Little Rock. A proposition, from which flow consequences so unreasonable, must itself be regarded as of that character. Where parties intend to contract by parol, and there is a misunderstanding as to the terms, neither is bound, because their minds have not met.* Where there is a written contract, and a like misunderstanding is developed, a court of equity will refuse to execute it.† If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to.‡ But it is unnecessary to invoke the aid of anything outside of the contract itself. Its interpretation presents no question for our consideration. That the proper construction has been given to it, we think is equally clear.

JUDGMENT AFFIRMED.

* Mildeberger v. Baldwin & Forbes, 2 Hall, 176.

† Coles v. Browne, 10 Paige, 534; Calverley v. Williams, 1 Vesey Jr., 211.

‡ James v. Morgan, 1 Levinz, 111; Thornborow v. Whitacre, 2 Lord Raymond, 1164; Baxter v. Wales, 12 Massachusetts, 365.

EDWARDS *v.* TANNERET.

A dismissal of a case for want of jurisdiction *held* to have been rightly made from the Circuit Court for Louisiana, as being a proceeding which, under the act of Congress of July 28th, 1866, was to remain in the District Court of the United States for that District; the case being one that had been begun in the "Provisional Court of Louisiana," on pleadings which showed that both parties were citizens of the State named. The jurisdiction of the Circuit Court was held not to have been helped by a suggestion made there on transferring the case, that the defendant was an alien; the fact being denied in the subsequent pleadings, and no proof of it in any way made.

ERROR to the Circuit Court for the District of Louisiana.

In 1862, during the late rebellion, the courts of the United States were broken up within the limits of Louisiana. New Orleans, however, being retaken by the army of the United States, and the national authority partially re-established in the State, though still liable to be overthrown by successes of the rebels, President Lincoln, in October, 1862, established by proclamation what was known as a "Provisional Court," with authority to hear, try, and determine all causes, civil and criminal, including causes in law, equity, revenue, and admiralty; and particularly all such powers and jurisdiction as belong to the District and Circuit Courts of the United States; conforming proceedings as far as possible to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana.

In this Provisional Court, one Daniel Edwards sued Emile Tanneret. The plaintiff's petition began thus:

"The petition of Daniel Edwards, *a loyal citizen, residing in the city of New Orleans*, with respect shows, that Emile Tanneret, *residing on False River, in the parish of Pointe Coupee*, is justly and truly indebted unto your petitioner for balance of account in the sum of $4995."

The writ or citation was thus:

"THE PRESIDENT OF THE UNITED STATES OF AMERICA TO THE UNITED STATES PROVISIONAL MARSHAL FOR THE STATE OF LOUISIANA, GREETING:

"You are hereby commanded to summon Emile Tanneret, *a*

Statement of the case.

citizen of the State of Louisiana, to comply with the demand of Daniel Edwards, *citizen of the State of Louisiana*."

Judgment was given for the plaintiff. However, in July, 1865, Tanneret, describing himself as "a resident of Pointe Coupee, Louisiana," and Edwards as "a resident of New Orleans," filed a petition, and got an injunction from the same court against the issue of any execution; the order being simply, "Let the injunction issue as prayed for."

On the 20th of July, 1866, the authority of the United States being now completely re-established in Louisiana, Congress passed an act,* by the first section of which all "suits, causes, prosecutions, or proceedings," then in the Provisional Court, with the records thereof, were transferred to the United States District Court for the Eastern District of Louisiana, and authority was given to the *Circuit Court* to hear and determine *such* of the suits or proceedings thus transferred "*as the Circuit Court could take jurisdiction of under the laws of the United States.*"

The second section enacted, that in case suits or proceedings were then pending in the Provisional Court *which could not have been instituted in the Circuit Court*, or the District Court for that district, the records, when removed into the District Court, should "*remain in said District Court without further action.*"

The third section enacted that all judgments, orders, decrees, and decisions of the Provisional Court, relating to the causes transferred by the act to the District Court or to the Circuit Court held in the Eastern District of Louisiana, should at once become the judgments, orders, decrees, and decisions of the District Court or the Circuit Court, unless the same were inconsistent with the rules and proceedings thereof; and that they might be enforced as the judgments, orders, and decrees of the District Court or the Circuit Court.

In this condition of things, Edwards appeared in the Circuit Court for the District of Louisiana, and suggesting the recovery of his judgment, and that the defendant was "an

* 14 Stat. at Large, 344.

alien, and a citizen of the French Empire," and himself "a citizen of the State of Louisiana," moved a transfer of his case into the Circuit Court. He made no allusion to the injunction, and having got a transfer of the case, issued execution.

The defendant's counsel then filed their own petition, alleging the injunction and denying the alienage of the defendant, asserting contrariwise that he was a citizen of Louisiana.

The court dismissed the case, as being a proceeding which, under the act of Congress, must remain in the archives of the District Court.

From this order of dismissal the present writ of error was taken.

Messrs. Weed and Clarke, for the plaintiff in error:

There were no State courts nor any Federal courts in Louisiana when the Provisional Court was established. This court was the creature of a social and civil necessity, temporary only. Any one might sue any one there. No allegation whatever of citizenship was necessary to give the court jurisdiction. Any allegation was therefore improper. The allegation of citizenship then that was made, was thus neither pertinent nor issuable, and was to be regarded as naught. It was only to give the *Circuit Court* jurisdiction and on the transfer that it became necessary that the alienage of one of the parties should appear; and the alienage did then appear in the motion and suggestion to the Circuit Court, on which a transfer of the case into that court was made. It was time enough to make it appear when its appearance was first wanted. It would have been more than senseless to have made it earlier. The unnecessary and unmeaning reference to citizenship in the proceedings in the Provisional Court don't affect the case. All things become new in the Circuit Court; and we have then a case where jurisdiction appears on the face of the pleadings. In such a case, if the alienage and consequent want of jurisdiction be denied, it should be taken advantage of by plea in

abatement. We have nothing here but a motion. That is insufficient.

Mr. Durant, contra:

The radical defect of the opposite argument is, in supposing that the case when it appeared in the Circuit Court, was a new suit. It was the old "suit, cause, prosecution, or proceeding," "transferred with the records thereof," and these records showed a case not cognizable in the Circuit Court "under the laws of the United States." The subsequent averment in the Circuit Court of alienage of one party, was thus as ineffective as if the case had been begun in the Circuit Court on the same pleadings on which it was begun in the Provisional one.

A plea of an abatement is necessary only when the citizenship averred is such as to support the jurisdiction of the court, and defendant desires to controvert it. That is not this case, and the want of jurisdiction can be taken advantage of on motion.*

Mr. Justice STRONG delivered the opinion of the court.

It is manifest that by the act of Congress of July 28, 1866, no proceeding of any description was intended to be transferred into the Circuit Court, unless it was one of which the Circuit Court could take jurisdiction under the laws of the United States, as they were prior to the passage of the act. All suits and proceedings were transferred into the District Court, but only those could be acted upon by either the District or Circuit Court which might have been instituted in those courts, or one of them. All others were directed to remain in the District Court without further action. It was not the design of Congress to enlarge the jurisdiction of the Federal courts in the Louisiana district, but rather to enable them to take up and dispose of cases which were within their jurisdiction, but which had been commenced in the Provisional Court, and, either not carried to judgment when

* Coal Company v. Blatchford, 11 Wallace, 172.

that court was abolished, or, if carried to judgment, not completed by execution.

Such being the purpose and meaning of the act, it becomes necessary to inquire whether this was a case of which the Circuit Court could entertain jurisdiction under the laws of the United States, for if it was not, it never was legally transferred into that court, but it remained, by force of the statute, in the District Court. The record discloses that the suit was brought in the Provisional Court by the plaintiff, who is described in the petition as a citizen, residing in the city of New Orleans, against the defendant, described as residing on False River, in the parish of Pointe Coupee. There is no other description of the citizenship of the parties contained in the petition. The citation, however, describes both the plaintiff and the defendant as citizens of Louisiana, and these are all the averments of citizenship which can be found in the record. As the suit was brought for a balance of an account, its subject-matter did not bring it within the jurisdiction of the Circuit Court, and hence, if it was a case of which that court could entertain jurisdiction, it must be because of the citizenship of the parties. But when the plaintiff in an action invokes the jurisdiction of the Circuit Court because of the citizenship of the parties, it must appear upon the record that the citizenship is such as to justify the court in taking cognizance of the case. And certainly the pleadings here exhibit nothing from which the court can see that both parties are not citizens of Louisiana. As already noticed, the petition makes no averment respecting the citizenship of the defendant, and simply describes the plaintiff as a citizen, without asserting of what state or kingdom. And the citation describes both parties as citizens of Louisiana.

It is true that after the judgment was obtained in the Provisional Court an injunction was granted against its execution, but neither that injunction nor the bill or petition upon which it was founded can be considered any part of this record; and if they could, they would not aid the plaintiff, for in neither of them is there any averment of the citizen

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ship of the parties. Nor does it sufficiently appear in any other way that both parties were not citizens of Louisiana. The plaintiff, indeed, when he moved for the transfer of the case into the Circuit Court, suggested that the defendant was an alien, but the suggestion was not made in the Provisional Court. No proof of it was offered, and the alleged alienage was subsequently denied. It is clear, therefore, that the case was not one of which the Circuit Court could entertain jurisdiction under the laws of the United States, and that it was never legally transferred to that court. It follows that the order dismissing the cause was correct.

We are to be understood as deciding only what is before us. We express no opinion respecting the regularity or effect of the injunction which was obtained in the Provisional Court.

JUDGMENT AFFIRMED.

THE PATAPSCO.

Upon a decree in the Circuit Court for a sum less than $2000, "with interest from a date named," an appeal lies here under the statute which gives an appeal "where the sum in dispute . . . exceeds $2000," provided that the sum for which the decree is given and the interest added to it together exceed $2000.

BOYCE filed a libel in the District Court for the Southern District of New York, against the steamer Patapsco, claiming $1724. That court dismissed the libel; but, on appeal, the Circuit Court reversed the decree and sent the case to a master, to report the amount due. The master, on the 15th July, 1868, reported $1982. The Circuit Court confirmed the report, and on the 11th February, 1870, decreed in favor of the libellant for the amount reported, *with interest from the date of the report.* Adding the one year, six months, and twenty-six days' interest to the amount given by the report the sum was $2200 and upwards.

Statement of the case.

On this state of facts, *Mr. Orville Horwitz, for the appellee,** moved to dismiss, on the ground that the $2000 necessary to give this court jurisdiction did not exist, unless by adding interest to the amount claimed, or to that reported due.

The statute, it will be remembered, gives an appeal "where the sum in dispute, exclusive of costs, exceeds $2000."

Mr. Donohue, contra.

The CHIEF JUSTICE: The decree of the Circuit Court was for the amount reported due the libellant on the 15th July, 1868, $1982, *and interest from the date of the report.* We think that interest to the date of the decree must be computed as a part of the sum for which the decree was rendered. The sum thus computed exceeds $2000, and the motion must, therefore, be

DENIED.

HALL v. ALLEN, ASSIGNEE.

A question relating to the adjustment of priorities and conflicting interests in a bankrupt's estate in his assignee's hands, arising on motion before the register, was taken, by means of a case and question agreed on, into the District Court. The decision of that court was in turn taken by appeal to the Circuit Court, which reversed the decision. The action of the Circuit Court herein, *held* to have been under the 2d section of the Bankrupt Act and only in the exercise of its superintending and revisory jurisdiction, and hence, on the authority of *Morgan* v. *Thornhill*, 11 Wallace, 65, not capable of being brought by further appeal here.

MOTION to dismiss, for want of jurisdiction, an appeal from the Circuit Court for Missouri: the case being thus:

The act to establish a uniform system of bankruptcy† gives to the District Courts exclusive original jurisdiction in matters of bankruptcy, including "the adjustment of the

* Citing Udall *v.* Ohio, 17 Howard, 17, and Olney *v.* Falcon, Ib. 19.

† 14 Stat. at Large, 518.

Statement of the case.

various priorities and conflicting interests of all parties." The act enacts, however, by its 2d section:

"That the several Circuit Courts . . . 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 6th section of the same act, after speaking of the District Court, provides that

"In any bankruptcy, or in any other proceedings, . . . the parties concerned may, at any stage of the proceedings, by consent, state any question or questions, in a special case, for the opinion of the court; and the judgment of the court shall be final, unless it be agreed and stated in such special case that either party may appeal, if, in such case, an appeal is allowed by this act."

With these provisions in force, one Downing, doing both an individual and a partnership business, and having creditors of both classes, was declared a bankrupt, and Allen was appointed his assignee. The bankrupt cause having been referred to a register in bankruptcy, a question arose upon the facts of the case (not disputed) whether the separate creditors were to be paid in full before the partnership creditors should get anything; the question arising upon some motion made before the register. And a case and the question upon it and the motion being agreed on by the counsel, the register certified the whole to the District Court for its opinion, a right of appeal being reserved to all parties. That court decided that the separate creditors were to be paid in full; to which decision the assignee excepted, and the court signed a bill of exceptions. The assignee now appealed to the Circuit Court. That court reversed the decision of the District Court. An appeal was then taken to this court by the assignee from the decision—the appeal which it was now asked to have dismissed.

Opinion of the court.

Mr. H. Hitchcock, in support of the motion: The matter before the Circuit Court was a mere question "arising in the course of the administration of the bankrupt's estate," and so within the supervisory jurisdiction given by the 2d section to the Circuit Court. It was the original jurisdiction for "the adjustment of the various priorities and conflicting interests of all parties," conferred on the District Courts by the Bankrupt Act, which was invoked by simple motion; which motion, together with an agreed statement of facts, was, at the request of all parties concerned, certified by the register for its opinion to the District Court. A case stated is within the terms, "other process," spoken of in the 2d section. *Morgan* v. *Thornhill*,* decides that in such cases no appeal lies to this court.

Mr. E. Avery, contra: This case, unlike *Morgan* v. *Thornhill*, did not arise under the 2d section of the act, but under the 6th. The parties had stated a case for the District Court, as that section provides, and had reserved their right of appeal. The case being thus in the Circuit Court, in a regular way, and not in it as a merely supervisory court, an appeal would lie.

The CHIEF JUSTICE: It is quite evident that the decision of the Circuit Court was made in the exercise of its superintending and revising jurisdiction, and this court decided at the last term, in *Morgan* v. *Thornhill*, that no appeal can be taken from the decision of the Circuit Court in the exercise of that jurisdiction. The appeal, therefore, is

DISMISSED.

* 11 Wallace, 65.

PEOPLE v. CENTRAL RAILROAD.

Two States made an agreement as to where the boundary line between them was, and Congress by statute gave its assent to the agreement. After this one of the States sued a corporation of the other for taking possession of land and water which the State suing alleged were in its territory. The corporation asserted, in defence, that under the agreement the land and water were within the jurisdiction of the other State; and the highest tribunal of the State in which the suit was brought decided that it was so.

Held, that this was but an adjudication upon the meaning of the agreement, and not one upon the construction of the statute; and accordingly that error would not lie under the 25th section of the Judiciary Act.

THIS was a motion to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of New York; the case being thus:

In 1833 an agreement was made between New York and New Jersey, relative to the boundary line between the two States, to which Congress gave its assent by an act approved June 28th, 1834. The subject of the agreement was "all the waters of the bay of New York, . . . and all the waters of the Hudson River lying west of Manhattan Island, and to the south of the mouth of Spuyten Duyvel Creek, and of the lands covered by the said waters to the low water-mark on the westerly or New Jersey side thereof." In this condition of things suit was brought in one of the courts of New York by the People of the State of New York against the Central Railroad Company for a nuisance committed by taking possession without license from the State of about 800 acres of land and water, and erecting docks, wharves, piers, and other improvements within the alleged jurisdiction of New York, under this agreement.

The railroad company asserted that, under the agreement, the land and water were within the jurisdiction of the State of New Jersey, by whose authority they committed the acts complained of, and the highest tribunal of the State of New York decided in favor of the claim of the railroad company

in behalf of the State of New Jersey. To that judgment the writ of error which it was now sought to have dismissed was taken.

In support of the motion to dismiss, *Mr. F. T. Frelinghuysen* insisted that in this decision of the court in New York there was not drawn in question the construction of any statute of the United States, and that the decision was not against the title, right, privilege, or exemption specially set up and claimed under any such statute. The controversy related wholly to the extent of the jurisdiction of New York over the land and water in the rivers and bay of New York, and presented nothing but a question of construction of the agreement.

On the other hand it was argued, by *Messrs. J. C. Dimick* and *A. J. Parker*, against the motion, that the decision was against the rights of New York, as defined by the agreement, and that this court had jurisdiction because of the act giving the assent of Congress to it.

The CHIEF JUSTICE: We think that the statement of the case shows that the question arose under the agreement and not under any act of Congress. The assent of Congress did not make the act giving it a statute of the United States, in the sense of the 25th section of the Judiciary Act. The construction of the act was in no way drawn in question, nor has any title or right been set up under it and denied by the State court. It had no effect beyond giving the consent of Congress to the compact between the two States.

The writ of error must, therefore, be

DISMISSED.

Statement of the case in Knox *v.* Lee.

LEGAL TENDER CASES.

KNOX *v.* LEE.

PARKER *v.* DAVIS.

1. A purchase of the property of a loyal citizen of the United States under a confiscation and sale made pursuant to statutes of the late rebel confederacy, passed in aid of their rebellion, is void. *Texas* v. *White* (7 Wallace, 700), affirmed on this point.
2. The acts of Congress known as the Legal Tender are constitutional, when applied to contracts made before their passage. *Hepburn* v. *Griswold* (8 Wallace, 603), on this point overruled.
3. They are also valid as applicable to contracts made since.

THESE were two suits; the first a writ of error to the Circuit Court for the Western District of Texas, the second an appeal from a decree in equity in the Supreme Judicial Court of Massachusetts.

The case in the FIRST one, *Knox* v. *Lee*, was thus:

Before the rebellion, Mrs. Lee, a loyal citizen of the United States, resident in Pennsylvania, owned a flock of sheep in Texas, which, on the outbreak of the rebellion, she left there in charge of their shepherd. In March, 1863, the Confederate authorities, under certain statutes which they had passed in aid of the rebellion, confiscated and sold the sheep as the property of an "alien enemy," one Knox purchasing them at $10.87\frac{1}{2}$ apiece, "Confederate money;" then worth but the third part of a like sum in coin. The rebellion being suppressed, Mrs. Lee brought trespass below against Knox for damages (laid at $15,000) for taking and converting the sheep. Knox pleaded in bar the confiscation and sale by the Confederate government; a plea which the court overruled. The case then coming on to be tried, it was proved that the flock consisted of 608 sheep, of which 30, 40, or perhaps 50, were bucks, about 140 or 150 wethers, and about 300 ewes; the witnesses varying both as to the number of sheep and the proportion of bucks, wethers, and ewes. It was also proved that in 1860 and 1861 the flock was worth $8 per head for ewes, and about $4 per head for

wethers, and about from $20 to $25 per head for breeding bucks, *in specie*. The witnesses all testified that the sheep would not bring in March, 1863, the price that they would have brought in 1860 or 1861, though one witness testified that at the sale one party remarked, *that if he could get a good title to the sheep* he would give $10 or $12 a head for them. Whether he meant specie or Confederate paper was not testified to.

The ordinary money in use in the United States at the time of the sale and purchase being notes of the United States, commonly known as "greenbacks"—notes whose issue was authorized by acts of Congress, and dated February 25th, 1862, July 11th, 1862, and March 3d, 1863,* and which the said acts declared should be a legal tender in the payment of all debts—the plaintiffs offered to prove what was the difference in value between gold and silver and this United States currency known as greenbacks, for the purpose of showing that gold and silver had a greater value than greenbacks, and for the purpose of allowing the jury to estimate the difference between the two, to which evidence *the defendant*, at the time it was offered, *objected*, on the ground that the United States currency was made a legal tender by law, and that there was no difference in value in law between the two. The court sustained the objection, and excluded all evidence as to the difference in value between specie and legal tender notes of the United States, and no evidence was allowed to go to the jury on this point.

After having ruled as above, the court, on its own motion, at the conclusion of its charge, said as follows:

"In assessing damages, the jury will *recollect* that whatever amount they may give by their verdict can be discharged by the payment of such amount in legal tender notes of the United States."

The jury found, June, 1867, for the plaintiff, $7368, and

* 12 Stat. at Large, 345, 532, 709. For the form of the notes mentioned in the text, see Bank *v.* Supervisors (7 Wallace, 26); and for the exact language of the acts, see Lane County *v.* Oregon (Ib. 74), and Hepburn *v.* Griswold (8 Id.), 605.

the defendant brought the case here, complaining, first, of the overruling of his plea, and second, of the above-quoted sentence in the charge; which he alleged had led the jury improperly to increase the damages.

There had been a previous trial, when, so far as the record showed, without any instruction of the sort complained of as increasing the damages, the jury found a verdict for $7376, an amount slightly greater than that given by the second verdict.

Messrs. Paschall, Sr. and Jr., for the plaintiff in error:

1. The plea was wrongly overruled. The Confederate government was a government *de facto*. It is easy now to say that it was not a government, but those who were within the scope of its action know that in point of fact it was a fearful reality. It had courts. It declared war; and long waged it. A title under its confiscations must therefore stand. *Mauran* v. *The Insurance Company*,* covers our case.

2. If this point is well taken, the court need not consider our objection to the last sentence of the charge. But if it is not well taken, our objection to it remains. Our objection is this: that in view of the facts that were proved before the jury, what the judge said to the jury at the conclusion of his charge, was equivalent to saying—

"The proof, as to the value of the sheep at the time of conversion, has been of their *specie* value. You will assess that value and add to it the known premium which it requires to buy that much gold with paper."

Thus, in fact, while he recognized the principle that greenbacks might discharge the claim, he yet left the jury to infer that they can only be forced upon the creditor at the rate which they would bring in gold. This instruction was wrong, because, practically, it made a distinction between coin and paper tenders, in regard to a debt accruing *after* the passage of all the legal tender acts. *Hepburn* v. *Griswold*,†

* 6 Wallace, 13.

† 8 Id. 604.

does not require this. There the cause of action accrued prior to the passage of any of the legal tender acts; here it accrued subsequently to them all. Indeed, in *Hepburn* v. *Griswold* the court say that the decision is not meant to control cases where the cause of action arises subsequently to the passage of the legal tender acts. Parties under that condition of things contract in reference to them.

Mr. Wills, contra:

1. Though the rebel government must, in some cases, be regarded as a government *de facto*, it is going too far to say that a purchase, by a rebel resident, of the property of banished loyal citizens, under its laws "in aid of the rebellion," can stand. Such a purchaser takes with full notice of his questionable title; *Texas* v. *White** is in point.

2. The argument of the opposing counsel proceeds upon a misapprehension of what the court meant in its charge. He would make it directly in the face of its ruling a few moments before. That it was so is not to be easily inferred. The charge must be interpreted reasonably. In the ruling, the court refused to receive evidence to show that greenbacks and coin had different values. The plaintiff had offered evidence of the difference between the two. Objection was made by the defendant, and the point was ruled against the plaintiff. Nothing was more natural, therefore, than that the court in charging the jury should advert to its rulings on the point—a very important one to be considered by the jury in making up its verdict—made at the defendant's instance, and to tell the jury to recollect it. That is what the court did do. The charge therefore means just the opposite of what counsel on the other side suppose. It means that greenbacks *would* discharge the debt, and that in considering the evidence given of the worth in gold of the sheep, the jury was not to add a premium for paper. This direction involves the question whether an obligation arising *after* the passage of the legal tender laws can be dis-

* 7 Wallace, 700.

charged in greenbacks; and the court charged that it could be. This may or may not have been within the ideas entertained by the court in *Hepburn* v. *Griswold*, but it certainly was favorable to the defendant. He cannot complain, and we do not.

That in point of fact there is no ground for the allegation that the jury were misled, or the damages exaggerated, appears by a short calculation. It was proved that the flock consisted of 608 sheep, of which number 30, 40, or perhaps 50, were bucks; about 140 or 150 wethers, and about 300 ewes. Add all these numbers, taking the highest estimates, 50, 150, and 300, and we have only 500 sheep accounted for; leaving 108 to be accounted for and valued, according to the different values of the different kinds of sheep. Now there was direct evidence fixing the *average value* of all the sheep *per head in specie*, in 1860 and 1861. Besides, it is well known that in Texas, as in California, coin is the standard of value in business, except when the contrary is stated. The depreciation of value at the sale, arising from the apprehended *defect of title*, which the event has shown to have been well grounded, must not be disregarded in arriving at the value of the sheep at that time. Accepting, therefore, this estimate of their average value, with a good title, the 608 sheep, at $10 per head, would be worth $6080 *in specie*. Adding four and one-third years' interest—that is, from March, 1863, till June, 1867—at 8 per cent. (the rate in Texas), say 33⅓ per cent. = $2026.66⅔, and we have the aggregate amount of $8106.66⅔, an amount *larger* than the verdict complained of, saying nothing, according to the ruling of the judge, about the *difference* between the value of the sheep, when estimated in gold and silver and when estimated in legal tender notes of the United States.

Moreover, on the first trial, where no such instruction as is here complained of was given, the verdict was for a greater amount than on the second.

The case in the SECOND suit, *Parker* v. *Davis*, arose on a bill in equity by Davis, to compel the specific performance

of a contract by Parker to convey a lot of land to Davis upon the payment of a given sum of money. This contract was dated and the suit brought upon it before the passage of any of the acts of Congress already referred to, as authorizing the issue of government notes, and making them a legal tender in payment of all "debts." The Supreme Court of Massachusetts in February, 1867 (after the passage of the acts), decreed that Davis should pay into court a certain sum of money, and that Parker should thereupon execute a deed to him of the land in question.

In pursuance of that decree Davis paid into court the sum named, in notes of the United States, known as "greenbacks." Parker refused to execute the deed required by the decree, upon the ground that he was entitled to have the sum paid into court in coin, and that the payment into court of greenbacks was not a compliance with the order of the court. Whereupon the court, upon hearing of the parties, changed the decree, and ordered that Parker should execute the deed required by his contract upon payment into court by Davis of a specific sum in notes of the United States. From that decree the case was brought here under the well-known 25th section of the Judiciary Act.

Mr. B. F. Thomas, for the plaintiff in error, contended:

1. That the consideration or sum of money to be paid for the conveyance of the land, did not constitute a debt within the meaning of the acts of Congress, known as the legal tender laws.

2. That if a debt, it was contracted before the passage of the legal tender laws, and not affected by them; a point determined in *Hepburn* v. *Griswold.*

Mr. Benjamin F. Butler, contra, contended:

1. That Parker having refused to perform his contract, there was no debt due him from Davis until he performed the judgment of the court by the execution of the deed mentioned in the decree; that then, and not till then, he

had a claim upon or a debt due from Davis. Thus the case was not within *Hepburn* v. *Griswold*.

2. That the court below has decided that it was equitable that Parker should execute his deed in performance of his contract, upon receiving a given sum in United States Treasury notes; that it would not be doubted that it was competent for that court to do this, that is to say, to create an obligation upon Davis only *sub modo*, or, according to its terms, which were, to pay into court a certain amount in a specific currency (notes); that the order, therefore, created only that specific liability. If this was so, then the determination of the court below (the counsel contended) was not within the jurisdiction of this court to review, no law or statute of the United States being involved.

The cases being thus before the court, Mr. Clarkson Nott Potter, by whom the case of *Hepburn* v. *Griswold*,* and the gold question,† had been argued, stated to the court that he had been informed that it was asserted that these or some other cases before the court, involved the question of the power of Congress to make Treasury notes a legal tender between private individuals in discharge of pre-existing debts; and he asked the court, in case they should find that this question was involved in the decision of any of the cases, and should determine to reconsider it, to allow him to be heard upon it.

Subsequently, a majority of the court (four judges dissenting) made an order:

"That Mr. Potter and the Attorney-General be heard in these cases upon the following questions:

"1. Is the act of Congress known as the legal tender act constitutional as to contracts made before its passage?

"2. Is it valid as applicable to transactions since its passage?"

And the argument was had on the 18th of April, 1871.

Mr. Potter, in support of the negative:

That no power has been expressly conferred upon Con-

* 8 Wallace, 606. † 7 Id.

gress by the Constitution to make the Treasury notes of the government a legal tender between private individuals in discharge of pre-existing debts, must be admitted.

Can such a power, then, be implied from the authority given Congress "to coin money and regulate the value thereof?" Or can it be regarded as one of the measures "necessary and proper" to carry into effect either the power to "borrow money," to "regulate commerce," to "raise and support armies," to "provide and maintain a navy," to "suppress insurrection," to "repel invasion," or any other of the powers delegated to Congress?

I. *This power is not embraced in the authority given Congress to "coin money."*

Money is used in the Constitution in two senses. In the second subdivision of the section relating to the powers of Congress, the Constitution speaks of the power "to borrow money;" and there the word must be used in the larger sense of strict money, or of anything received instead. But in the fifth subdivision of that section, which gives Congress power "to coin money and regulate the value thereof, and of foreign coins," it must be evident that Congress referred only to *metallic* money.

From time immemorial, in all countries, in all ages of the world, the precious metals have been the medium of exchanges, and the strict moneys. The value of these metals has been designated by a stamp upon them indicating their fineness and weight; that is, indicating the value at which the coins were rated. When the coins have possessed the value indicated, they have passed from hand to hand as of that value. When they have been found not to possess that value, they have, *except within very narrow limits*, failed to so pass.

It is true that, at certain periods in the history of some of the States, the skins of the beaver passing by tale; strings of shells, known as wampum, passing by measure; and packages of tobacco of defined weights were, in the absence of the precious metals, used as money, and were made the medium of exchanges. But none of these was a "legal

tender" as money,* or ever had anything but a local and limited circulation, or ever was used as a substitute for money, after money was introduced. While in all ages of the world, in all countries, the precious metals, when stamped with a designated value, have been known as moneys; and (with representatives of such moneys) have always been the great and universal medium of exchanges.

Not only has "money" meant *metallic* money, but, upon looking at the public history of the times (which this court has established as a proper guide to the construction of the Constitution),† we find that in the history of the country there was no period in which "money" was more distinctly understood and meant to be hard money than at the period when the Constitution was framed and adopted. "Its framers had just passed through all the horrors of an unredeemed paper currency." "The history of that currency had been, within the view of those who staked their property on the public faith, always freely given and grossly violated."‡ "The mischiefs of the various experiments that had been made were fresh in the public mind, and had excited general disgust."§ With the bills of the government unredeemed—indeed, become at last so hopelessly beyond redemption as to be entirely given up as worthless,‖—the country had returned for circulation to a specie currency, to absolute money having an *intrinsic* value; and neither had nor wished any other currency.

But the context as well as the word itself shows that the power is confined to metals. This grant is not a grant to create money, but simply "to coin money"—a power that can be exercised only on money that admits of being coined; that is, a bare power to "strike coin," which was the phrase used in the Articles of Confederation as the equivalent of "to coin money." It was from those Articles that the power to coin money and regulate the value thereof was transferred to the existing Constitution. And that this provision only

* 2 Duvall, 63.
† Briscoe *v.* Bank of Kentucky, 11 Peters, 332.
‡ Ib. 348.
§ 3 Madison Papers, p. 1345.
‖ Story's Commentaries on the Constitution, § 1360.

gave Congress power to strike coin and regulate its alloy and value, was declared at the time, and undisputed. The Federalist, No. 43, tells us:

"The right of coining money, which is here taken from the States, was left in their hands by the Confederation, as a concurrent right with that of Congress, under an exception in favor of the exclusive right of Congress to regulate the alloy and value. In this instance, also, the new provision is an improvement on the old. Whilst the alloy and value depended on the general authority, a right of coinage in the particular States could have no other effect than to multiply expensive mints, *and diversify the forms and weights of the circulating pieces.*"

Indeed, the very next clause of the Constitution (subdivision 6) which gives Congress power to punish the "counterfeiting of the securities and current coin of the United States," expressly distinguishes between the coins and the obligations of the government.

If, however, Congress could take the power of stamping leather, or paper, under this clause, and the leather or the paper so stamped could be considered as "coined money," the value whereof could be regulated by Congress, even that would not support the legal tender provision of the Treasury notes. With such a power, Congress might, indeed, stamp a lump of leather, or a ream of paper, so that they should circulate as current money; that, however, would not make these notes such stamped paper, nor current money.

Treasury notes have, as substance, no appreciable value. They are not declared to be, and do not purport to be, of any value as substance. They are not stamped with any intrinsic value. They are not, so far as they possess value, things at all, but only things in action. The material holds the evidence of the promise; but it is the promise, and the promise alone, which is, and which purports to be, of value. One dash of the pen across the signature of the Treasurer of the United States at their foot, and the note is not a Treasury note; not a thing in action; not a matter which bears the government stamp of value; not ten dollars at all, but a worthless rag of paper, once used to hold a promise,

now cancelled. If, therefore, "money," in the phrase "to coin money," could be considered as embracing other substances beside those precious metals, alone in use throughout all the world as coin, none the less would it remain that to utter *promises* to pay money would not be "coining," or "to coin money."

I cannot find that before the passage of this legal-tender act it had ever been supposed by any court, or by any judge of any court, or by any commentator or statesman, that this power "to coin money" had reference to anything but a metallic currency. Indeed, of all the judges who have given opinions, as well in the support of as against the legality of this law, I find hardly any who do not concede that to "coin money" was a grant of power relating to the coining of the precious metals. Nevertheless, although the power to coin money has not sufficed to support the right to make these Treasury notes a legal tender, the power to "regulate the value thereof," that is, of coined money, has been taken as one of the most effective arguments to support this law.

If, under this power to regulate the value of coined moneys, Congress may debase the coinage; if it may put upon the coined moneys any other than their true intrinsic value; if it may declare that one-half or three-fourths of a dollar, when stamped by it as a dollar, shall be taken to be equal to a whole dollar, and may thus impair the obligation of contracts and transfer one man's property to another; why, it is asked, under the constitutional power to borrow money, and other delegated powers, and the powers necessary and proper to enable it to exercise the delegated powers, may Congress not do a like thing to produce a better result with these Treasury notes? To this I answer:

II. *This power cannot be implied from the power to regulate the value of money.*

For, 1*st*. Congress has no power given it to regulate the value of the money it borrows, but only of the money it coins, and of foreign coins. The analogy claimed would exist if the Constitution gave Congress power to *borrow*

money and regulate the value thereof. But that it does not give.

And, 2*d.* Congress has no power to even materially debase the coin. A power to regulate is not a power to destroy.

I quite agree that "a uniform course of action involving the right to the exercise of an important power for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised."* But a careful review of the legislation of Congress on this subject, will show not only that Congress has not (as the Court of Appeals in New York,† and the other tribunals which have affirmed the validity of this law have assumed) exercised plenary power over the subject of currency and the legal tender laws, but that, on the contrary, the legislation of Congress from first to last has been strictly confined to designating the value of coined money, and to discriminating with reference to its real value.

Let us review the legislation on coinage. From the establishment of the government to the passage of the act authorizing Treasury notes, the legal tender coin has been three times debased, and three times only. Once, in June, 1834, when the gold coinage was reduced about 6 per cent. in value; once, in 1851, when the three-cent pieces were first coined; and once, in 1853, when the fractional silver coinage was reduced some 6 per cent. in value. But the pieces of these latter coinages were restricted as legal tender within such very narrow limits, and for such fractional and special uses, that, practically, these laws did not operate as debasements of the coin at all.

From the first issue of coin by this government to this time, the unit of calculation and of coinage, the silver dollar, has remained the same. It remains still of the same intrinsic value as when first coined; whatever changes have been made, have been made to bring the other coin into more actual and just relation to it.

When the subject of coinage was first considered by the

* Briscoe *v.* Bank of Kentucky, 11 Peters, 318.

† Metropolitan Bank *v.* Van Dyke, 27 New York, 425, 426.

Confederation, it was proposed to have a unit of account and of coinage much smaller than the dollar, and to employ the decimal system. Jefferson, while recommending the adoption of the decimal system, suggested a coin equal to the then existing Spanish milled dollar as the unit of value. His recommendation was adopted, and the dollar has ever since remained the same.*

The first coinage was under the act of April 2, 1792,† and that act provided (§ 11) that the coinage should be of both gold and silver, and *that the relative value of the two metals should be as fifteen to one*, that is, that 1 ounce of gold should be taken as the equal in value of 15 ounces of silver. By that act (§ 9) "*dollars or units*," as they were styled, were each to contain $371\frac{4}{16}$ grains of *pure silver*, and to weigh 416 grains according to the then standard, which was, *for silver*, (§ 13), 1485 parts pure or "fine" to 179 parts alloy; and eagles (§ 9), "each to be of the value of 10 dollars or units," and to contain $247\frac{4}{8}$ grains *of pure gold*, and to weigh 270 grains, according to the then standard *for gold*, which was (§ 12) 11 parts pure to 1 part alloy.

Both of these precious metals were, after that, coined as money; both became lawful money, and therefore, *ex necessitate*, a tender in payment of debts due in money, even if not so declared by law; just as coals of the specified kind are a lawful tender in discharge of a contract for coal, and cotton, of a contract calling for cotton. But in the lapse of years, the relation in value existing and established by Congress in this act of 1792, between the two precious metals, was lost. Owing to the increased produce of silver, and perhaps to the increased demand by the commerce of the world for gold, their relative value had so materially altered that, by 1823, the Secretary of the Treasury called the attention of Congress to the fact that gold had relatively appreciated in value, so that their true relation was then as 16 to 1, and to the evils resulting from the erroneous standard main-

* Randolph's Jefferson, vol. 1, 395–6; Jefferson's paper on coinage, in the Appendix to his works.

† Chap. 16, vol. 1, Stat. at Large, 246–9.

tained.* For as soon as gold had advanced or silver declined in relative value so that they really bore to each other the relation of 16 to 1 in value, instead of 15 to 1, as they were valued by the law, every person who could secure an ounce of our gold coinage for 15 ounces of silver secured what was intrinsically worth 16 silver ounces; that is, made a profit of about 6 per cent. It followed, of course, that all the gold was taken up as fast as coined and sent out of the country to be recoined, and that the country retained, instead, only silver, and the gold coins of those countries whose gold coinage bore a true relation to the existing value of gold and silver. In fact, our gold coin went regularly directly from the mint as fast as coined to the foreign packet; and, out of some $12,000,000 of gold which had been coined, it was computed there was hardly a gold piece to be found in the whole United States. As was said in Congress:† "Hitherto, like the tracks to the lion's den, the coins have gone all one way—to Europe; and not one solitary eagle has ever made good its cisatlantic flight." This evil led at last to the introduction into Congress of a bill to regulate the value of the gold coinage of the country, by adjusting the rate for gold coin to its true relation to the existing and continuing silver coin.‡ The debate upon the bill,§ shows how anxious Congress was to get at the true relative value of the two precious metals, and to fix the coinage accordingly. Opinions as to the relative values of gold and silver ranged from 15.60 to 1, to 16 to 1. The majority of those best qualified from their pursuits to understand the subject, including the New York banks, regarded the true ratio to be as 15.62 to 1, *although for the previous few years it had averaged* 15.80 to 1. But Congress, at the instance of the friends of metallic money, determined to adopt 16 to 1 as the relative value; partly because that seemed to be the ratio which had proved practically the most correct in the nations which had adopted it; partly because the

* Congressional Debates, 6th Feb., 1823, p. 859.

† Ib., June, 1834, p. 4654.

‡ Chap. 95, Laws 1834, 4 Stat. at Large, p. 699.

§ Congressional Debates, June 21, 1834.

variation from the true relation was, if any, so small it might safely be disregarded; and partly because it was believed that the relative appreciation of gold which had been so long going on would continue, and that the slight over-valuation of it, if any there was, would be thus in time corrected.* By that act (§ 1) the eagle was reduced from 247$\frac{4}{8}$ grains *of pure gold*, as required by § 9 of the said act of 1792, to 232 grains *of pure gold*, or about six per cent. in intrinsic value. But, so far from Congress assuming any power to materially depreciate the coinage or impair the rights of creditors, the power of Congress to make depreciated coin a legal tender was expressly disclaimed in the debate.† And the statesman at whose instance, and by whose will, this bill was mainly carried through was, of all men who ever had part in the government of this country, the last to be quoted on the side of the power of Congress to make promissory notes a legal tender in payment of private debts,—Thomas Hart Benton.

The court will thus see that while Congress did indeed reduce the standard and value of gold coinage, so that $100 of the new gold coins were hardly equal in intrinsic value to $94 of the former gold coinage, yet *that in fact Congress did absolutely nothing to impair the obligation of contracts or to destroy the rights of the creditor.* For, from the beginning, the debtor had the right to pay in the coinage of either of the precious metals. At first these were of equal value, and payment in either was indifferent. Gradually the gold appreciated or the silver depreciated, and then, of course, the debtor, *as he had the option*, paid in silver; so that, in 1834, the debtor who owed $1000, and had $940 of the then gold coinage, could exchange his gold for $1000 in silver coin, and discharge with these his debt of $1000.

Therefore, although Congress did reduce the value of the gold coinage in 1834, the debtor, after 1834, could no more pay his $1000 with money of less intrinsic value than he

* 1 Benton's Thirty Years, p. 469.

† Congressional Debates, June 21, 1834, pp. 4650, 4652–8.

could before. True, he could take $940 in gold of the old coinage, and get with it $1000 in gold of the new, with which to pay his debt. But so, before the law, he could take this same $940 of gold coinage, and purchase $1000 of the then, and still, equivalent silver coinage, with which to pay the debt. Indeed, that law, so far from taking $\frac{1}{16}$ of the debt from the creditor and giving it to the debtor, as at first appears, actually gave the debtor no new privilege, and deprived the creditor of no property. It remained optional with the debtor, after the law as before, to pay in the gold pieces of the old coinage. True, it became possible, after the law, for the debtor to pay in the new gold coinage; but it had been optional with him before the law to pay in the constant silver coinage *equivalent in value* to the new gold coinage. The law was, in fact, but an adjustment and recognition of the true relation between the values of the two metals, the selection of which had always remained optional to debtors, and, so far from being an attempt by Congress to regulate money without reference to or differing from its intrinsic value, it was, on the contrary, a most careful and earnest effort to bring the recognizable value of its money more closely to its intrinsic value.*

Following this act of June 28, 1834, Congress passed an act on the same day, conforming the value at which foreign coins were to be rated to their true intrinsic value.†

In 1837,‡ Congress fixed the standard of both gold and silver coin at $\frac{9}{10}$ths fine; that is 9 parts of pure metal to 1 of alloy. By this change the *gross* weight of the dollar was reduced to $412\frac{1}{2}$ grains (§ 9), but the *fineness* was correspondingly increased, and the dollar therefore continued to contain $\frac{9}{10}$ths of $412\frac{1}{2} = 371\frac{4}{16}$ grains of pure silver, as provided for the dollar when first coined, and to remain therefore of the same intrinsic value as before. And the *gross* weight of the eagle was, by the same act, somewhat increased, but it con-

* Congressional Debates, June, 1834, pp. 4643–4671.

† Chap. 96, 4 Stat. at Large, 700.

‡ Chap. 3, 5 Stat. at Large, p. 136–7, § 8.

tinued to contain, however (§ 10), 232 grains of *pure* gold, as provided by the act of 1834.

This change in the gross weight of the silver coinage has led to the idea it was then debased, the corresponding increase in its fineness having been overlooked.

Let us refer to later changes in the silver coinage? For nearly twenty years after the passage of these laws of 1834, the relations between the precious metals remained undisturbed, so that no action by Congress was required. But the unlooked-for discoveries of gold in California disturbed again, and in a reverse direction, the relation between the two metals, and thereafter silver advanced and gold declined in relative values; so that, by 1853, silver attained a marked premium over the gold coined since the act of 1834, and a scarcity in silver coin had been felt. Congress, however, did not thereupon generally depreciate the silver coinage. It was, indeed, urged upon Congress to appreciate the gold coinage.* Instead, however, of doing this, thinking, probably, that this gold harvest was to be of short duration, and its disturbance of the relation, then so long subsisting between the two metals, not likely to continue; and striving to meet the evil of small notes issued by every kind of corporation and of paper tokens for change, then pressing —Congress did depreciate the silver coin, *for parts of dollars* only, about 6 per cent. (so that two half-dollars or four quarter-dollars are no longer equal to one dollar piece). But these depreciated coins were restricted from being legal tender for any sum greater than $5 in all, although the smaller silver coin of the earlier coinage remained a tender for any amount.

Prior to this, in 1851, Congress had directed the coinage of three-cent pieces of a fineness and weight which gave them a value of only 80 cents on the nominal dollar of these pieces (*i. e.*, 33 pieces of three-cent coinage were worth intrinsically only $\frac{80}{100}$ of one silver dollar); but these pieces were only made tender to the extent of 30 cents in the ag-

* *Vide* New York Tribune, and other journals.

gregate, and their issue was very limited and was shortly stopped, and by the act of 1853 their intrinsic value was raised to the standard of that of the other fractions of the dollar.*

Then as to change in the copper coinage. Congress, also, in 1793 and 1796, reduced the weight and the intrinsic value of the cent to accord with the increased value of copper, the planchets for which government had to import.† *These cents, however, were not made a legal tender.*

The interference by government with the rights of creditors by regulations of the coin have, therefore, been:

1. By the acts of 1834, a possible, but disputed and doubtful depreciation, if of anything, of less than 1 per cent.

2. By the act of 1851, a depreciation of fractional silver coin (the three-cent piece) to an extent which could not, in the largest tender, exceed 6 cents; shortly, however, altered, so that it could not exceed in the aggregate 2 cents.

3. By the act of 1853, a depreciation of fractional silver coinage to an extent which could not exceed in the largest tender 30 cents.

Now, if these debasements of fractional coin be deemed merely such; nevertheless, from their minute and fractional nature, they would form no precedent for future material debasements of the coinage, or indicate any acquiescence by the people and the courts in an assumption by Congress of the right to put a false or arbitrary value upon its coined money. *De minimis non curat lex.*

But, indeed, these acts of 1851 and 1853 were practically not at all infringements upon the rights of creditors or debasements of the coinage below its value. As already remarked (page 464), when coins were struck with a value which they did not possess, they have, "except within very narrow limits," failed to pass at more than their true intrinsic worth. But there are limits within which coins, somewhat depreciated below their true value, will circulate as

* Edelman's Bullion Dealers' Guide, pp. 14, 15; 9 Stat. at Large, p. 591; 10 Id. p. 160.

† Report as to the Mint, Congressional Debates, February, 1823, p. 804.

well as if they had not been depreciated. Those limits are when the payment is so small that the difference between the nominal and intrinsic values, does not leave it worth while to regard the difference, or when some particular convenience about the coin, such as its portability or denomination, overbalances the intrinsic depreciation; that is, the peculiar fitness for the fractional purpose required, will, in such cases, actually make good the depreciation, and carry the small coin, for all purposes of use, up to the stamped value.

All will recollect how often, in the days of the Spanish piece for 12½ cents, we accepted 12 cents instead, and took Spanish quarters with holes drilled through them equally with perfect coin. Those who have been in England know that the sovereign has so depreciated by wear that a large majority of the coins in circulation in Great Britain are intrinsically worth less than the standard value—2*d.* per sovereign it is said—and yet, for all minor payments, they pass from hand to hand by tale equally as of full weight; while in large transactions they are always paid out by weight and not by tale. So with the depreciated three-cent pieces of 1851; within the very narrow limit at which they were legal tender, their *portability and convenience* made up what they wanted in intrinsic silver value.

And so, too, with the depreciated coinage of 1853. It was confined to fractions of a dollar, which were so slightly depreciated, and the convenience of which was such, that the trifling intrinsic loss was not to be regarded. But the depreciated coins were made a legal tender only to twice the amount of the lowest tenderable gold coin, Congress still keeping to its idea of a double money standard, and still holding to its unchanged unit of value, the silver dollar.

Now it is submitted that all these exercises of the powers of Congress to "coin money and regulate the value thereof" were within the letter and spirit of the Constitution. Congress has, indeed, established the value of certain foreign coins at one time and changed it at another; made them a tender, and deprived them of that quality; and changed

from time to time the standard of value of coin struck at its mint. But how has it done this? Without regard to the intrinsic value of the coin struck? By fixing upon it any arbitrary value, and making it a tender at anything but its true value, as all the courts which have supported the constitutionality of the provision we are considering have assumed? Not at all; but, on the contrary, by uniformly seeking to conform the stamp upon its coin to its true value, and by scrupulously limiting the departures from intrinsic value for special purposes within limits so narrow that the special usefulness of the coin within those limits has actually made good the trifling deficiency in weight.

In the same spirit, Congress has provided that its coin shall be a legal tender at its stamped valuation only when of full weight; if of light weight, only proportionately, according to its weight.

In fine, Congress, under a power to coin money and regulate the value thereof, has done only and exactly what those words in their plain signification imply; has struck metallic coins, and has regulated the value thereof and of foreign coins; and has done this on every occasion with careful regard to their true intrinsic value; manifesting as well by the particular purposes and narrow limits within which they have departed from intrinsic value, as by their general strict regard for such values, not their belief that they could strike any metal and stamp it with an arbitrary value, but that they could rightfully regulate the value of money only by truly declaring the value thereof. Not that they "possess a magic power to give, by their omnipotent fiat, a precious value to inanimate and valueless things," but that they possessed only power to regulate the coin stamped, by declaring its value according to the fact—according to the value stamped upon it when of full weight, and of only proportionate value when of light weight.

In the opinions which have been given in various legal tender cases, nothing has seemed to go so far toward supporting the authority of Congress to make treasury notes a legal tender as the assumption that Congress had been left

by the Constitution at liberty to impair private rights and the obligation of contracts by debasing the specie coinage, and that it had actually debased that coinage and impaired those rights to the extent of $\frac{1}{16}$, without question or challenge. Had this been the action of Congress, it would not indeed have established its power or right to do this. One permitted invasion of an established right does not do away with the right. That Congress had debased the coinage $\frac{1}{16}$th would not establish the right to further debase it; would, at most, indicate that the power to regulate it extended up to that limit, and would, of itself, furnish no justification for a more general or further invasion. Nevertheless, the assertion, in all the opinions, that government had assumed to debase the coinage to the extent of $\frac{1}{16}$th, impairing to that degree the recovery of all creditors, and that this action had been submitted to without question, has seemed to me the strongest argument for the power of government to exercise plenary control over coined money. Indeed, it was through inquiry as to how it was possible that creditors could have submitted to so serious an infringement of their rights without contest in the courts that I learned that in fact nothing of the kind really took place.*

On the contrary, we see that, so far from "Congress having claimed and exercised unlimited power over legal tender," so far from having assumed the power to make even coin a legal tender, without regard to its real intrinsic value, as all the decisions supporting this law assume, its legislation

* Notwithstanding the true facts of the case, so little have they been rightly understood, that we find an article in that excellent journal, the American Law Register, as late as February, 1871 (vol. 19, p. 91), still asserting in the course of a review of Hepburn *v.* Griswold, and other decisions of this court, in legal tender cases reported in 7th and 8th Wallace, that the power of Congress to make dollars of a greater or of a less value had been exercised in various instances; and that "in 1834, 6 per cent. was taken from the weight and value of the gold dollar, and the holders of all debts subjected to a corresponding loss;" that "in 1837 and 1853, the half-dollar and smaller similar coin underwent a similar reduction." Yet this is all a mistake, except as to the fractions of a dollar coined under the act of 1853.

shows that for seventy-five years, from the beginning of the government down to the act authorizing these legal tender notes, through all the most pressing exigencies of peace and war, Congress—not only by its direct efforts to regulate the coinage from time to time, according to its intrinsic value, but also by the narrow limitation it imposed on the right of legal tender when diverging slightly from intrinsic value for special and temporary purposes—has shown a determination, as uniform as just, to keep the stamp upon the government coins a true index to their value, and to so regulate these coins as that they should have and express their actual values. Nay, by reference to the debates in Congress, it will be seen that the right of Congress to debase the coin and make the debased coin legal tender, in such wise as to materially affect the rights of the creditor or debtor, was not only never professed or asserted, but that, so far as the question has arisen, the right has been directly repudiated.

So, therefore, the difficulty, judges and other persons have had in perceiving why, if Congress, under this power to coin money, could coin any metallic substance and stamp it with an arbitrary value, it would not have equally the power to declare its treasury notes a legal tender without reference to their intrinsic value—is a difficulty that this court is freed from, and that should never have existed. Indeed, I look in vain to-day for the production of the declaration, prior to these legal tender days, of one judge, one statesman, one commentator, that Congress, by the power "to coin money and regulate the value thereof," possessed the right of striking even metals with false and arbitrary values. The right, therefore, to make a promise to pay—a promise not expected to be kept at the time for which it was made, nor at any other certain or definite time—the substitute for the thing promised, and to oblige every creditor to accept this of his debtor instead of the thing promised, is not only not within the provisions of this grant to Congress "to coin money and regulate the value thereof," but we have seen that no kindred power in fixing the value of even

coined moneys has ever been claimed or attempted under that grant.

We are driven, therefore, to seek in other parts of the Constitution this power to make treasury notes a legal tender between private parties at their nominal value for pre-existing debts.

But it has been asserted that the power of thus making the bills of the government legal tender is a power "necessary and proper"—in the sense in which those words are settled to have been used—to carry into effect some one or more of the powers delegated to Congress by the Constitution. I say "necessary and proper" in the sense in which those words have been settled to have been used, because I admit that this court has decided that they are not to be construed according to their literal and precise meaning.

Those judges of this court who stated in the dissentient opinion in *Hepburn* v. *Griswold*,* that it was claimed that *when an act of Congress is brought to the test of this clause of the Constitution, its necessity must be absolute and its adaptation to the conceded purpose unquestionable*, were stating no claim of mine; and the discussion of that question, so fully pursued in that opinion, will not be necessary, since I shall adopt for these words the most liberal construction ever asserted by this court.

Indeed, whatever differences might exist as to the true construction of this clause of the Constitution, as a lawyer, addressing this supreme tribunal, I am bound to remember that its meaning was long since defined and settled here. In the very first Congress the meaning of this clause was greatly discussed. There were those who held, with Mr. Jefferson, that it authorized only those means without which the grant would be nugatory. Others took a more liberal view of its meaning. The latter prevailed in Congress. The discussion was then renewed in the Cabinet. Washington finally followed the opinion of Hamilton, who main-

* 8 Wallace, 631.

tained the more liberal view. Subsequently the discussion was from time to time renewed in Congress, until finally the meaning of this clause came, in 1819, to be decided by this court, in *McCulloch* v. *Maryland*,* when Marshall, C. J., speaking for the whole court, gave as the result of their most careful consideration, that precise definition which opposing counsel admit was, by his intrinsic and perfect reasoning, wrought into the texture of our constitutional law. Nevertheless, the utmost that great chief justice, who extended the Federal authority to its farthest limits, then said, was:

"Let the end be legitimate; let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

We must inquire, therefore, to the exercise of which one of the powers delegated to government "it is necessary and proper," it is even "appropriate and plainly adapted," that treasury notes should be made a legal tender for antecedent debts. Is it appropriate and plainly adapted to the power to borrow money, to regulate commerce, to raise and support armies, to provide and maintain a navy, to suppress insurrections or repel invasions, or even to any of these powers united? For it is true that Congress had occasion to exercise every one of these powers at the time when these notes were issued.

III. *The exercise of this legal tender power was not necessary, nor appropriate and plainly adapted to carrying into execution any of the powers expressly delegated.*

No one can read the opinions of any of the courts which have held this law to be constitutional without finding their decisions distinctly put upon the importance of this provision to enable government to borrow money and carry on the war, and to maintain its very existence. But it is sub-

* 4 Wheaton, 421.

mitted, especially after the experience of the past nine years, that no such necessity existed, and that no such advantage was gained by the provision. On the contrary, at no time before since the establishment of the government was the national wealth so great; at no time were private debts, in proportion to the means of the country, so reduced. The panic and suspension of 1857 had led to very general liquidation. The agitations of the succeeding years had tended to check men in forming new engagements, or entering upon speculative undertakings. At no time had so few new schemes for capitalists been proposed; had so few bubble corporations been projected; had so little general speculation prevailed. At no time were our traders so little extended, or had our people so few debts (excluding debts maturing at the end of long terms of years). The banks and the government had already suspended specie payments for months before the issue of these notes. The entire business of the country was being done in unredeemed bank paper and treasury notes, which were not a legal tender in payment of debts, but which, nevertheless, circulated everywhere, and never fell at the great centres of trade to any considerable depreciation. Finally, the government determined upon an issue of legal tender notes.

The security of the notes was not increased by the legal tender clause. Had they been issued without the clause they would have been equally secure. Without it, they still had, as fully as with it, whatever security the credit and faith of the government could give them. So, too, without that clause, they would have been equally as available and valuable as now, in all payments for taxes, public lands, or other dues to the government. The only value that clause did give the notes was the power it gave debtors to discharge pre-existing debts with them, equally as with real dollars. I say pre-existing debts, because, as to subsequently contracted debts, the dealings of the country would have been in these notes, whether or not they had been made a legal tender. The country was, at the time of their issue, carrying on its dealings in the unredeemed paper money of the banks, styled

"currency," in which all ordinary transactions were measured, and payments made. This currency had not at that time depreciated more than 3 per cent. below the specie standard; and yet treasury notes, as soon as issued, at once fell to the same depreciated value. Their legal tender character never seems at any time to have made them better than the bills of any other solvent but suspended debtors not containing that clause.

It has indeed been urged that general insolvency and ruin would have followed, had not debtors been authorized to meet their demands with these notes.* But what really would have been the effect had these notes not been made a legal tender for pre-existing debts? Necessarily they would have been as well secured and as useful for payments of taxes and public dues as now. They would have been as valuable as now, for the purchasing of goods, and service, and labor. True, the debtor could not have discharged his debts of long standing in them; but what of that? In great part, the debts of the country consisted of commercial paper, even then payable in what was styled "currency." As to the debts of the country not already specially payable in "currency," the great bulk of the residue matured within a short time, so that, had the debtors not been able to have benefited by the slight depreciation in treasury notes which took place during such times, it would have caused no wide-spread disaster. For they would in no event have had to pay more than they received, nor was there, after these notes were issued, any such depreciation of property, even reckoned at its specie value, as would have made such payments generally disastrous. Specie payments have been suspended by the banks and the treasury in 1837, and 1857, and 1861, without producing any great ruin. Irredeemable paper circulated after the suspension of the banks in 1857 and 1861, as well as before. Indeed, the crisis was before the suspension of the banks, not afterwards.

Neither the bills of the old Confederation nor those issued

* See dissenting opinion in Hepburn v. Griswold, 8 Wallace, 632, 8.

by the government in 1812 were ever made a legal tender at all, and yet circulated generally. So in England during all the great Napoleonic wars, the notes of the bank were never made a legal tender. They are by law a tender, everywhere except at the counter of the bank so long as the bank pays specie. In 1797, however, the government authorized the bank to suspend specie payments. The law provided* that the bank might suspend specie payments; that if sued on its notes (§ 1) it might apply to the courts and have proceedings against it stayed on such terms as might be just; and (§ 7) that payments *voluntarily received* in the notes should be regarded as payments of cash. But the notes were not made a legal tender except for government dues and taxes. Nevertheless, they answered every purpose of our notes.†

So those United States notes that were not a tender always rated equally high with those which were; and as matter of fact, capable of being proved by price currents of the day after the decision in *Hepburn* v. *Griswold*, that treasury notes were not constitutional as a discharge for pre-existing debts, they at once advanced in market value as compared with gold.

But, were it conceded that the quality of legal tender gave to these notes a material advantage which they would not have possessed without it, how can it be said that this provision was "necessary and proper" or "appropriate and plainly adapted" to the exercise of any of the powers expressly delegated to Congress?

It should be borne in mind that (except in the single aspect of a regulation of commerce, to which I shall presently refer) this legal tender provision has been maintained

* Chap. 38, Laws George III, 41 Pickering's Statutes at Large, 523.

† Encyclopædia Britannica, title, Money. In 1811, it was made penal in England to buy coin at a premium, or to sell notes of the bank at a discount; and tender of notes of the bank stopped distress for rent, and payment in them satisfied executions (like the bills of the Bank of Kentucky, Briscoe *v.* Bank of Kentucky, 11 Peters, 315). But this law continued in force only till March, 1814, and was, in effect, a "stay-law," as the notes of the bank were at no time made a legal tender so as to discharge debts or to release securities.

as necessary or proper to the exercise of the delegated powers, and has been asserted to be appropriate and plainly adapted to their exercise, in no other way than that by this measure the government was made stronger. The effect of this provision is to take the property of the creditor and transfer it to the debtor to the extent to which these notes may be depreciated below their nominal value. To which one of the delegated powers is such a wrong "appropriate and plainly adapted?" To all, as much as to one. For clearly this power has no relation whatever to the power to raise armies and maintain navies; to suppress insurrections; to borrow money; unless it is the relation which results from the mere fact that government was made stronger and more efficient by it. In no other sense is it appropriate, or adapted, or auxiliary at all to the exercise of any or of all the delegated powers.

I concede that if this provision of legal tender be a "proper ancillary means," to use the words of Strong, J., in the Pennsylvania cases,* for executing the delegated powers singly or together, it is enough. Any *means* which *is* appropriate, and plainly adapted to carrying into effect two or more or all of the delegated powers, is not *on that account* less to be implied than if it has such relation to one only of the delegated powers. But the question remains, is the power sought to be implied appropriate, and plainly adapted to the exercise of delegated powers? To be appropriate, to be at all adapted to the exercise of powers, it must have some direct relation to such powers; some particular fitness for the exercise of those powers. As Mr. Clay felicitously said:

"The principal and incidental ought to be congenial with each other, and partake of a common nature. The incidental power ought to be strictly subordinate, and limited to the end proposed to be attained by the specific power."

Referring to the first great debate on the powers of Congress under this clause, and remembering that one portion

* 52 Pennsylvania State (2 P. F. Smith), 9.

of the men contemporaneous with the Constitution agreed, with Mr. Jefferson, that the means to be authorized under this clause must be means without which the grant would be *nugatory*, it is instructive to note how even those who favored a more liberal construction of this clause regarded it.*

That eminent Federalist, Mr. Sedgwick, declared the means, authorized by this clause, "must be a known and usual means in the exercise of the delegated powers to effect their end, as expressed in the Constitution."

Or, as Mr. Ames said, "must be fairly relative and necessarily incident to the delegated powers."

Or, as Mr. Giles said, "a subaltern authority necessarily connected with the exercise of the delegated powers."

According to others, it was to be "embraced in as a detail of the enumerated power, and to be inseparable from it."

And in their opinions on the constitutionality of the United States Bank, both Hamilton, Madison, and Randolph united in defining a constitutional means as a natural *means* of executing the delegated power.

As Hamilton himself said, "The *criterion* of what is constitutional, and what is not so, is the end to which the measure *relates* as a *means*. If the end be clearly comprehended within any of the specified powers, and if the *means* have *an obvious relation* to that end, it may be deemed within the provisions of the national authority."

As Mr. Madison elsewhere said, the constitutional means must be "a *direct* and *incidental* auxiliary;" must be "incidental to the nature of the specified power."

As Marshall, C.J., said, in *Gibbon* v. *Ogden*, the auxiliary power must be *clearly incidental* to the powers expressly given, to be implied.

As Story, J., said, in *Martin* v. *Hunter*, "The powers actually granted to the Federal government must be expressly given, or given by *necessary implication*."

But this provision of legal tender has no relation, no fitness,

* 1 Congressional Debates, 1940, *et seq.*, Feb. 3–8, 1791.

no adaptation to the exercise of any one or more of the express powers conferred by the Constitution; none whatever. It is as much auxiliary to one as to the other; nay, as much auxiliary to every conceivable power of government granted or forbidden, requiring revenue, as to either or to all the delegated powers. Its aid is derived from the fact, and the single fact, that thereby government was made stronger. But it is an abuse of language to so construe a grant of particular powers as to treat anything by which the grantee is made stronger in the exercise of the particular power as an incident of such power, and therefore to be implied. Surely, a grant to a man to run a ferry or to sail a privateer, or to establish and maintain a fort and trading post, would not give him the right to rob on the highway; to cheat his creditors; or to sell to other persons the right to cheat their creditors as an incident to such a grant. And yet such powers would make him stronger; would make him better able to run his ferry; to sail his privateer; to defend his fort. They would be auxiliary in the sense that they made him stronger to do the authorized work. They would, indeed, if he was not able otherwise to execute his grant, be a necessity for its execution. But not a granted necessity; not a granted auxiliary; not to be implied as a *means* to the authorized powers.

Just so, this power of legal tender, if it was of any practical importance to government, which I deny, was in no otherwise an aid to the delegated power of raising armies, maintaining navies, and regulating commerce, than that it made the government stronger; not that war could not be made, armies raised, or commerce regulated without it, for these and all other powers of government had been exercised without it; not that it had any relation to the exercise of any of those powers as a *means*, but solely because it made government generally stronger.

Test this idea, that because by this sale of indulgences to one man to wrong another, government was made better able to execute its delegated powers; and that, therefore, this power was ancillary or auxiliary to those powers. The

Constitution gave Congress power to establish post-offices and post-roads; and this grant has been taken as authorizing the establishment of new offices and new routes, the conveyance of the mails, the punishment of offences against them, and even as authorizing government to assert a monopoly of that business; and all these powers have an appropriateness and a plain adaptation to the power expressly granted. But let us suppose government should sell licenses to rifle every tenth letter, or licenses to take half, or a fourth, or a tenth of all the valuables inclosed in the letters directed to particular offices. Will any one pretend that such a power would be authorized? And yet government would be stronger for it, richer for it, better able to carry the mails for it; that is, better able because of this authority to execute the powers delegated to it. Nay, it might even be that without such extraordinary resource it might not be able to carry the mails at all. But who will pretend that such a necessity would any the less make such an assumption of power unauthorized and outrageous?

I understand one member of this bench to have maintained in another tribunal* that even a substantive power might be implied as an incident to the execution of a delegated power. I do not so understand the law. I had understood the direct reverse of this to have been asserted by those who framed the Constitution, both before and after its adoption, in all the great discussions upon the power of Congress; and by the men who favored liberal as well as those who favored strict construction; and to have been established in *McCulloch* v. *State of Maryland*, where the Chief Justice gave it as the unanimous opinion of the court that "a great substantive and independent power cannot be implied as incidental to other powers, or used as a means of executing them."

But, however this may be, whether another substantive power can, or cannot, be properly implied as an incident to the execution of an enumerated power, the substantive

* See Legal Tender Cases, 52 Pennsylvania State (2 P. F. Smith), 9.

power, in order to be implied, must at least have the same fitness and adaptability to the power to which it is implied as incidental as is required of other means.

It has, however, been asserted that Congress is to judge of what means are appropriate and adapted to the end, and that whether a particular measure be or be not such a means is for Congress alone to determine. But it was to decide whether the action of Congress was within the authority of the Constitution that this supreme tribunal was established. The Constitution delegated to Congress certain specified powers. It delegated also the necessary and proper means to carry those powers into effect. Whether a particular authority be delegated either expressly or as a means to carry into effect the delegated powers, may, and should indeed, in the first place, be inquired into by the legislature. But the power of this court to revise these determinations of the legislature was uniformly asserted, as well during the Convention which framed the Constitution, as throughout the discussion by which it was commended to the people, and by the wisest men of every political view after the Constitution was adopted, and has been established by the repeated decisions of this court.

"If," said Hamilton,* "it be claimed that the legislative body are themselves the constitutional judges of their own powers, *and that the construction they put upon them is conclusive upon the other departments*, it may be answered that it is not to be supposed that the Constitution could intend to enable the representatives of the people *to substitute their will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and the peculiar province of the courts. A constitution is, in fact, and must be regarded by judges, as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well

* Federalist, 88.

as the meaning of any particular act proceeding from the legislative body. The intention of the people ought to be preferred to the intention of their agents."

"Whatever meaning," said Mr. Madison,* "the clause of the Constitution conferring on Congress the power of using all necessary and proper means to carry into effect the enumerated powers may have, none could be admitted that would give an unlimited discretion to Congress."

"To what purpose," said Marshall, C. J., speaking for this court in *Madison* v. *Marbury*, "are limitations committed to writing, if these limits may at any time be passed by those intended to be restrained. The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed;" but all powers under the discretion of a choice of means are left open to them. And in that case the court held the law of Congress unconstitutional.

So in *McCulloch* v. *Maryland*, he said:

"Should Congress in the execution of its powers adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

The utility of a measure can never be any proper test of its constitutionality. As Hamilton declared in that great argument upon chartering the first United States Bank, which successfully maintained the Federal power, and upon which all subsequent arguments on that side of the question have been based—because, as Marshall, C. J., said, it exhausted the arguments upon that side—"the degree in which a measure is necessary can never be a test of the *legal right* to adopt it. That must be a matter of opinion, and can only be a test of expediency. The relation between the means and the end, between the nature of a *means* employed toward

* 1 Annals of Congress, p. 1898.

the execution of the power and the *object* of that power, must be the criterion of unconstitutionality; not the more or less of necessity or utility."

I concede that if a means be appropriate, and plainly adapted to the exercise of an enumerated power, and not prohibited, then, whether it may be useful or not, is for Congress alone to judge. I agree, too, that engagements by Congress to purchase arms, which may prove to be worse than useless, to buy ships which may not be needed, and the like, are engagements within the constitutional powers of Congress; and that this court may not inquire into the propriety of their judgment in such regards. But what brings these measures within the constitutional powers of Congress, except that they are appropriate, plainly adapted means, to the end of enabling Congress to make war, to maintain navies, or to executing other powers expressly delegated to Congress—and are therefore authorized? *And, being authorized*, whether useful or useless, whether Congress judged wisely or unwisely in selecting them, is not open to review.

As Marshall, C. J., said in *McCulloch* v. *Maryland*, in discussing the constitutionality of the United States Bank, "Were its necessity less apparent, *none can deny its being an appropriate measure;* and if it is, the degree of its necessity is to be discussed in another place."*

But where a means has no fitness, no adaptation, *except that it makes government stronger*—except that it is in that way useful—then, if it can be considered as *therefore* an authorized means—one that may be implied, which I dispute—the constitutional power of Congress to exercise that means must, in that event, depend upon that utility alone; and of that utility this court is, in such event, the ultimate judge.

* It may be here stated that the appropriateness of the bank as a fiscal agent to enable the government to borrow money, collect taxes, and the like, although not now so apparent, seems at the time of the decision in McCulloch *v.* Maryland to have been generally conceded. But whether, notwithstanding that appropriateness, it was an authorized means, was most severely contested, since government *could* borrow money and collect taxes without it.

If it be insisted that this court was never meant to judge of such utilities—that this is the province of the legislative, and not of the judicial branch of the government—my answer is, that the absurdity grows out of selecting as an appropriate means, or incident, or auxiliary to the delegated powers, that which has no fitness, no adaptation to such powers, except merely that it makes government stronger. For if any means that increases the strength of government may be taken as therefore to be implied as a constitutional means, to be, for that mere quality, fit—which I deny—then it remains that since this court is the ultimate judge of fitness, it must be, according to that assumption, the ultimate judge of whether the measures in question did, indeed, make government stronger.

IV. *This power cannot be assumed as a necessary inherent sovereign right.*

It is claimed that the right to declare what shall be a legal tender for private debts is a necessary right inherent in every sovereignty. That, within the scope of their respective authorities, the Federal and State governments are sovereign; and that, consequently, this power must be lodged with one or the other authority, and that, since it is prohibited to the States, and not prohibited to Congress, it must therefore be taken to dwell with Congress.

But upon what principle is it a necessary sovereign right? True, it is a right which has been exercised by absolute sovereigns. So has every other form of power and plunder. But that does not make it a necessary right in a limited constitutional government established to maintain justice. It is by no means clear that this right exists in England. Blackstone says that

"The coining of money is the act of the sovereign power, *that its value may be known on inspection.* Every nation fixes on it its own impression, that the weight and standard, *wherein consist the intrinsic value, may be known by inspection only.* . . . Of this sterling metal all the coin of the kingdom must be made; *but the*

*King's prerogative seemeth not to extend to the debasing or enhancing the value of the coin below or above the sterling value."**

To the same effect speaks my Lord Coke:†

"The law doth give the King mines of gold and silver *thereof to make money*, and not any other metal, because thereof money cannot be made, and hereof there is great reason; for the value of money being in effect the value of all contracts, is in effect the value of every man."

It was, indeed, one of the glories of Queen Elizabeth, that she restored her moneys to their true value. "*Religio reformata. Pax fundata. Moneta ad suum valorem reducta*," is the inscription on her monument.

In truth, there seems to have been a general misapprehension as to the action of England. Although base moneys were formerly issued, I find none authorized in England for nearly three hundred years past.

It is a mistake to suppose that the framers of this government, or the people who ratified their work, intended that all powers of government should be vested either in the Federal or the State governments. On the contrary, this was an artificial government; not the result of gradual growth, but formed by the union of independent States; not formed for the benefit of any family, or ruler, or person, but formed to secure certain ends for those who thus united. What those ends were, the framers of the government took care to declare. Far from requiring that the new government should possess all the powers usual to sovereigns, they expressly forbade some most sovereign powers, and refused to grant others. From that day it was the boast of the people that their Federal government was the freest and most limited government that had ever existed. That while it possessed powers necessary for protection against foreign and domestic attack, it contained none by which individual rights could be destroyed without process of law or just compensation.

It is true the powers to make *ex post facto* laws, pass bills,

* 1 Commentaries, 278. † 2 Institutes, 534.

of attainder, confer titles of nobility, are expressly forbidden to both State and Federal governments. But they were for bidden to both, because otherwise—States by virtue of their original authority, the Federal government by virtue of its expressly enumerated powers—each within its province might lawfully exercise these powers; and this at the time of the adoption of the Constitution was fully discussed and understood. Indeed, the friends of the Constitution were very generally called upon to show that the restrictions upon the Federal power were not to be taken as implying the grant of powers not expressed. Accordingly it was everywhere shown that the restrictions upon the Federal government contained in the Constitution were necessary as exceptions to powers *particularly* granted in the Constitution. A very precise statement was made in the Virginia convention by Mr. Edmund Randolph of the particular grant upon which each restriction on the Federal power was a limitation.*

It is true, also, the power of legal tender, though restricted by the States to gold and silver, was not forbidden to the Federal government; *but neither was it granted.*

As Hamilton said in the Federalist:†

"Why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed?"

And Mr. Marshall‡ asked, in the Virginia convention, "if gentlemen were serious when they asserted that if the State governments had power to interfere with the militia it was by implication? The State governments," he said, "did not derive their powers from the General government, but each government derived its powers from the people, and each was to act according to the powers given it. Would any gentleman deny this? Could any man say so? Could any man say that this power was not retained by the States, *as they had not given it away?* For," says he, "does not a power remain till it is given away?"

* 3 Elliott, 464. † No. 84. ‡ 3 Elliott, 419.

Indeed, where a particular power is neither expressly granted nor fairly to be considered as a means of executing the granted powers, it cannot, because of its necessity or of its importance, be implied, since those sovereign powers which the framers of the government thought necessary were expressly enumerated.

"A distinction," as Mr. Madison said,* "is to be kept in view between a power necessary and proper for the government or Union and a power necessary for executing the enumerated powers." In the latter case, the powers included in the express powers were not expressed, but to be drawn from the *nature* of each. In the former, the powers composing the government were expressly enumerated. *This constituted the peculiar nature of the government; no power, therefore, not enumerated could be inferred from the general nature of the government.* Had the power of making treaties, for example, been omitted, however necessary it might have been, the defect could only have been lamented, or supplied by an amendment of the Constitution.

So Judge Story, in his Commentaries,† lays it down:

"On the other hand, a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, and even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment. If they do not choose to apply the remedy, it may fairly be presumed that the mischief is less than what would arise from a further extension of the power, or that it is the least of two evils. Nor should it be ever lost sight of that the government of the United States is one of limited and enumerated powers; and that a departure from the true import and sense of its powers is, *pro tanto, the establishment of a new Constitution. It is doing for the people what they have not chosen to do for themselves.* It is usurping the functions of a legislator and deserting those of an expounder of the law. Arguments drawn from impolicy or inconvenience ought here to be of no

* 1 Annals of Congress, p. 1900. † § 426.

weight. The only sound principle is to declare, '*ita lex scripta est*,' to follow and obey."

So Mr. Webster said, in reply to Hayne:

"The people, sir, erected this government. They gave it a Constitution, and in that Constitution they have enumerated the powers which they have bestowed on it. They have made it a limited government. They have defined its authority."

And so distinctly was this recognized as to draw from Chief Justice Marshall, in *McCulloch* v. *Maryland*, the sharp reproof:

"This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted."

And so this court, in other cases,* declared that

"The people had a right to prohibit to the States the exercise of any powers which were, in their judgment, incompatible with the objects of the general compact; to make the powers of the State government, in given cases, subordinate to those of the nation, or *to reserve to themselves those sovereign authorities which they might not choose to delegate to either.*

"The sovereignty of the States is surrendered, in many instances, where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution. The maintenance of these principles, in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department."

So far, however, from the power of making the promises of the government a legal substitute for the thing promised having been regarded as a necessity of government when this government was established, it seems to me impossible

* Cohens v. Virginia, per Marshall, C. J.; Martin v. Hunter, per Story J.

to review the history of the times without being convinced that this power was not only not regarded as a necessity, but rather as an evil to be forbidden.

V. *The history of the Constitution and of the country indicates that this power was not intended to be exercised at all, but was reserved to the people.*

Looking to the history of the Constitution, how natural and probable it is that the power, in respect to legal tender, now claimed by the Federal government, was not intended to be granted to it. The union of the Confederation was established for the same purpose as the present Union. It was equally to be "perpetual." By the Articles of Confederation, the Confederation had the identical powers given it in respect of money which the Constitution gives to our Federal government. And yet when, during the sore needs of the Revolution, it did issue treasury notes, and wished to make them legal tender, it found itself powerless to do so.* The States, however, generally made their bills a tender; and with the result, Judge Story says, of prostrating all private credit and all private morals, "entailing the most enormous evils on the country, and introducing a system of fraud, chicanery, and profligacy which destroyed all private confidence, and all industry and enterprise."†

Indeed, the framers of the Constitution had themselves experienced the mischief of these experiments, which were in the Convention declared "to have excited the disgust of all the respectable part of America." [The learned counsel here referred to the action of the Convention which framed the Constitution in striking out the clause authorizing the emission of bills on the credit of the United States, and in adopting the clause restricting the States from issuing bills of credit; and especially Mr. Madison's remark as to the first matter, that it would "cut off the pretext for making them a tender;" to the declaration of the Federalist (No. 44), and to the debates of the State conventions held to

* Story's Commentaries on the Constitution, § 1360. † Ib. § 1371.

ratify the Constitution.* He also quoted the opinion of this court in *United States* v. *Marigold*,† *Craig* v. *Missouri*,‡ *Ogden* v. *Saunders*,§ *Fox* v. *Ohio*,‖ *Briscoe* v. *Bank of Kentucky*,¶ and also to the strongly-expressed declaration of Mr. Webster. As these authorities are quoted in the opinion of the dissenting justices,** they are here omitted.]

To recapitulate:

The Articles of Confederation gave the same power to the Confederation that the Constitution gives to Congress, to coin money and regulate the value thereof. Nevertheless, the Confederation never assumed to make treasury notes a legal tender.

The States did make their own notes a legal tender, and with results which disgusted the people.

Accordingly, when the Convention met that framed the existing Constitution, they struck out of the draft the power to emit bills on the credit of the United States, in order, as Mr. Madison says, that it might not be a pretext for declaring such bills a tender.

They took from the States the power of making anything but gold and silver a tender, and even refused to permit its exercise with the permission of Congress.

It was declared in every State whose debates on adopting the Constitution are reported, that paper money was to be put an end to.

For several years, in the direst needs of the country, Congress not only never asserted any right to make treasury notes a legal tender, but, by the nature of its legislation, has indicated that it had no power to even materially debase the coin of the republic, or stamp it with false and arbitrary values.

During these years this court has spoken of the legal tender as pernicious, and has pronounced the money power a trust delegated to Congress to maintain a pure metallic standard.

* 1 Elliott, Id. 492; 5 Id. 435, 485; 3 Id. 486; 4 Id. 184, 185, 436; 2 Id. 290, 291, 471, 478; Yates's Minute, 39–40.

† 9 Howard, 567.

‡ 4 Peters, 434.

§ 12 Wheaton, 288.

‖ 5 Howard, 433.

¶ 11 Peters, 317.

** See *infra*.

Not only Mr. Madison thought Congress had no power to make paper a tender, but Mr. Webster thought so; and the power has been frequently denied in Congress, and prior to the law in question never contended for.

No framer of the Constitution, no judge, no commentator, is found prior to this law who claimed any such power for Congress.

With the clause giving it power to coin money and regulate the value thereof, Congress received also power to *fix the standard of weights and measures;* and, as the Federalist* declared, on like considerations with the previous power of regulating coin, which considerations, it added, were to provide for the harmony and proper intercourse among the States. But can Congress fix a standard, and then reduce its pound to eight ounces, its foot to six inches, its acre to two roods, and thus provide that no man shall collect upon his contracts, and that no one need pay more than one-half of what was bargained for? And if Congress cannot do this arbitrarily and by itself, can it regulate the standard of weights and measures, by making sales of licenses which would give to the holder, for every dollar paid, a right to abate or increase an ounce, or an inch, or a rod, in every contract of sale he had made? And yet the right to fix weights and measures is a sovereign right and prerogative, as well as the right to coin money and regulate the value thereof.

VI. *This legal tender power was not proper, nor consistent with the letter or spirit of the Constitution, and was prohibited.*

In seeking to show that an auxiliary power, to be implied, must have in itself some particular relation to and fitness for the exercise of the delegated power or powers to which it is claimed to be incident, I have been treating the question as if these were the only considerations required. But, indeed, that is not all; not only must the auxiliary power be appropriate, and plainly adapted to the exercise of the

* No. 42.

delegated power, but the end must be legitimate, and within the scope of the Constitution as well; and the means must not merely be appropriate and plainly adapted to such an end, *but must also be not prohibited.*

But the dissenting judges in *Hepburn* v. *Griswold** have said that "the argument is too vague for their perception, by which the indirect effect of a great public measure in depreciating the value of lands, stocks, bonds, and other contracts, renders such a law invalid as taking private property for public use, or as depriving the owner of it without due process of law." But in its effects upon the creditor, this provision does not operate indirectly, but directly. If the issue of treasury notes, without this provision, by inflating or depressing prices and values, by making money easy or hard to realize, affected creditors, that would be a case in which the evil resulting from the indirect action of a public measure could not be considered as impairing its authority. But in this case, the power which enabled debtors to discharge pre-existing debts by treasury note promises, instead of real dollars—discharge their debts by paying one-half or three-fourths of the amount due, according to the rate at which treasury notes could be procured—operated not indirectly, but directly on the creditors' rights; was the sale of a license to let men pay in short measures.

We are told that the government has power when prosecuting a war to seize any man's property, burn any man's barns, raze any man's house. And so it has when these operations are necessarily exercised in the course of the actual prosecution of the war. But an officer carrying on war in Carolina has, therefore, no authority to raze a house in Illinois; still less to raze every house throughout the country. His authority to destroy is limited to property *immediately necessary* to be destroyed in the prosecution of the war; and for the property so taken or destroyed, government becomes liable.† Government has indeed power to take the property of citizens to carry on war, but it is a

* 8 Wallace, 687.

† Mitchell *v.* Harmony, 13 Howard, 134.

constitutional power, to be exercised by government, by taxation, or other method prescribed by the Constitution; not by the sale of licenses to let one man wrong another. Nor is a wrong the less a wrong because enacted as a part of a great public measure, instead of by private act. Is my property any the less unjustly taken, any the less taken without process of law, because taken by a general law instead of by a special one? Surely the injustice of the act does not depend on the number of persons affected by it. The Constitution did not declare it should not be lawful to take private property for public use, nor deprive persons of property without compensation, except generally, and by great public acts. On the contrary, it declares it shall not be done at all, nor to any person.

Those judges of this court who concurred in that opinion have presented,* as analogous cases, the discharge of the creditors' claim by a bankrupt court, depreciating the value of his vessels by a declaration of war, reducing the worth of his furnaces or of his mills by a change in the tariff; and have declared that these measures would be subject, equally with this legal tender provision, to the objection that they are unconstitutional, as taking private property without compensation. And they would indeed be unconstitutional as coming within this very provision, but for the vital distinction, among others, that they happen, each one of them, to be *expressly* authorized by the Constitution. Can it need argument to show the distinction between the effect of a general prohibition in an instrument upon a power expressly authorized, and upon one only implied? The people expressly delegated to this government certain powers; among them was the express power to "declare war," although it would depreciate the value of ships; to "establish a system of bankruptcy," although it would discharge the debtor from his liability to his creditor; to "lay and collect, and remit duties and imports," although they should enhance or diminish the value of furnaces and mills. They delegated,

* 8 Wallace, 637.

also, to the government the power to "make all laws necessary and proper to carry into execution" the granted powers. And then to make sure that powers should not be implied beyond those granted which might impair private rights, they added the provision that "no person should be deprived of life or property without due process of law, nor should private property be taken without just compensation." Had the Constitution conferred upon Congress the express power to make treasury notes a legal tender in discharge of pre-existing debts, then, I grant that the analogy between the cases suggested and the case of legal tender would have been competent, and I should then no more be here contending that this prohibition against the taking of private property prevented the issue of such notes than I am contending that it prevents a declaration of war, the establishment of a system of bankruptcy, or the change of tariff. But it is exactly because the express power given in every one of these instances is wanting in this instance, and is sought to be implied, and because it is the settled rule that a power to be implied as an auxiliary to a delegated power must be "not prohibited," that I assert against the implication of the legal tender provision the prohibition which the Constitution imposes.

VII. *This law impairs the obligation of contracts.*

The court, on the late argument of this question in *Hepburn* v. *Griswold*, were all agreed that the legal tender provision did impair the obligation of pre-existing contracts. But a portion of the court declared that this was not forbidden to Congress, and that, in some cases, it was expressly authorized. I am not unmindful of the impression that has prevailed among the profession in this respect; and I beg to point out the misapprehension I think has existed as to this.*

* It has been said that this law does not impair the obligation of contracts, because, in all agreements to pay mere dollars, the creditor takes the risk of what the law may declare to be dollars. But this is to beg the question of power to work such injustice. Indeed, until such law is established or expected, the risk of it cannot be said to enter into the contract.

Mr. Potter's argument against the constitutionality.

In the course of a cause tried in 1816,* in the Circuit Court in Philadelphia, Mr. Justice Washington is reported to have made the interlocutory remark that Congress was not restricted from impairing the obligation of contracts. This remark has been since frequently quoted without either approval or disapproval. It is a singular instance of a casual observation, passing for years unaffirmed and unchallenged by all the great commentators upon the Constitution. This was said in reference to a grant by the Federal government of a patent for an invention. If it meant that Congress was at liberty to recall its voluntary grant, I shall not dispute it. If it even meant that the government was not compelled to keep its own contracts, I need not dispute it, for government can never be coerced. It can only be sued according to its own provisions; and whether it be or be not constitutional for government to extinguish its contracts without fully performing them, it nevertheless remains that the creditor can in no event recover anything more than the government chooses he shall have. The remark does not indeed imply that Congress had any such general power; but only that it was not restricted by any such limitation in the exercise of its particularly granted powers.

That the power to impair the obligation of contracts is not generally forbidden to Congress in express terms, I admit. It was unnecessary, upon the theory of the Constitution, to have so forbidden it. That such power in the case of bankrupts is expressly authorized, and not therefore to be taken as forbidden by the general prohibitions in favor of private rights, I also admit. But that it is not withheld or otherwise forbidden, I deny. It is, except in the authorized cases, indeed forbidden, by the very nature of the instrument, from the fact that it is *not* authorized. It is forbidden by those amendments which forbid the infringement of private rights and property. It is forbidden by the scheme and object of the instrument, which it itself declares was "to establish justice and secure the blessings of liberty."

* Evans *v.* Eaton, 1 Peters's Circuit Court, 323.

Mr. Potter's argument against the constitutionality.

Thirteen States met to form a common government. Before such meeting, and except as then formed, this government had no existence. Certain powers were invested for the general advantage in the hands of what Marshall, C. J., in *McCulloch* v. *Maryland*, called the common agent; what Daniels, J., in *Fox* v. *Ohio*, called the common arbiter. Such of these powers as were important to be exercised for the general good, like the power to make war, maintain a navy, enter into treaties, and the like, were conferred on the agent, and were forbidden to the States; others were left concurrently to both; still others were forbidden to both. Among the powers of the States when they thus met was the power to impair the obligation of contracts; but only within their respective limits. New York had no power to impair contracts in Delaware, but only in New York; nor had Delaware power to impair contracts in New York, but only in Delaware. Now, the whole history of the time shows this was regarded as a dangerous power; as a power to be limited even between the States and their own citizens—*not to be extended throughout all.* It was, therefore, forbidden to the States. In particular cases of general concern, the power was expressly granted to the Federal government. But to assume it was otherwise granted, and to imply it, because expressly forbidden to the States and not to the Federal government, is to reverse the whole spirit and purpose of the times; to turn a restraint upon a limited evil into permission to make it general. Since then, except in these specific instances, when, before this legal tender law, has Congress claimed to exercise such a power? Has it ever been suggested that Congress can direct divorces—can authorize a man to discharge a contract for one hundred bushels of wheat by delivering fifty, or fulfil a contract to convey one thousand acres of land by conveying nine hundred? We all know it cannot.

Indeed, that Congress has power to impair the obligations of private contract is absolutely without authority. I find no court that has so decided. On the contrary, the very

reverse has been declared by this very court, and other high constitutional authorities.*

If Congress possesses, by implication, this power to impair the obligation of contracts, why was authority to establish a uniform system of bankruptcy expressly granted to it? If Congress took this sovereign power in any case without express grant, surely it would be in connection with bankruptcies, where it might be regarded in some aspects as a regulation of commerce, and as, indeed, in the interest of creditors generally. As Marshall, C. J., remarked, "the bankrupt law had been said to grow out of the exigencies of commerce, and to be applicable solely to traders." The Federalist† refers to the grant of power to establish a uniform system of bankruptcy "as so intimately connected with the regulation of commerce, and so preventive of frauds, that its expediency was not likely to be drawn into question." That such a power was regarded as necessary‡ to be specifically granted, establishes, I maintain, that the Federal government took by the Constitution, even as it was before the restrictive amendments were added, no general power of impairing the obligation of contracts.

And when the dissenting judges of this bench declared, in *Hepburn* v. *Griswold*, "that it is difficult to perceive how it can be in accordance with the spirit of the Constitution to destroy directly the creditors' contract for the sake of the individual debtor, but contrary to its spirit to affect remotely its value for the safety of the nation," I answer that in the one case it is in accordance with this spirit, because it is so expressly declared and provided; and in the other it is not in accordance with it, because it is not provided for at all, but is in violation of its general restrictions,—a discrimination which, recalling those provisions of the Constitution, I submit it is not difficult to perceive; difficult, indeed, not to perceive.

* Wilkinson *v.* Leland, 2 Peters, 646, 657; Calder *v.* Bull, 3 Dallas, 386; Sturges *v.* Crowninshield, 4 Wheaton, 206; Ogden *v.* Saunders, 12 Id. 269, 270, 312, 303, 304, 327, 331, 336, 354; Federalist, No. 44.

† No. 42. ‡ 12 Wheaton, 274.

Mr. Potter's argument against the constitutionality.

This whole question, however, of the power of Congress to impair the obligation of contracts depends upon the other question of what power Congress can take by implication; returns, indeed, to the pivotal question of whether Congress is a body of absolute or limited powers. And here let me remark, that it seems to me very immaterial whether it be considered that it is for Congress to determine what means are necessary and proper to carry into effect the delegated powers, and that its decision is not subject to revision here, or whether it be that this court is the ultimate judge, if it be decided that any means are appropriate to the exercise of any of the delegated powers which make the government stronger. The one conclusion would relieve Congress from all restraint but that of its own judgment; the other conclusion would relieve it from all but the express limitations of the Constitution. If by the assertion of the discretion of Congress it be meant that when the end is legitimate, and within the scope of the Constitution, and a choice of appropriate means exists, Congress is the sole judge of which to select among those means, and that its judgment in such selection is not open to review, I shall not deny it. But to hold that Congress, in selecting the means to carry into effect any of the delegated powers, may select means not authorized, not necessary nor proper, not appropriate nor plainly adapted, and can make them appropriate *simply by its selection of them*, is to make the power of Congress generally absolute.

On the other hand, a decision by this court that Congress, in order to raise armies or execute any of its enumerated powers, may exercise any other powers that make the government stronger, without regard to the fitness of its measures to such delegated powers; that it may take any power by which strength is gained to execute the delegated power as *therefore incidental* to those powers—whether really fit or not, and whether coming within the general prohibition of the Constitution or not—is a doctrine which equally makes Congress absolute, and leaves it—except as to the provisions especially forbidden in the Constitution itself—without check

or limitation; and makes much of the great bill of rights contained in the amendments of no effect.

It was indeed because, as Strong, J., maintained in the Pennsylvania cases,* there might be powers not enumerated, not even means to execute the delegated powers which might be claimed as resulting from the Constitution, and which would transcend the limits intended to be fixed by the Constitution, that the people insisted upon the amendment and inserted their general declaration, which properly, as I maintain, prevents Congress from taking, by implication, any power to deprive persons of property without process of law.

What do the amendments to the Constitution provide? Not particularly that Congress shall not impair the obligations of contracts; not particularly that it shall not intervene to declare what shall be a legal tender in discharge of pre-existing debts between citizens of any State; but they provide that private property shall not be taken for public use without just compensation, nor any person be deprived of property without due process of law. But this legal tender clause takes the creditor's property to the extent of one portion of his right of action; takes it, to be sure, not directly to the public use, but, as asserted, takes it because of the public necessities, and gives it to the debtor; equally takes it from the creditor, and takes it from him without any compensation. So, too, this legal tender clause deprives the creditor of his property to the extent of one portion of his debt, of his chose in action, without due, or any, process of law. By what authority is this done? Not by the express authority of the Constitution; for that is not pretended. Not surely by its implied authority; for authority to be implied must be "not prohibited, within the scope of the Constitution, consistent with its letter and spirit." But this act which thus strips the creditor of his property without process of law is absolutely prohibited. It establishes injustice, and cannot therefore be consistent with the letter of the

* 52 Pennsylvania State, 2 P. F. Smith, 114.

Constitution; establishes injustice, and therefore is flatly opposed to its whole scope and purpose—cannot therefore possibly be implied.

NOW AS TO THE SECOND PROPOSITION, as to which the court has directed argument—that is, the effect of this legal tender provision of the law upon subsequent transactions.

It is to be observed that the Constitution contains nothing whatever in respect to tender except that it limits the States against making anything but gold and silver coin a tender in payment of debts. But whether the tender for debts should be of gold or silver, and of which of the coins of either or both, it is left with the States to declare. No limitation as to the class of coins which might be adopted for that purpose was imposed. Indeed, at that time our decimal system was not established. No such coins as those we use existed, and various descriptions of coin and methods of account prevailed in all the States. Congress early established a decimal system, and, under its power of coining money and regulating the value thereof, coined moneys according to that system, with the dollar as the unit of account and coinage, and regulated the relative value of different foreign coins with the dollar by weight. The dollar thus coined thereupon became, *ex necessitate*, even without any express law, a lawful tender for contracts calling for such dollars, just as wheat, and wheat only, is a lawful tender for a contract for wheat, and wine for a contract for wine, since it alone complies with and satisfies the contract. The States having made no other coins a tender in payment of debts, and having all adopted the Federal system of account and reckoning, the dollar has thus remained not only the universal tender in payment of such debts, but has become also the universal unit of calculation, upon which all damages are estimated and all recoveries of money are made. Subsequently the government issued its notes, also called dollars, and they went into universal circulation. Of course, contracts calling either expressly or by implication for these treasury-note dollars are satisfied and discharged by the pay

ment of the requisite number of them; and this because they meet and satisfy the contract—are what the contract requires. Sovereigns would not satisfy such a contract; neither would they satisfy a contract for specie dollars; nor would any description of dollars satisfy a contract for sovereigns. When, therefore, a man has a contract upon which dollars are due, the first question must be, what description of dollars is meant by it? If these treasury-note dollars, then the stipulated number of them will satisfy the contract, and will satisfy it equally whether such notes be or be not a lawful "tender in payment of debts," unless, indeed, these treasury notes are wholly unauthorized and invalid.

If it were an open question, I should be disposed to think that Congress had no power to issue bills of credit. Looking at the history of the times; at the action of the Convention which framed the Constitution; at the declarations of the men who participated in that Convention; at the general opinion throughout the States when the Constitution was first considered, it does certainly seem to have been intended that no power of issuing paper money should be given to Congress at all. None the less, the power to borrow money does embrace the power to issue obligations for the money borrowed, and can, perhaps, be taken of itself to sustain the issue by the government of its bills of credit. The power was regarded as existing by many very early in the history of the government, and in 1812 the government did put out its treasury notes, which circulated as money, although not declared a legal tender. This course of action was repeated in 1837, 1842, 1861, and has been continued and sustained by this court. So that whatever might have been originally the proper determination of that question, it is now too late to assume that the Federal government does not possess the power to issue bills of credit, and that they are not valid. Being valid, they will of course lawfully discharge any contract made expressly payable in them; and any contract which, although not so particularly expressed, now implies that it is made payable in them. That is, any contract simply expressed in "dollars," which is the term which now

distinguishes these notes from coined, or, as they are generally styled, specie dollars. So, too, when the courts come to allow recoveries upon contracts calling for treasury-note dollars, they can give judgment for their payment, and this, whether they be or not the tender in payment of debts authorized by the Constitution, just as the court can enter a decree for hay on a contract for hay. Whether, therefore, these treasury notes are a lawful tender in payment of debts in the sense of the Constitution, or not, it is nevertheless true that they are, and may properly continue, a medium of exchange; and that contracts can be met by and recoveries had in them.

Nevertheless, when the courts come to turn contracts and claims into judgment debts; when they come to assess damages, and allow recoveries for wrongs, the question remains, can they do so in this treasury-note dollar; or, is it no lawful money for such purposes, and must the court make their calculations, allow their damages, and state their judgments in the coin of the country as the only authorized constitutional standard of value?

My ox has been converted. Its value is $100 specie or $110 treasury-note dollars. A recovery by me of the given amount of either of those dollars would be just, and make me whole. And it may not, therefore, seem of much public importance whether recoveries in law should be had and reckonings made in specie dollars, as customary on the Pacific coast (where they quoted "greenbacks" at a discount), or in treasury-note dollars, as on the Atlantic side (where specie is quoted at a premium). And yet, can anything be of greater public importance than to have the value of every transaction measured by a certain, instead of a fluctuating standard?

Nevertheless, whatever its importance, the question of power in Congress to make these notes a tender in payment of debts remains.

If Congress has such power, where is it granted? To what delegated power can it properly be regarded as auxiliary? I can find none. It is true that making these notes

a legal tender for subsequent transactions does not impair private rights, as it must if they be regarded a tender for pre-existing debts. The presumption against the power is not, therefore, so strong in the former as in the latter case, and yet the question of power remains. Where was it conferred upon Congress? I repeat, I cannot find that it has been conferred at all. The power given Congress by the Constitution to coin money and regulate the value thereof, and of foreign coins, and to provide for punishing the counterfeiting of the securities and current coin of the United States; the analogous power given it to fix the standard of weights and measures; and the restriction upon the power of the States against making anything but gold and silver coin a tender in payment of debts, all combine to establish that the government has no power to make any legal tender whatever except the coin that it strikes. The action of the Convention which framed the Constitution, the discussion by which it was recommended to the people, the debates in the State conventions by which it was adopted, and the whole record of the times combine also to establish that the power to make bills of credit a tender was not intended to be given to the Federal government at all; but that, on the contrary, it was intended and believed to be wholly beyond the power of either States or Union. Story says in his Commentaries:*

"The prohibition to 'emit bills of credit' cannot, perhaps, be more forcibly vindicated than by quoting the glowing language of the Federalist—a language justified by that of almost every contemporary writer, and attested in its truth by facts from which the mind involuntarily turns away at once with disgust and indignation."

This prohibition, as we have seen, met the warmest approbation of the Federalist,† and was evidently considered by the author to prevent all legal tender paper and all substitutes for coin. The Federalist further declared‡ that:

"The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen

* Sec. 1358. † No. 44. ‡ Ib.

with regret and indignation that sudden changes and legislative interferences in cases affecting personal rights became jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less-informed part of the community. They have seen, too, that one legislative interference is but the first link in a long chain of repetitions, every subsequent interference being naturally provoked by the effects of the preceding. They very rightly infer, therefore, that some thorough reform is wanting, which will banish speculations on public measures, inspire a general prudence and industry, and give a regular course to the business of society."

In *Craig* v. *The State of Missouri*,* Marshall, C. J., said, speaking of paper money:

"Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss; are the sources of ruinous speculations, and destroy all confidence between man and man. *To cut up this mischief by the roots—a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all*—the people declared in their Constitution that no State should emit bills of credit."

And so Judge Washington in *Ogden* v. *Saunders*:†

"This policy was, to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, shall be regulated. And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterward be discharged by a different standard, or by that which is not money?"

Why was the power of fixing the standard of weights and measures given to Congress but to enable it to fix a *general and uniform standard of weights and measures?* Why was the power of coining money and regulating the value thereof, and of foreign coin, given to Congress, except to enable it to provide *a fixed and uniform standard of value?* And yet you cannot have a measure of weights that have no weight,

* 4 Peters, 432.

† 12 Wheaton, 265.

nor a standard of measure without length. How, then, can you have a uniform standard of value without value? A substance that constantly fluctuated in weight, or that would not weigh—like gas—could not be made a standard of weight. An elastic and variable measure could not properly be made the standard of measures. How, therefore, can Congress, under this power to establish a uniform system of coinage and values, select as the standard of value, not a coin at all, but a fluctuating and changeable unit; not even a thing at all, but only the promise of a thing? This power of coining money was intrusted to Congress, and restrictions were put upon the States, in order to secure "uniformity of value, and to preclude a fluctuating and variable currency." The people, when called upon to sacrifice their right to issue bills of credit, and make anything but gold and silver a tender, did so for the same end. This court has never spoken of the power of Congress except as a trust to maintain the uniformity and purity of the standard of value. Under that trust, and that alone, Congress seeks to establish a standard of value, neither pure nor uniform. On the contrary, a standard without any intrinsic value whatever; forever fluctuating and uncertain, and affecting with those qualities all transactions in it in arithmetical proportion to their magnitude—a standard which, instead of affording certainty and uniformity of value, invites forever to uncertainty, to speculation, and extravagance. This is not what the Constitution granted to Congress. It is exactly what it forbade to the States—exactly what the wise men who framed this government never intended either State or Federal government should possess, and what no statesman from the foundation of the government to the introduction of this law had ever claimed for it.

The question before the court is no mere question for to-day, when the two currencies are nearly equivalent in value,*

* Gold was at the time of this argument worth about 10 per cent. more than the notes of the United States, called "legal tenders." There had been a time, during the rebellion, when it was worth 185 per cent. more.—REP.

but it is a question whether this supreme tribunal will establish, as the permanent standard for the dealings, values, and engagements of this great nation, something without intrinsic value at all—a forever fluctuating and uncertain unit.

The importance of the question is that its decision depends upon, and must determine, the powers of Congress in respect of private rights. For if Congress may impair the obligation of contracts in this respect, it may in other respects; and the obligation of contracts is among the most important subject as to which Congress can legislate. It is, as Chief Justice Marshall well said, a power which comes home to every man; touches the interest and controls the credit of all. What was true in that regard at the foundation of the government, when the fathers saw the importance of limiting such power, is vastly more true now, when our property is so extensively represented in notes, bills, bonds, coupons, mortgages, and other money obligations.

The decision by this court that Congress can use the legal tender provision as a means to any delegated power, leaves Congress as much at liberty to use it as an auxiliary to borrowing money, or to regulating commerce, as to levying war. It will thus be, that whenever the great corporate and moneyed interests of the country wish to wrong their creditors, they will create a necessity which shall compel the issue of these notes; while, whenever the creditors would wrong the debtors, they will struggle to repeal the law making these notes a tender. It was the feeling created by the decision that such notes would not be legal tender for pre-existing debts which, more than anything, I think, tended to deter the lower House of the last Congress from passing a bill to increase their issue.

Who can deny that a whole community is being demoralized, as under such a system of paper money communities everywhere and at all times have been demoralized? Who can deny that men will do now what they would have shrunk from ten years ago, before this system existed? When the wicked prosper, other men make haste to do like-

wise. And now, not from the cities only, but from every part, men seek the great marts to try their fortune in the ventures of the hour, hoping to gather where they have not strewn. Gambling in stocks, with the dangerous combinations it invites, and the corruption which it encourages, has become general; so that it is deemed venial to artificially inflate or depress prices, to create fictitious values by forced scarceness, or undue depression by combined attacks. And whatever danger may come to the public debt of this great country, will come, not from the unwillingness of the people to pay; not from their want of ability to pay; but will come, if it shall come at all, from the recklessness of a people carrying out their schemes upon the waves of an inflated currency, and from the demoralization which such speculations produces. How can it be expected that this people will make the sacrifices necessary to enable their government to keep its pledged faith, when it has not only failed to keep its own faith with its creditors, but has filled its coffers from the sale of licenses to men to wrong each other by short payments, and has made haste to ratify, by the decision of its supreme tribunal, the constitutionality and righteousness of such a course?

It is said that the course of action and decisions, since this law was passed, has been favorable to its validity. To the action of Congress, in this respect, I do not attach weight. There were various opinions in Congress as to its power, and the time was one of doubt and danger, illy suited to the consideration of that question. As Mr. Gouverneur Morris said, in his famous letter to Mr. Pickering, "The legislative lion will never be confined in the meshes of a logical net." And legislators will always find it in their consciences to consider that measure constitutional which they wish to adopt.

As to the decisions of the State courts, though the majority were in favor of the law—only Kentucky and Indiana being adverse—they were almost all by divided courts, and in all there were indications that these decisions were given doubtfully and in view of the existing crisis, and with the feeling

that the ultimate determination of the question of power should, under the circumstances, be left to this tribunal.

There was, however, a decision on this subject in Rhode Island, in 1786, in the case of *Trevitt* v. *Weldon*. That State had issued bills of credit and made them a tender, and fixed a penalty for refusing to receive them at their nominal value. Mr. Weldon refused, and was prosecuted for the penalty, and the Rhode Island court held the legal tender provision unauthorized on the same general principles which were declared by this court in *Wilkinson* v. *Leland*, also from that State. And for that decision the judges lost their office.

This court rather avoided the consideration of the question until forced upon it after the determination of the Kentucky Court of Appeals in *Griswold* v. *Hepburn*. When, however, that case had been argued and submitted here, the court, at the suggestion of the government, ordered it to stand over to be reheard, when counsel, than whom there were none more eminent in the country, were heard in favor of the validity of the provision. After which the court, being then *a full court*, held the case under advisement, until, in February, 1870, when it decided that the law was invalid in respect of pre-existing debts.

Here let me remark that I think Judge Grier was right, in the view he took of the act, as not applying to precedent contracts. I see no principle of construction by which this statute—if it be considered that Congress has the constitutional power to issue notes which shall be a legal tender in discharge of pre-existing debts—should be held to embrace such debts. The law contains no necessary expression of the kind. True, it provides that the notes shall be a tender for all debts except customs and bonded interest. This was, however, a distinction necessary for subsequent debts. Indeed, since there were relatively few debts due for customs or bonded interest at the time of the passage of this act, this distinction would rather indicate that it was meant to apply only to subsequent debts. But surely, if the power to impair private rights is not to be taken to exist without very strong

and direct expression, where it does exist, it should not be presumed that the legislature intended to exercise it without like clear and positive expression.

I shall say nothing to this high tribunal as to the general importance to courts of justice of the maxim of *stare decisis*. Those judges who have been longest here know best how carefully and wisely it has adhered to that maxim.

It has been urged upon the court to review the legal tender question in these cases, in order to settle the law as to the abstract power of Congress to make treasury notes a legal tender in discharge of pre-existing debts. But how can the court thus settle the question? Should you affirm the former decision, you would indeed settle it; but should you overrule that decision without change in the opinions of the justices who have heretofore passed upon the question, how then will you have settled it? What can then result but to leave this question open for the future, and destroy the consistency and influence of the court?

It is the high and peculiar function of this supreme tribunal that it has not merely to determine questions of right between private parties, but even to pronounce upon the validity of the laws themselves. And why was this momentous and delicate duty committed to this great court by the people but for the belief that by its wise and independent judgments those disputes as to the powers of government, which, under a limited government, based upon a written compact, must unavoidably arise, would be likely to be most wisely and certainly settled? Now, whatever importance there may be in the doctrine of *stare decisis* in the determination of questions of private rights, it is to a tribunal charged with the determination of the limits of the power of government that certainty and consistency are absolutely essential. For more than seventy years this supreme tribunal, by the high character and learning of its members, by its rare and practical wisdom, and, above all, by its uniform, cautious, and consistent course, has so secured the respect and confidence of this people as to be able, in the stormiest times, to successfully establish the limits upon the rights and powers

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of the States and of the General government. To now, for the first time in its history, so gratuitously and needlessly review an abstract constitutional question so solemnly decided; to review it, not because of changes or doubts on the part of those who shared in the decision, but through a change in the composition of the court, is to divert the regard of the people from the court itself to the *personnel* of those who compose it; and would, as it seems to me, be in effect to abdicate the highest function with which your honors are intrusted. For men cannot be expected to submit their views of the powers of government to the construction of this tribunal when they once learn that, after a construction has been most solemnly established, they can change that construction by changing the persons who com pose the tribunal.

Those of us who, in the words of the late Thaddeus Stevens, "believe, as all should believe, that the judiciary is the most important department of the government, and that great, wise, and pure judges are the chief bulwark of the lives, liberty, and rights of the people," will then, indeed, have reason to fear that the court, in reviewing this question, will, so far from having actually and finally settled the principle of constitutional law involved, the rather have unsettled it; and, in so unsettling it, have unsettled also the grounds for the confidence and submission of this people under the determination by this tribunal of constitutional questions.

*Mr. Akerman, Attorney-General, contra:**

Two questions are submitted. The first, as the chief one, will be chiefly considered. If that is decided affirmatively the second must be so answered also.

According to the uniform custom, when the powers of

* A brief which had been filed in the case of Latham *v.* The United States, a real or supposed legal tender case, which having been withdrawn by the appellant (9 Wallace, 145), never came to hearing,—that brief being the same that had been filed in Hepburn *v.* Griswold,—was also submitted and relied on by Mr. Akerman, here.

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Congress are questioned, the court is told that ours is a limited government, and that Congress has no powers but what are derived from the Constitution. In the words of the vexed patriarch, "Who knoweth not such things as these?" Of course the court will not sustain the legislation in question, unless it finds authority for it in the Constitution, either expressly given or fairly implied.

It would be wonderful that a government formed in modern times and for a commercial people, and in large measure the offspring of commercial wants, should not be provided with all the powers on the subject of money—that indispensable instrument of commerce—which have been possessed by the governments of other commercial nations. The world's experience did not fall into barren soil when it was cast by history into the minds of the men who framed the Constitution of the United States. Many of them were well versed in financial history. All of them had seen their country undergo a memorable financial experience. Thus instructed, they went to their work. They gave to Congress express powers on the subject of money. They laid Congress under no express restrictions on the subject of money. The only restrictions which they imposed in this matter were upon the States. They are in these words:

"No State shall make anything but gold and silver coin a tender in payment of debts."

From this clause—the only place in the Constitution where tender is named—a mind guided by the rules of strict construction, and jealous of national power, might derive the doctrine that the right to prescribe a legal tender is in the States only. This doctrine would have a stronger foundation in the letter of the Constitution than most of the propositions which are seriously put forth against the validity of the legal tender act. But it has no advocates; at least none whose views deserve consideration in this court. It would encounter invincible reasoning, fortified by the practice of the government from a very early date. Congress has never hesitated to enact what should be a legal

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tender in payment of debts. The right thus to enact has been assumed in twenty-four statutes, passed in the presidencies of Washington, Jefferson, Madison, Monroe, Jackson, Tyler, Polk, Fillmore, Pierce, Lincoln, and Johnson.

Before the act now in question the authorized tenders were all in metallic coin; but under modifications in purity and value according to the pleasure of Congress. Debts contracted when money was of a certain degree of purity, have been made dischargeable in money of the same nominal value, but of less purity, and therefore of less intrinsic value. Counsel on the other side has attempted to show that this statement, which has often been made in discussions of this subject, is not correct. He goes into an analysis of the statutes, and while he admits that coins of certain denominations have been debased, he affirms that the quantity of pure silver in the dollar coin has remained unchanged. This fact, if demonstrated, does not answer his end. It does not disprove that a man who lent ten eagles at one time might afterwards, by the force of an intervening act of Congress, be compelled to take in satisfaction of the principal of that loan ten eagles of 6 per cent. less intrinsic value. This legislation assumes that, in contemplation of law, money of every species has the value which the law fixes on it; that Congress has the constitutional power to say that 10 pennyweights of silver shall henceforth be the dollar, and do the office hitherto done by 17 pennyweights and $4\frac{1}{2}$ grains.

We have been told that the practice thus established is not pertinent to the present argument: First, because the extent of debasement has been small. Secondly. Because the currency with which these liberties were taken remained metallic through all the changes.

The right to debase cannot depend on the extent of the debasement. If the right exists, it is bounded only by the pleasure of Congress. In this matter questions of constitutional right are not questions of more or less. Congress at one time has said that a gold coin of a certain weight and fineness shall be worth ten silver dollars, and a legal tender for

that sum. Congress has afterwards said that a coin containing less of gold shall be worth ten silver dollars, and a legal tender for that sum. The power to make this debasement to the extent of 6 per cent., and to give to the debased coin the quality of a legal tender for precontracted debts, involves the power to carry the debasement to the extent of 60 per cent., and to give the same quality to the coin thus debased. And it is difficult to see the difference in constitutional principle when the article on which a legal value is fixed, and which is made a legal tender, is the nation's paper promise to pay, now worth in the market over nine-tenths of its legal value in coin, and certain, if the nation keeps its faith, to be ultimately worth its par in coin.

Some men appear to consider that there is a peculiar constitutional virtue in metal, whether gold, silver, nickel, or copper. According to them, what is a crime against the Constitution, if done in paper, may be innocently done in metal. The obligation of contracts may be impaired, in metal. The dictates of justice may be disobeyed, in metal. A man may be lawfully compelled to take, in metal, a fraction in value of what he contracted for. The scope for the discretion of Congress is unlimited within the metallic field. That sensitive being, always invoked in such discussions, whom they denominate "the spirit of the Constitution," though enraged by the rustle of paper, is lulled to repose by the clink of metal, however base.

The Constitution nowhere declares that nothing shall be money unless made of metal. Congress has enacted that these treasury notes shall be lawful money. Nobody questions here the power to issue them and to give them some of the qualities of money. This power has been expressly admitted by this court. With certain exceptions, they are receivable for all dues to the government, and payable for all dues from the government, old and new. The largest creditor in the land, the government, is bound to take them. The largest debtor in the land, the government, pays in them. The creditors of the United States (except holders of bonds and of interest-bearing notes) must take them or

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nothing. Nobody maintains that they are not "money" in the sense in which that word is used in some places in the Constitution. "No appropriation of money" [to the use of raising and supporting armies] "shall be for a longer term than two years."* This provision would certainly be violated by an appropriation of treasury notes to the support of the army for three years. "No money shall be drawn from the treasury but in consequence of appropriations made by law."† Treasury notes could not be drawn from the treasury without such appropriation. The regular statement "of the receipts and expenditures of all public money," which the same section requires to be published from time to time, would be incomplete if treasury notes were left out.

These notes, then, are money, for most purposes, between the government and the citizen. It is argued, however, that they are not money between citizen and citizen for all the purposes for which Congress has made them such; that though Mr. Davis (a party now before the court) might be allowed by Congress to discharge a debt to the government contracted in 1857 with treasury notes, he cannot be allowed by Congress to discharge a debt of the same date to Mr. Parker with the same currency; that a debt which he owes to the collective American people is less sacred than a debt which he owes to one of them. Hence, it follows, from the reasoning of opposing counsel, that what can be made money, in the constitutional sense of the word, for some purposes, cannot be made money for other purposes. The singularity of the conclusion suggests that there must be a fallacy in the logic.

The supporters of the legal tender provision are called on to show the authority for it in the Constitution. To this call different responses have been made.

Some have found the authority in the power to coin money and regulate its value. They think that the word "coin" is here used in the large sense—to make, to fabricate; and the meaning of the word "money" is not limited

* Art 1, § 8. † Ib. § 9.

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to metallic coinage, but extends to everything which had been in general use as money, or which may answer the purposes of money—a definition which will embrace a government's promises to pay, of a form and denomination designed for circulation as currency. They maintain that an article may be money for some uses or for all, at the will of the power that creates it; that one sort of money may be good to pay duties on imports and another to pay for public lands; that one sort may be a legal tender for all debts and another for debts of a certain kind or amount, as Congress may determine. Probably this view was in the mind of Congress when the act of 1862 was framed, and suggested the words, "shall be lawful money." Perhaps it was in the mind of the statesman who then had charge of the national finances, who issued the legal tender notes, and who afterwards, in vindicating this policy before the people, said: "Under these circumstances I coined the credit of the nation."*

But this derivation of the required power, though supported by strong reason and respectable authority, has received less of professional and judicial favor than the derivation from the power "to make all laws which shall be necessary and proper for carrying into execution all powers vested by the Constitution in the government of the United States, or in any department or officer thereof."†

Among the admitted powers which the act in question is believed to aid in executing, are the powers of borrowing money on the credit of the United States, of declaring war, of suppressing insurrection, of raising and supporting armies, and of providing and maintaining a navy. The power to borrow money carries with it the power to give to the lender an evidence of the debt thus created, and to strengthen the loan with incidents and adjuncts making it the more attractive in the market. And it is one of these incidents that the evidences of the debt shall perform the offices of money between government and citizen, and between man and man.

* Hon. S. P. Chase, at Louisville, Ky., in 1864. † Art. 1, § 8.

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Counsel on the other side has insisted that the value of treasury notes is not increased by the circumstance that they are legal tender. One might as well say that a commodity is not increased in value by the opening of a new market for it. The more uses there are for an article, the greater is its value. A bank whose notes are in demand for many purposes is (other things being equal) in better credit than one whose notes will do fewer services to the holder. The credit of the United States is better when its promises will pay debts than when they will not. At least such was the judgment of Congress, from whose judgment on questions of expediency there is no appeal to the judiciary.

Whenever the extent of "the auxiliary powers" of Congress is in controversy, those who take the most restricted view are in the habit of quoting the following paragraph from Marshall, C. J., in *McCulloch* v. *The State of Maryland:*

"Let the end be legitimate, let it be within the scope of the Constitution, and all the means which are appropriate, which are plainly adapted to that end, which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional."

It is assumed, rather inconsiderately, that Marshall, C. J., held all means not coming within this description to be unconstitutional. Such is not the fact. In *United States* v. *Fisher*,* his language was, "any means which are, in fact, conducive to the exercise of a power granted by the Constitution." In another part of the opinion in the case of *McCulloch* v. *The State of Maryland*, his language was, "any means calculated to produce the end." These words are less restrictive than the first quotation.

Returning to that quotation, let us apply the rule there laid down to the matter in hand. It has not been denied here that the ends for which this currency was issued, and for which it was made a legal tender, were legitimate and within the scope of the Constitution. Insurrection could not be suppressed, armies could not be raised and supported,

* 2 Cranch, 358.

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and a navy could not be provided and maintained, without a currency. This court has pronounced it within the undisputed power of Congress to provide a currency for the country consisting largely of treasury notes.* There is no pretence that the means in question are prohibited.

But it is affirmed with confidence that the means are not consistent with the letter and spirit of the Constitution. The means consist in the issue of the notes as a currency and in the imparting to them the faculties of paying dues to and from the government, and of legal tender. If it is consistent with the letter and spirit of the Constitution to issue these notes as a currency, to protect them against a rival currency (which is held to be authorized in the case of the Veazie Bank), and to give them many of the ordinary faculties of money, it is difficult to see how the letter and spirit of the Constitution are violated when another of those faculties is given to them.

The opponents of the power which we maintain lay most stress upon that part of C. J. Marshall's definition of the allowable means which describes them as "appropriate and plainly adapted to the end." That the issuing of a paper currency on the credit of the United States was an appropriate and plainly adapted means of maintaining the government during the insurrection is not questioned. That this currency should, by law, be made to do most of the offices of money, even as the term "money" is used in the Constitution, seems to be of admitted constitutionality. But to go a step further, and to complete the investiture of this currency with the attributes of money, our friends on the other side think carries us beyond the region of "appropriate and plainly adapted means." Soliciting a judicial opinion adverse to that of the legislature on a question of appropriateness and adaptation of means, they go into financial discussion, and argue that the usefulness of the treasury notes was not increased by making them a legal tender. So the question of constitutionality, in their view, is to be

* Veazie Bank *v.* Fenno, 8 Wallace, 549.

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determined by the agreement or disagreement of the court with the legislature in opinion upon finance, a subject on which men differ as much as on theology. This view has been pressed in the thorough argument to which we have listened, with an earnestness that permits no doubt that it is seriously taken.

But unless the court is prepared to say that the means cannot, in good faith, be supposed by Congress to have any adaptation to the proposed end, it cannot pronounce them unconstitutional. The individual judgment of judges in regard to their expediency should not be substituted for that of Congress. This court cannot say that the means now in question lay without the field of examination when the instrumentalities to the desired end were to be chosen. This admitted, the privilege of selection is with Congress. Within that field Congress is supreme. This court may consider the question of congressional power, but not the question of congressional wisdom. If Congress may issue a currency as an appropriate means to lawful ends, it may, in its discretion, give to that currency few, many, or all of the faculties of money.

The main objection to this mode of reasoning is that it goes very far. So it does. It leads to the conclusion that Congress has a great deal of power. A government without power is contemptible. The men who made this government intended that it should have strength enough to maintain its own existence, and to accomplish the ends for which it was made. The mainspring of a government is in the department that makes the laws, and there the Constitution has wisely reposed power sufficient for national exigencies. In relation to money and contracts, the Constitution is jealous of the States, but shows no jealousy of Congress. Power in Congress is as little liable to abuse as power elsewhere. Of course, there is a possibility of abuse in the imperfection of man; and an argument against a claimed power, on the ground of this possibility, is an argument against all government. Every legislature, state or national, can do infinite harm by abusing its trust, and yet keep within its constitu-

tional limits. Congress, at any session, if disposed to mischief, could reduce the country to misery by the exercise of express and undoubted powers. It could declare pernicious wars. It could impose oppressive taxes. But these great powers have never been exercised to the country's ruin. We have had, and I hope we shall continue to have, sufficient safeguards in the character and accountability of the members and their identity in interest with the people on whom their laws bear. The same safeguards stand against the abuse of the auxiliary powers.

The counsel on the other side says that now, after nine years' experience in war and peace, it is manifest that there was no necessity for giving to the treasury notes the faculty of legal tender. Without admitting that such is the lesson of this experience, I must deny that the constitutionality of an act of Congress can be determined by events subsequent to its passage. A statute which is constitutional if it shall work well, and unconstitutional if it shall work ill, would be a novelty in legislation. The counsel probably meant to lay down no such rule. Yet this part of his argument is baseless without such a rule. This question ought to be decided now as it would have been decided in 1862. The Constitution is not variable. Where Congress has a choice of means, the validity of its action cannot be affected by the correctness or incorrectness of its judgment in choosing.

Opposing counsel quotes the felicitous expression of Mr. Clay, that "the principal and the incidental power ought to be congenial to each other." This doctrine contravenes no part of our argument. There is a kinship between the coining of money and the making of that money a legal tender. There is a kinship between the borrowing of money and the issuing of a currency made valuable by being invested with all the faculties of money, in evidence of that borrowing. There is a kinship between supporting armies and paying the soldiers in a valuable currency. And so on, through the long list of good services which this currency has performed, the congeniality required by Mr. Clay is abundantly manifest.

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Mr. Webster is also quoted by the counsel on the other side, and it is true that he expressed himself very emphatically against the power of Congress to make paper a legal tender. Admitting that great respect is due to the opinion of that eminent but not infallible man, I am at liberty to suggest that the authors of the act in question had an experience in public necessities which was wanting to him, and that his inexorable proposition that there can be no legal tender in this country but gold and silver is clearly wrong. This proposition would forbid the use in coinage of a metal better adapted than gold or silver to the purposes of coinage, should such a metal be discovered. We may not know all that is in the bowels of the earth. The discovery of such a metal would not be stranger than the discovery of the gold fields of California.

The counsel quotes from the debates in the Federal Convention of 1787 to show that members of that body were opposed to making paper a legal tender. The very quotations prove that the members considered that the power to emit bills of credit involved the power to make them a legal tender, and hence they struck out of the draft of the Constitution the power to emit bills. But it is no uncommon experience that the words of a constitution or statute are found, in their fairest interpretation, to import more than their authors distinctly designed. It is not given to man, when framing a constitution, to foresee all the cases to which the conferred powers will properly extend. And in this very matter, notwithstanding that the power to emit bills of credit was struck out, this court has held that the power exists; and why, then, does it not exist with all that in 1787 was supposed to belong to it?*

The counsel says that not much inconvenience will be caused to debtors by holding the legal tender act invalid, because most of the debts existing in 1862 have been already paid in treasury notes. This is, in effect, to say to those creditors who trusted the government in dark hours, that

* 5 Elliott, 432.

they were the victims of a foolish confidence; to declare that, in future national embarrassments, the most selfish men will come out best. The decision which he desires will favor the churls and disfavor the patriots.

It has been urged also that the decision in *Hepburn* v. *Griswold* should be held final under the doctrine of *res adjudicata*, independently of the merits of that decision. But circumstances, the absence of a court as large as now,* lessened the force of that decision, and induced a great portion of the legal profession to desire a reconsideration of the question. Moreover in that case the question of the validity of the legal tender act, as to debts contracted after its passage, was not decided, and a discussion of this question involves the whole subject. Indeed this doctrine of *res adjudicata* is against the position of opposing counsel, inasmuch as the court, by ordering the present argument, has adjudged that the question is still open.

On the first of May, 1871, judgment in both the cases, as already mentioned in 11th Wallace, p. 682, was AFFIRMED;

* By act of March 3d, 1863 (12 Stat. at Large, 794), the court was ordered to consist of ten members; a new member being then added. By act of July 23d, 1866 (14 Id. 209), "to fix the number of judges of the Supreme Court of the United States," &c., it was enacted "that no vacancy in the office of associate justice shall be filled by appointment until the number of associates shall be reduced to six, and thereafter the Supreme Court shall consist of a chief justice and six associate justices." By an act of 10th April, 1869 (16 Id. 44), to take effect from the first Monday of December, 1869, it was enacted that the court should consist of a chief justice and eight associates, and that for the purposes of this act there should be appointed an additional judge. Hepburn *v.* Griswold, it is stated in the opinion of the court in the case, was decided in conference November 27th, 1869 (8 Wallace, 626), there being then eight judges (the chief justice and seven associates) on the bench, the lowest number to which the court had been reduced. One of them, Justice Grier, resigned February 1st, 1870. The judgment in Hepburn *v.* Griswold was announced from the bench and entered February 7th, 1870. Mr. Justice Strong was appointed February 18th, 1870, and Mr. Justice Bradley March 21st, 1870; and the order for the present argument was made by, and the argument itself heard before, the court of nine, as constituted by the act of 10th April, 1869.

the CHIEF JUSTICE, with NELSON, CLIFFORD, and FIELD, JJ., dissenting.

On the 15th January, 1872,—till which time, in order to promote the convenience of some of the dissentient members of the court, the matter had been deferred,—the opinion of the court, with concurring or dissenting opinions from the Chief Justice and different Associate Justices, was delivered.

Mr. Justice STRONG delivered the opinion of the court.

The controlling questions in these cases are the following: Are the acts of Congress, known as the legal tender acts, constitutional when applied to contracts made before their passage; and, secondly, are they valid as applicable to debts contracted since their enactment? These questions have been elaborately argued, and they have received from the court that consideration which their great importance demands. It would be difficult to overestimate the consequences which must follow our decision. They will affect the entire business of the country, and take hold of the possible continued existence of the government. If it be held by this court that Congress has no constitutional power, under any circumstances, or in any emergency, to make treasury notes a legal tender for the payment of all debts (a power confessedly possessed by every independent sovereignty other than the United States), the government is without those means of self-preservation which, all must admit, may, in certain contingencies, become indispensable, even if they were not when the acts of Congress now called in question were enacted. It is also clear that if we hold the acts invalid as applicable to debts incurred, or transactions which have taken place since their enactment, our decision must cause, throughout the country, great business derangement, widespread distress, and the rankest injustice. The debts which have been contracted since February 25th, 1862, constitute, doubtless, by far the greatest portion of the existing indebtedness of the country. They have been contracted in view of the acts of Congress declaring treasury

notes a legal tender, and in reliance upon that declaration. Men have bought and sold, borrowed and lent, and assumed every variety of obligations contemplating that payment might be made with such notes. Indeed, legal tender treasury notes have become the universal measure of values. If now, by our decision, it be established that these debts and obligations can be discharged only by gold coin; if, contrary to the expectation of all parties to these contracts, legal tender notes are rendered unavailable, the government has become an instrument of the grossest injustice; all debtors are loaded with an obligation it was never contemplated they should assume; a large percentage is added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress, and bankruptcy may be expected. These consequences are too obvious to admit of question. And there is no well-founded distinction to be made between the constitutional validity of an act of Congress declaring treasury notes a legal tender for the payment of debts contracted after its passage and that of an act making them a legal tender for the discharge of all debts, as well those incurred before as those made after its enactment. There may be a difference in the effects produced by the acts, and in the hardship of their operation, but in both cases the fundamental question, that which tests the validity of the legislation, is, can Congress constitutionally give to treasury notes the character and qualities of money? Can such notes be constituted a legitimate circulating medium, having a defined legal value? If they can, then such notes must be available to fulfil all contracts (not expressly excepted) solvable in money, without reference to the time when the contracts were made. Hence it is not strange that those who hold the legal tender acts unconstitutional when applied to contracts made before February, 1862, find themselves compelled also to hold that the acts are invalid as to debts created after that time, and to hold that both classes of debts alike can be discharged only by gold and silver coin.

The consequences of which we have spoken, serious as

they are, must be accepted, if there is a clear incompatibility between the Constitution and the legal tender acts. But we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule. In *Commonwealth* v. *Smith*,* the language of the court was, "It must be remembered that, for weighty reasons, it has been assumed as a principle, in construing constitutions, by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt;" and, in *Fletcher* v. *Peck*,† Chief Justice Marshall said, "It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers and its acts to be considered void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." It is incumbent, therefore, upon those who affirm the unconstitutionality of an act of Congress to show clearly that it is in violation of the provisions of the Constitution. It is not sufficient for them that they succeed in raising a doubt.

Nor can it be questioned that, when investigating the nature and extent of the powers conferred by the Constitution upon Congress, it is indispensable to keep in view the objects for which those powers were granted. This is a universal rule of construction applied alike to statutes, wills, contracts, and constitutions. If the general purpose of the instrument is ascertained, the language of its provisions must be construed with reference to that purpose and so as to subserve

* 4 Binney, 128.

† 6 Cranch, 87.

it. In no other way can the intent of the framers of the instrument be discovered. And there are more urgent reasons for looking to the ultimate purpose in examining the powers conferred by a constitution than there are in construing a statute, a will, or a contract. We do not expect to find in a constitution minute details. It is necessarily brief and comprehensive. It prescribes outlines, leaving the filling up to be deduced from the outlines. In *Martin* v. *Hunter*,* it was said, "The Constitution unavoidably deals in general language. It did not suit the purpose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution." And with singular clearness was it said by Chief Justice Marshall, in *McCulloch* v. *The State of Maryland*,† "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution, would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves." If these are correct principles, if they are proper views of the manner in which the Constitution is to be understood, the powers conferred upon Congress must be regarded as related to each other, and all means for a common end. Each is but part of a system, a constituent of one whole. No single power is the ultimate end for which the Constitution was adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose. Thus the power to levy and collect taxes, to coin money and regulate its value, to raise and support armies, or to provide for and maintain

* 1 Wheaton, 326.

† 4 Id. 405.

a navy, are instruments for the paramount object, which was to establish a government, sovereign within its sphere, with capability of self-preservation, thereby forming a union more perfect than that which existed under the old Confederacy.

The same may be asserted also of all the non-enumerated powers included in the authority expressly given "to make all laws which shall be necessary and proper for carrying into execution the specified powers vested in Congress, and all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof." It is impossible to know what those non-enumerated powers are, and what is their nature and extent, without considering the purposes they were intended to subserve. Those purposes, it must be noted, reach beyond the mere execution of all powers definitely intrusted to Congress and mentioned in detail. They embrace the execution of all other powers vested by the Constitution in the government of the United States, or in any department or officer thereof. It certainly was intended to confer upon the government the power of self-preservation. Said Chief Justice Marshall, in *Cohens* v. *The Bank of Virginia*,* "America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete; for all these objects it is supreme. It can then, in effecting these objects, legitimately control all individuals or governments within the American territory." He added, in the same case: "A constitution is framed for ages to come, and is designed to approach immortality as near as mortality can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it is sure to encounter." That would appear, then, to be a most unreasonable construction of the Constitution which denies to the government created by it, the right to

* 6 Wheaton, 414.

employ freely every means, not prohibited, necessary for its preservation, and for the fulfilment of its acknowledged duties. Such a right, we hold, was given by the last clause of the eighth section of its first article. The means or instrumentalities referred to in that clause, and authorized, are not enumerated or defined. In the nature of things enumeration and specification were impossible. But they were left to the discretion of Congress, subject only to the restrictions that they be not prohibited, and be necessary and proper for carrying into execution the enumerated powers given to Congress, and all other powers vested in the government of the United States, or in any department or officer thereof.

And here it is to be observed it is not indispensable to the existence of any power claimed for the Federal government that it can be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. Its existence may be deduced fairly from more than one of the substantive powers expressly defined, or from them all combined. It is allowable to group together any number of them and infer from them all that the power claimed has been conferred. Such a treatment of the Constitution is recognized by its own provisions. This is well illustrated in its language respecting the writ of habeas corpus. The power to suspend the privilege of that writ is not expressly given, nor can it be deduced from any one of the particularized grants of power. Yet it is provided that the privileges of the writ shall not be suspended except in certain defined contingencies. This is no express grant of power. It is a restriction. But it shows irresistibly that somewhere in the Constitution power to suspend the privilege of the writ was granted, either by some one or more of the specifications of power, or by them all combined. And, that important powers were understood by the people who adopted the Constitution to have been created by it, powers not enumerated, and not included incidentally in any one of those enumerated, is shown by the amendments. The first ten of these were suggested in the conventions of

the States, and proposed at the first session of the first Congress, before any complaint was made of a disposition to assume doubtful powers. The preamble to the resolution submitting them for adoption recited that the "conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and *restrictive* clauses should be added." This was the origin of the amendments, and they are significant. They tend plainly to show that, in the judgment of those who adopted the Constitution, there were powers created by it, neither expressly specified nor deducible from any one specified power, or ancillary to it alone, but which grew out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted. Most of these amendments are denials of power which had not been expressly granted, and which cannot be said to have been necessary and proper for carrying into execution any other powers. Such, for example, is the prohibition of any laws respecting the establishment of religion, prohibiting the free exercise thereof, or abridging the freedom of speech or of the press.

And it is of importance to observe that Congress has often exercised, without question, powers that are not expressly given nor ancillary to any single enumerated power. Powers thus exercised are what are called by Judge Story in his Commentaries on the Constitution, resulting powers, arising from the aggregate powers of the government. He instances the right to sue and make contracts. Many others might be given. The oath required by law from officers of the government is one. So is building a capitol or a presidential mansion, and so also is the penal code. This last is worthy of brief notice. Congress is expressly authorized "to provide for the punishment of counterfeiting the securities and current coin of the United States, and to define and punish piracies and felonies committed on the high seas and offences against the laws of nations." It is also empowered to declare the punishment of treason, and provision is made for impeachments. This is the extent of power to punish crime

expressly conferred. It might be argued that the expression of these limited powers implies an exclusion of all other subjects of criminal legislation. Such is the argument in the present cases. It is said because Congress is authorized to coin money and regulate its value it cannot declare anything other than gold and silver to be money or make it a legal tender. Yet Congress, by the act of April 30, 1790, entitled "An act more effectually to provide for the punishment of certain crimes against the United States," and the supplementary act of March 3d, 1825, defined and provided for the punishment of a large class of crimes other than those mentioned in the Constitution, and some of the punishments prescribed are manifestly not in aid of any single substantive power. No one doubts that this was rightfully done, and the power thus exercised has been affirmed by this court in *United States* v. *Marigold.** This case shows that a power may exist as an aid to the execution of an express power, or an aggregate of such powers, though there is another express power given relating in part to the same subject but less extensive. Another illustration of this may be found in connection with the provisions respecting a census. The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

Indeed the whole history of the government and of congressional legislation has exhibited the use of a very wide discretion, even in times of peace and in the absence of any trying emergency, in the selection of the necessary and proper means to carry into effect the great objects for which the government was framed, and this discretion has generally been unquestioned, or, if questioned, sanctioned by this court. This is true not only when an attempt has been

* 9 Howard, 560.

made to execute a single power specifically given, but equally true when the means adopted have been appropriate to the execution, not of a single authority, but of all the powers created by the Constitution. Under the power to establish post-offices and post-roads Congress has provided for carrying the mails, punishing theft of letters and mail robberies, and even for transporting the mails to foreign countries. Under the power to regulate commerce, provision has been made by law for the improvement of harbors, the establishment of observatories, the erection of lighthouses, breakwaters, and buoys, the registry, enrolment, and construction of ships, and a code has been enacted for the government of seamen. Under the same power and other powers over the revenue and the currency of the country, for the convenience of the treasury and internal commerce, a corporation known as the United States Bank was early created. To its capital the government subscribed one-fifth of its stock. But the corporation was a private one, doing business for its own profit. Its incorporation was a constitutional exercise of congressional power for no other reason than that it was deemed to be a convenient instrument or means for accomplishing one or more of the ends for which the government was established, or, in the language of the first article, already quoted, "necessary and proper" for carrying into execution some or all the powers vested in the government. Clearly this necessity, if any existed, was not a direct and obvious one. Yet this court, in *McCulloch* v. *Maryland*,* unanimously ruled that in authorizing the bank, Congress had not transcended its powers. So debts due to the United States have been declared by acts of Congress entitled to priority of payment over debts due to other creditors, and this court has held such acts warranted by the Constitution.†

This is enough to show how, from the earliest period of our existence as a nation, the powers conferred by the Constitution have been construed by Congress and by this court whenever such action by Congress has been called in ques-

* 4 Wheaton, 416.

† Fisher *v.* Blight, 2 Cranch, 358.

tion. Happily the true meaning of the clause authorizing the enactment of all laws necessary and proper for carrying into execution the express powers conferred upon Congress, and all other powers vested in the government of the United States, or in any of its departments or officers, has long since been settled. In *Fisher* v. *Blight*,* this court, speaking by Chief Justice Marshall, said that in construing it "it would be incorrect and would produce endless difficulties if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose it might be said with respect to each that it was not necessary because the end might be obtained by other means." "Congress," said this court, "must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution. The government is to pay the debt of the Union and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills or otherwise, and to take those precautions which will render the transaction safe." It was in this case, as we have already remarked, that a law giving priority to debts due to the United States was ruled to be constitutional for the reason that it appeared to Congress to be an eligible means to enable the government to pay the debts of the Union.

It was, however, in *McCulloch* v. *Maryland* that the fullest consideration was given to this clause of the Constitution granting auxiliary powers, and a construction adopted that has ever since been accepted as determining its true meaning. We shall not now go over the ground there trodden. It is familiar to the legal profession, and, indeed, to the whole country. Suffice it to say, in that case it was finally settled that in the gift by the Constitution to Congress of authority to enact laws "necessary and proper" for the execution of all the powers created by it, the necessity spoken

* 2 Cranch, 358.

of is not to be understood as an absolute one. On the contrary, this court then held that the sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Said Chief Justice Marshall, in delivering the opinion of the court: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional." The case also marks out with admirable precision the province of this court. It declares that "when the law (enacted by Congress) is not prohibited and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court (it was said) disclaims all pretensions to such a power." It is hardly necessary to say that these principles are received with universal assent. Even in *Hepburn* v. *Griswold*,* both the majority and minority of the court concurred in accepting the doctrines of *McCulloch* v. *Maryland* as sound expositions of the Constitution, though disagreeing in their application.

With these rules of constitutional construction before us, settled at an early period in the history of the government, hitherto universally accepted, and not even now doubted, we have a safe guide to a right decision of the questions before us. Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited.

* 8 Wallace, 603.

This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect, or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times.

We do not propose to dilate at length upon the circumstances in which the country was placed, when Congress attempted to make treasury notes a legal tender. They are of too recent occurrence to justify enlarged description. Suffice it to say that a civil war was then raging which seriously threatened the overthrow of the government and the destruction of the Constitution itself. It demanded the equipment and support of large armies and navies, and the employment of money to an extent beyond the capacity of all ordinary sources of supply. Meanwhile the public treasury was nearly empty, and the credit of the government, if not stretched to its utmost tension, had become nearly exhausted. Moneyed institutions had advanced largely of their means, and more could not be expected of them. They had been compelled to suspend specie payments. Taxation was inadequate to pay even the interest on the debt already incurred, and it was impossible to await the income of additional taxes. The necessity was immediate and pressing. The army was unpaid. There was then due to the soldiers in the field nearly a score of millions of dollars. The requisitions from the War and Navy Departments for supplies exceeded fifty millions, and the current expenditure was over one million per day. The entire amount of coin in the country, including that in private hands, as well as that in banking institutions, was insufficient to supply the need of the government three months, had it all been poured into the treasury. Foreign credit we had none. We say nothing of the overhanging paralysis of trade, and of business gener-

ally, which threatened loss of confidence in the ability of the government to maintain its continued existence, and therewith the complete destruction of all remaining national credit.

It was at such a time and in such circumstances that Congress was called upon to devise means for maintaining the army and navy, for securing the large supplies of money needed, and, indeed, for the preservation of the government created by the Constitution. It was at such a time and in such an emergency that the legal tender acts were passed. Now, if it were certain that nothing else would have supplied the absolute necessities of the treasury, that nothing else would have enabled the government to maintain its armies and navy, that nothing else would have saved the government and the Constitution from destruction, while the legal tender acts would, could any one be bold enough to assert that Congress transgressed its powers? Or if these enactments did work these results, can it be maintained now that they were not for a legitimate end, or "appropriate and adapted to that end," in the language of Chief Justice Marshall? That they did work such results is not to be doubted. Something revived the drooping faith of the people; something brought immediately to the government's aid the resources of the nation, and something enabled the successful prosecution of the war, and the preservation of the national life. What was it, if not the legal tender enactments?

But if it be conceded that some other means might have been chosen for the accomplishment of these legitimate and necessary ends, the concession does not weaken the argument. It is urged now, after the lapse of nine years, and when the emergency has passed, that treasury notes without the legal tender clause might have been issued, and that the necessities of the government might thus have been supplied. Hence it is inferred there was no necessity for giving to the notes issued the capability of paying private debts. At best this is mere conjecture. But admitting it to be true, what does it prove? Nothing more than that

Congress had the choice of means for a legitimate end, each appropriate, and adapted to that end, though, perhaps, in different degrees. What then? Can this court say that it ought to have adopted one rather than the other? Is it our province to decide that the means selected were beyond the constitutional power of Congress, because we may think that other means to the same ends would have been more appropriate and equally efficient? That would be to assume legislative power, and to disregard the accepted rules for construing the Constitution. The degree of the necessity for any congressional enactment, or the relative degree of its appropriateness, if it have any appropriateness, is for consideration in Congress, not here. Said Chief Justice Marshall, in *McCulloch* v. *Maryland*, as already stated, "When the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground."

It is plain to our view, however, that none of those measures which it is now conjectured might have been substituted for the legal tender acts, could have met the exigencies of the case, at the time when those acts were passed. We have said that the credit of the government had been tried to its utmost endurance. Every new issue of notes which had nothing more to rest upon than government credit, must have paralyzed it more and more, and rendered it increasingly difficult to keep the army in the field, or the navy afloat. It is an historical fact that many persons and institutions refused to receive and pay those notes that had been issued, and even the head of the treasury represented to Congress the necessity of making the new issues legal tenders, or rather, declared it impossible to avoid the necessity. The vast body of men in the military service was composed of citizens who had left their farms, their workshops, and their business with families and debts to be provided for. The government could not pay them with ordinary treasury notes, nor could they discharge their debts

with such a currency. Something more was needed, something that had all the uses of money. And as no one could be compelled to take common treasury notes in payment of debts, and as the prospect of ultimate redemption was remote and contingent, it is not too much to say that they must have depreciated in the market long before the war closed, as did the currency of the Confederate States. Making the notes legal tenders gave them a new use, and it needs no argument to show that the value of things is in proportion to the uses to which they may be applied.

It may be conceded that Congress is not authorized to enact laws in furtherance even of a legitimate end, merely because they are useful, or because they make the government stronger. There must be some relation between the means and the end; some adaptedness or appropriateness of the laws to carry into execution the powers created by the Constitution. But when a statute has proved effective in the execution of powers confessedly existing, it is not too much to say that it must have had some appropriateness to the execution of those powers. The rules of construction heretofore adopted, do not demand that the relationship between the means and the end shall be direct and immediate. Illustrations of this may be found in several of the cases above cited. The charter of a Bank of the United States, the priority given to debts due the government over private debts, and the exemption of Federal loans from liability to State taxation, are only a few of the many which might be given. The case of *Veazie Bank* v. *Fenno** presents a suggestive illustration. There a tax of ten per cent. on State bank notes in circulation was held constitutional, not merely because it was a means of raising revenue, but as an instrument to put out of existence such a circulation in competition with notes issued by the government. There, this court, speaking through the Chief Justice, avowed that it is the constitutional right of Congress to provide a currency for the whole country; that this might be done by coin, or United States

* 8 Wallace, 533.

notes, or notes of National banks; and that it cannot be questioned Congress may constitutionally secure the benefit of such a currency to the people by appropriate legislation. It was said there can be no question of the power of this government to emit bills of credit; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to make them a currency uniform in value and description, and convenient and useful for circulation. Here the substantive power to tax was allowed to be employed for improving the currency. It is not easy to see why, if State bank notes can be taxed out of existence for the purposes of indirectly making United States notes more convenient and useful for commercial purposes, the same end may not be secured directly by making them a legal tender.

Concluding, then, that the provision which made treasury notes a legal tender for the payment of all debts other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the government, we proceed to inquire whether it was forbidden by the letter or spirit of the Constitution. It is not claimed that any express prohibition exists, but it is insisted that the spirit of the Constitution was violated by the enactment. Here those who assert the unconstitutionality of the acts mainly rest their argument. They claim that the clause which conferred upon Congress power "to coin money, regulate the value thereof, and of foreign coin," contains an implication that nothing but that which is the subject of coinage, nothing but the precious metals can ever be declared by law to be money, or to have the uses of money. If by this is meant that because certain powers over the currency are expressly given to Congress, all other powers relating to the same subject are impliedly forbidden, we need only remark that such is not the manner in which the Constitution has always been construed. On the contrary it has been ruled that power over a particular subject may be exercised as auxiliary to an express power, though there is another express power relat-

ing to the same subject, less comprehensive.* There an express power to punish a certain class of crimes (the only direct reference to criminal legislation contained in the Constitution), was not regarded as an objection to deducing authority to punish other crimes from another substantive and defined grant of power. There are other decisions to the same effect. To assert, then, that the clause enabling Congress to coin money and regulate its value tacitly implies a denial of all other power over the currency of the nation, is an attempt to introduce a new rule of construction against the solemn decisions of this court. So far from its containing a lurking prohibition, many have thought it was intended to confer upon Congress that general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation than our own, especially when considered in connection with the other clause which denies to the States the power to coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts. We do not assert this now, but there are some considerations touching these clauses which tend to show that if any implications are to be deduced from them, they are of an enlarging rather than a restraining character. The Constitution was intended to frame a government as distinguished from a league or compact, a government supreme in some particulars over States and people. It was designed to provide the same currency, having a uniform legal value in all the States. It was for this reason the power to coin money and regulate its value was conferred upon the Federal government, while the same power as well as the power to emit bills of credit was withdrawn from the States. The States can no longer declare what shall be money, or regulate its value. Whatever power there is over the currency is vested in Congress. If the power to declare what is money is not in Congress, it is annihilated. This may indeed have been intended. Some powers that usually belong to sovereignties were extin-

* United States *v.* Marigold, 9 Howard, 560.

guished, but their extinguishment was not left to inference. In most cases, if not in all, when it was intended that governmental powers, commonly acknowledged as such, should cease to exist, both in the States and in the Federal government, it was expressly denied to both, as well to the United States as to the individual States. And generally, when one of such powers was expressly denied to the States only, it was for the purpose of rendering the Federal power more complete and exclusive. Why, then, it may be asked, if the design was to prohibit to the new government, as well as to the States, that general power over the currency which the States had when the Constitution was framed, was such denial not expressly extended to the new government, as it was to the States? In view of this it might be argued with much force that when it is considered in what brief and comprehensive terms the Constitution speaks, how sensible its framers must have been that emergencies might arise when the precious metals (then more scarce than now) might prove inadequate to the necessities of the government and the demands of the people—when it is remembered that paper money was almost exclusively in use in the States as the medium of exchange, and when the great evil sought to be remedied was the want of uniformity in the current value of money, it might be argued, we say, that the gift of power to coin money and regulate the value thereof, was understood as conveying general power over the currency, the power which had belonged to the States, and which they surrendered. Such a construction, it might be said, would be in close analogy to the mode of construing other substantive powers granted to Congress. They have never been construed literally, and the government could not exist if they were. Thus the power to carry on war is conferred by the power to "declare war." The whole system of the transportation of the mails is built upon the power to establish post-offices and post-roads. The power to regulate commerce has also been extended far beyond the letter of the grant. Even the advocates of a strict literal construction of the phrase, "to coin money and regulate the value thereof,"

while insisting that it defines the material to be coined as metal, are compelled to concede to Congress large discretion in all other particulars. The Constitution does not ordain what metals may be coined, or prescribe that the legal value of the metals, when coined, shall correspond at all with their intrinsic value in the market. Nor does it even affirm that Congress may declare anything to be a legal tender for the payment of debts. Confessedly the power to regulate the value of money coined, and of foreign coins, is not exhausted by the first regulation. More than once in our history has the regulation been changed without any denial of the power of Congress to change it, and it seems to have been left to Congress to determine alike what metal shall be coined, its purity, and how far its statutory value, as money, shall correspond, from time to time, with the market value of the same metal as bullion. How then can the grant of a power to coin money and regulate its value, made in terms so liberal and unrestrained, coupled also with a denial to the States of all power over the currency, be regarded as an implied prohibition to Congress against declaring treasury notes a legal tender, if such declaration is appropriate, and adapted to carrying into execution the admitted powers of the government?

We do not, however, rest our assertion of the power of Congress to enact legal tender laws upon this grant. We assert only that the grant can, in no just sense, be regarded as containing an implied prohibition against their enactment, and that, if it raises any implications, they are of complete power over the currency, rather than restraining.

We come next to the argument much used, and, indeed, the main reliance of those who assert the unconstitutionality of the legal tender acts. It is that they are prohibited by the spirit of the Constitution because they indirectly impair the obligation of contracts. The argument, of course, relates only to those contracts which were made before February, 1862, when the first act was passed, and it has no bearing upon the question whether the acts are valid when

applied to contracts made after their passage. The argument assumes two things,—*first*, that the acts do, in effect, impair the obligation of contracts, and *second*, that Congress is prohibited from taking any action which may indirectly have that effect. Neither of these assumptions can be accepted. It is true that under the acts, a debtor, who became such before they were passed, may discharge his debt with the notes authorized by them, and the creditor is compellable to receive such notes in discharge of his claim. But whether the obligation of the contract is thereby weakened can be determined only after considering what was the contract obligation. It was not a duty to pay gold or silver, or the kind of money recognized by law at the time when the contract was made, nor was it a duty to pay money of equal intrinsic value in the market. (We speak now of contracts to pay money generally, not contracts to pay some specifically defined species of money.) The expectation of the creditor and the anticipation of the debtor may have been that the contract would be discharged by the payment of coined metals, but neither the expectation of one party to the contract respecting its fruits, nor the anticipation of the other constitutes its obligation. There is a well-recognized distinction between the expectation of the parties to a contract and the duty imposed by it.* Were it not so the expectation of results would be always equivalent to a binding engagement that they should follow. But the *obligation* of a contract to pay money is to pay that which the law shall recognize as money when the payment is to be made. If there is anything settled by decision it is this, and we do not understand it to be controverted.† No one ever doubted that a debt of one thousand dollars, contracted before 1834, could be paid by one hundred eagles coined after that year, though they contained no more gold than ninety-four eagles such as were coined when the contract was made, and this,

* Apsden *v.* Austin, 5 Adolphus & Ellis, N. S. 671; Dunn *v.* Sayles, Ib. 685; Coffin *v.* Landis, 10 Wright, 426.

† Davies, 28; Barrington *v.* Potter, Dyer, 81, b., fol. 67; Faw *v.* Marsteller, 2 Cranch, 29.

not because of the intrinsic value of the coin, but because of its legal value. The eagles coined after 1834, were not money until they were authorized by law, and had they been coined before, without a law fixing their legal value, they could no more have paid a debt than uncoined bullion, or cotton, or wheat. Every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power. Nor is this singular. A covenant for quiet enjoyment is not broken, nor is its obligation impaired by the government's taking the land granted in virtue of its right of eminent domain. The expectation of the covenantee may be disappointed. He may not enjoy all he anticipated, but the grant was made and the covenant undertaken in subordination to the paramount right of the government.* We have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wide distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money. It cannot, therefore, be maintained that the legal tender acts impaired the obligation of contracts.

Nor can it be truly asserted that Congress may not, by its action, indirectly impair the obligation of contracts, if by the expression be meant rendering contracts fruitless, or partially fruitless. Directly it may, confessedly, by passing a bankrupt act, embracing past as well as future transac-

* Dobbins *v.* Brown, 2 Jones (Pennsylvania), 75; Workman *v.* Mifflin, 6 Casey, 362.

tions. This is obliterating contracts entirely. So it may relieve parties from their apparent obligations indirectly in a multitude of ways. It may declare war, or, even in peace, pass non-intercourse acts, or direct an embargo. All such measures may, and must operate seriously upon existing contracts, and may not merely hinder, but relieve the parties to such contracts entirely from performance. It is, then, clear that the powers of Congress may be exerted, though the effect of such exertion may be in one case to annul, and in other cases to impair the obligation of contracts. And it is no sufficient answer to this to say it is true only when the powers exerted were expressly granted. There is no ground for any such distinction. It has no warrant in the Constitution, or in any of the decisions of this court. We are accustomed to speak for mere convenience of the express and implied powers conferred upon Congress. But in fact the auxiliary powers, those necessary and appropriate to the execution of other powers singly described, are as expressly given as is the power to declare war, or to establish uniform laws on the subject of bankruptcy. They are not catalogued, no list of them is made, but they are grouped in the last cluse of section eight of the first article, and granted in the same words in which all other powers are granted to Congress. And this court has recognized no such distinction as is now attempted. An embargo suspends many contracts and renders performance of others impossible, yet the power to enforce it has been declared constitutional.* The power to enact a law directing an embargo is one of the auxiliary powers, existing only because appropriate in time of peace to regulate commerce, or appropriate to carrying on war. Though not conferred as a substantive power, it has not been thought to be in conflict with the Constitution, because it impairs indirectly the obligation of contracts. That discovery calls for a new reading of the Constitution.

If, then, the legal tender acts were justly chargeable with impairing contract obligations, they would not, for that

* Gibbons v. Ogden, 9 Wheaton, 1.

reason, be forbidden, unless a different rule is to be applied to them from that which has hitherto prevailed in the construction of other powers granted by the fundamental law. But, as already intimated, the objection misapprehends the nature and extent of the contract obligation spoken of in the Constitution. As in a state of civil society property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government, and no obligation of a contract can extend to the defeat of legitimate government authority.

Closely allied to the objection we have just been considering is the argument pressed upon us that the legal tender acts were prohibited by the spirit of the fifth amendment, which forbids taking private property for public use without just compensation or due process of law. That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals. A new tariff, an embargo, a draft, or a war may inevitably bring upon individuals great losses; may, indeed, render valuable property almost valueless. They may destroy the worth of contracts. But whoever supposed that, because of this, a tariff could not be changed, or a non-intercourse act, or an embargo be enacted, or a war be declared? By the act of June 28, 1834, a new regulation of the weight and value of gold coin was adopted, and about six per cent. was taken from the weight of each dollar. The effect of this was that all creditors were subjected to a corresponding loss. The debts then due became solvable with six per cent. less gold than was required to pay them before. The result was thus precisely what it is contended the legal tender acts worked. But was it ever imagined this was taking private property without compensation or without due process of law? Was the idea ever advanced that the new regulation of gold coin was against the spirit of the fifth amendment? And has any

one in good faith avowed his belief that even a law debasing the current coin, by increasing the alloy, would be taking private property? It might be impolitic and unjust, but could its constitutionality be doubted? Other statutes have, from time to time, reduced the quantity of silver in silver coin without any question of their constitutionality. It is said, however, now, that the act of 1834 only brought the legal value of gold coin more nearly into correspondence with its actual value in the market, or its relative value to silver. But we do not perceive that this varies the case or diminishes its force as an illustration. The creditor who had a thousand dollars due him on the 31st day of July, 1834 (the day before the act took effect), was entitled to a thousand dollars of coined gold of the weight and fineness of the then existing coinage. The day after, he was entitled only to a sum six per cent. less in weight and in market value, or to a smaller number of silver dollars. Yet he would have been a bold man who had asserted that, because of this, the obligation of the contract was impaired, or that private property was taken without compensation or without due process of law. No such assertion, so far as we know, was ever made. Admit it was a hardship, but it is not every hardship that is unjust, much less that is unconstitutional; and certainly it would be an anomaly for us to hold an act of Congress invalid merely because we might think its provisions harsh and unjust.

We are not aware of anything else which has been advanced in support of the proposition that the legal tender acts were forbidden by either the letter or the spirit of the Constitution. If, therefore, they were, what we have endeavored to show, appropriate means for legitimate ends, they were not transgressive of the authority vested in Congress.

Here we might stop; but we will notice briefly an argument presented in support of the position that the unit of money value must possess intrinsic value. The argument is derived from assimilating the constitutional provision respecting a standard of weights and measures to that confer-

ring the power to coin money and regulate its value. It is said there can be no uniform standard of weights without weight, or of measure without length or space, and we are asked how anything can be made a uniform standard of value which has itself no value? This is a question foreign to the subject before us. The legal tender acts do not attempt to make paper a standard of value. We do not rest their validity upon the assertion that their emission is coinage, or any regulation of the value of money; nor do we assert that Congress may make anything which has no value money. What we do assert is, that Congress has power to enact that the government's promises to pay money shall be, for the time being, equivalent in value to the representative of value determined by the coinage acts, or to multiples thereof. It is hardly correct to speak of a standard of value. The Constitution does not speak of it. It contemplates a standard for that which has gravity or extension; but value is an ideal thing. The coinage acts fix its unit as a dollar; but the gold or silver thing we call a dollar is, in no sense, a standard of a dollar. It is a representative of it. There might never have been a piece of money of the denomination of a dollar. There never was a pound sterling coined until 1815, if we except a few coins struck in the reign of Henry VIII, almost immediately debased, yet it has been the unit of British currency for many generations. It is, then, a mistake to regard the legal tender acts as either fixing a standard of value or regulating money values, or making that money which has no intrinsic value.

But, without extending our remarks further, it will be seen that we hold the acts of Congress constitutional as applied to contracts made either before or after their passage. In so holding, we overrule so much of what was decided in *Hepburn* v. *Griswold*,* as ruled the acts unwarranted by the Constitution so far as they apply to contracts made before their enactment. That case was decided by a divided court, and by a court having a less number of judges than the law

* 8 Wallace, 603.

then in existence provided this court shall have. These cases have been heard before a full court, and they have received our most careful consideration. The questions involved are constitutional questions of the most vital importance to the government and to the public at large. We have been in the habit of treating cases involving a consideration of constitutional power differently from those which concern merely private right.* We are not accustomed to hear them in the absence of a full court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error. And it is no unprecedented thing in courts of last resort, both in this country and in England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it as our duty so to decide and to affirm both these judgments.

The other questions raised in the case of *Knox* v. *Lee* were substantially decided in *Texas* v. *White*.†

JUDGMENT IN EACH CASE AFFIRMED.

Mr. Justice BRADLEY, concurring:

I concur in the opinion just read, and should feel that it was out of place to add anything further on the subject were it not for its great importance. On a constitutional question involving the powers of the government it is proper that every aspect of it, and every consideration bearing upon it, should be presented, and that no member of the court should hesitate to express his views. I do not propose, however, to go into the subject at large, but only to make such additional observations as appear to me proper for consideration, at the risk of some inadvertent repetition.

The Constitution of the United States established a gov-

* Briscoe v. Bank of Kentucky, 8 Peters, 118. † 7 Wallace, 700.

ernment, and not a league, compact, or partnership. It was constituted by the people. It is called a government. In the eighth section of Article I it is declared that Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in *the government of the United States*, or in any department or office thereof. As a government it was invested with all the attributes of sovereignty. It is expressly declared in Article VI that the Constitution, and the laws of the United States made in pursuance thereof, and all treaties made under the authority of the United States, shall be the supreme law of the land.

The doctrine so long contended for, that the Federal Union was a mere compact of States, and that the States, if they chose, might annul or disregard the acts of the National legislature, or might secede from the Union at their pleasure, and that the General government had no power to coerce them into submission to the Constitution, should be regarded as definitely and forever overthrown. This has been finally effected by the National power, as it had often been before, by overwhelming argument.

The United States is not only a government, but it is a National government, and the only government in this country that has the character of nationality. It is invested with power over all the foreign relations of the country, war, peace, and negotiations and intercourse with other nations; all which are forbidden to the State governments. It has jurisdiction over all those general subjects of legislation and sovereignty which affect the interests of the whole people equally and alike, and which require uniformity of regulations and laws, such as the coinage, weights and measures, bankruptcies, the postal system, patent and copyright laws, the public lands, and interstate commerce; all which subjects are expressly or impliedly prohibited to the State governments. It has power to suppress insurrections, as well as to repel invasions, and to organize, arm, discipline, and call into service the militia of the whole country. The Presi-

dent is charged with the duty and invested with the power to take care that the laws be faithfully executed. The judiciary has jurisdiction to decide controversies between the States, and between their respective citizens, as well as questions of National concern; and the government is clothed with power to guarantee to every State a republican form of government, and to protect each of them against invasion and domestic violence. For the purpose of carrying into effect and executing these and the other powers conferred, and of providing for the common defence and general welfare, Congress is further invested with the taxing power in all its forms, except that of laying duties on exports, with the power to borrow money on the National credit, to punish crimes against the laws of the United States and of nations, to constitute courts, and to make all laws necessary and proper for carrying into execution the various powers vested in the government or any department or officer thereof.

Such being the character of the General government, it seems to be a self-evident propositi on that it is invested with all those inherent and implied powers which, at the time of adopting the Constitution, were generally considered to belong to every government as such, and as being essential to the exercise of its functions. If this proposition be not true, it certainly is true that the government of the United States has express authority, in the clause last quoted, to make all such laws (usually regarded as inherent and implied) as may be necessary and proper for carrying on the government as constituted, and vindicating its authority and existence.

Another proposition equally clear is, that at the time the Constitution was adopted, it was, and had for a long time been, the practice of most, if not all, civilized governments, to employ the public credit as a means of anticipating the national revenues for the purpose of enabling them to exer cise their governmental functions, and to meet the various exigencies to which all nations are subject; and that the mode of employing the public credit was various in different countries, and at different periods—sometimes by the agency

of a national bank, sometimes by the issue of exchequer bills or bills of credit, and sometimes by pledges of the public domain. In this country, the habit had prevailed from the commencement of the eighteenth century, of issuing bills of credit; and the revolution of independence had just been achieved, in great degree, by the means of similar bills issued by the Continental Congress. These bills were generally made a legal tender for the payment of all debts public and private, until, by the influence of English merchants at home, Parliament prohibited the issue of bills with that quality. This prohibition was first exercised in 1751, against the New England colonies; and subsequently, in 1763, against all the colonies. It was one of the causes of discontent which finally culminated in the Revolution. Dr. Franklin endeavored to obtain a repeal of the prohibitory acts, but only succeeded in obtaining from Parliament, in 1773, an act authorizing the colonies to make their bills receivable for taxes and debts due to the colony that issued them. At the breaking out of the war, the Continental Congress commenced the issue of bills of credit, and the war was carried on without other resources for three or four years. It may be said with truth, that we owe our national independence to the use of this fiscal agency. Dr. Franklin, in a letter to a friend, dated from Paris, in April, 1779, after deploring the depreciation which the Continental currency had undergone, said: "The only consolation under the evil is, that the public debt is proportionately diminished by the depreciation; and this by a kind of imperceptible tax, every one having paid a part of it in the fall of value that took place between the receiving and paying such sums as passed through his hands." He adds: "This effect of paper currency is not understood this side the water. And indeed the whole is a mystery even to the politicians, how we have been able to continue a war four years without money, and how we could pay with paper, that had no previously fixed fund appropriated specially to redeem it. This currency, as we manage it, is a wonderful machine. It performs its office when we issue it; it pays and clothes troops, and pro-

vides victuals and ammunition."* In a subsequent letter, of 9th October, 1780, he says: "They [the Congress] issued an immense quantity of paper bills, to pay, clothe, arm, and feed their troops, and fit out ships; and with this paper, without taxes for the first three years, they fought and battled one of the most powerful nations of Europe."† The Continental bills were not made legal tenders at first, but in January, 1777, the Congress passed resolutions declaring that they ought to pass current in all payments, and be deemed in value equal to the same nominal sums in Spanish dollars, and that any one refusing so to receive them ought to be deemed an enemy to the liberties of the United States; and recommending to the legislatures of the several States to pass laws to that effect.‡

Massachusetts and other colonies, on the breaking out of the war, disregarded the prohibition of Parliament, and again conferred upon their bills the quality of legal tender.§

These precedents are cited without reference to the policy or impolicy of the several measures in the particular cases; that is always a question for the legislative discretion. They establish the *historical fact* that when the Constitution was adopted, the employment of bills of credit was deemed a legitimate means of meeting the exigencies of a regularly constituted government, and that the affixing to them of the quality of a legal tender was regarded as entirely discretionary with the legislature. Such a quality was a mere incident that might or might not be annexed. The Continental Congress not being a regular government, and not having the power to make laws for the regulation of private transactions, referred the matter to the State legislatures. The framers of the Constitution were familiar with all this history. They were familiar with the governments which had thus exercised the prerogative of issuing bills having the quality, and intended for the purposes referred to. They had first drawn their breath under these governments; they

* Franklin's Works, vol. 8, p. 329. † Ib. p. 507.

‡ Journals of Congress, vol. 3, p. 19–20; Pitkin's History, vol. 2, p. 155

§ Bancroft's History, vol. 7, p. 324.

had helped to administer them. They had seen the important uses to which these securities might be applied.

In view, therefore, of all these facts when we find them establishing the present government, with all the powers before rehearsed, giving to it, amongst other things, the sole control of the money of the country and expressly prohibiting the *States* from issuing bills of credit and from making anything but gold and silver a legal tender, and imposing no such restriction upon the General government, how can we resist the conclusion that they intended to leave to it that power unimpaired, in case the future exigencies of the nation should require its exercise?

I am aware that according to the report of Mr. Madison in the original draft of the Constitution, the clause relating to the borrowing of money read, "to borrow money and emit bills on the credit of the United States," and that the words, "and emit bills," were, after some debate, struck out. But they were struck out with diverse views of members, some deeming them useless and others deeming them hurtful. The result was that they chose to adopt the Constitution as it now stands, without any words either of grant or restriction of power, and it is our duty to construe the instrument by its words, in the light of history, of the general nature of government, and the incidents of sovereignty.

The same argument was employed against the creation of a United States bank. A power to create corporations was proposed in the Convention and rejected. The power was proposed with a limited application to cases where the public good might require them and the authority of a single State might be incompetent. It was still rejected. It was then confined to the building of canals, but without effect. It was argued that such a power was unnecessary and might be dangerous. Yet Congress has not only chartered two United States banks, whose constitutionality has been sustained by this court, but several other institutions. As a means appropriate and conducive to the end of carrying into effect the other powers of the government, such as that of borrowing money with promptness and dispatch, and

facilitating the fiscal operations of the government, it was deemed within the power of Congress to create such an institution under the general power given to pass all such laws as might be necessary and proper for carrying into execution the other powers granted. The views of particular members or the course of proceedings in the Convention cannot control the fair meaning and general scope of the Constitution as it was finally framed and now stands. It is a finished document, complete in itself, and to be interpreted in the light of history and of the circumstances of the period in which it was framed.

No one doubts at the present day nor has ever seriously doubted that the power of the government to emit bills exists. It has been exercised by the government without question for a large portion of its history. This being conceded, the incidental power of giving such bills the quality of legal tender follows almost as a matter of course.

I hold it to be the prerogative of every government not restrained by its Constitution to anticipate its resources by the issue of exchequer bills, bills of credit, bonds, stock, or a banking apparatus. Whether those issues shall or shall not be receivable in payment of private debts is an incidental matter in the discretion of such government unless restrained by constitutional prohibition.

This power is entirely distinct from that of coining money and regulating the value thereof. It is not only embraced in the power to make all necessary auxiliary laws, but it is incidental to the power of borrowing money. It is often a necessary means of anticipating and realizing promptly the national resources, when, perhaps, promptness is necessary to the national existence. It is not an attempt to coin money out of a valueless material, like the coinage of leather or ivory or kowrie shells. It is a pledge of the national credit. It is a promise by the government to pay dollars; it is not an attempt to make dollars. The standard of value is not changed. The government simply demands that its credit shall be accepted and received by public and private creditors during the pending exigency. Every government

has a right to demand this when its existence is at stake. The interests of every citizen are bound up with the fate of the government. None can claim exemption. If they cannot trust their government in its time of trial they are not worthy to be its citizens.

But it is said, why not borrow money in the ordinary way? The answer is, the legislative department, being the nation itself, speaking by its representatives, has a choice of methods, and is the master of its own discretion. One mode of borrowing, it is true, is to issue the government bonds, and to invite capitalists to purchase them. But this is not the only mode. It is often too tardy and inefficient. In time of war or public danger, Congress, representing the sovereign power, by its right of eminent domain, may authorize the President to take private property for the public use and give government certificates therefor. This is largely done on such occasions. It is an indirect way of compelling the owner of property to lend to the government. He is forced to rely on the national credit.

Can the poor man's cattle, and horses, and corn be thus taken by the government when the public exigency requires it, and cannot the rich man's bonds and notes be in like manner taken to reach the same end? If the government enacts that the certificates of indebtedness which it gives to the farmer for his cattle and provender shall be receivable by the farmer's creditors in payment of his bonds and notes, is it anything more than transferring the government loan from the hands of one man to the hands of another—perhaps far more able to advance it? Is it anything more than putting the securities of the capitalist on the same platform as the farmer's stock?

No one supposes that these government certificates are never to be paid—that the day of specie payments is never to return. And it matters not in what form they are issued. The principle is still the same. Instead of certificates they may be treasury notes, or paper of any other form. And their payment may not be made directly in coin, but they may be first convertible into government bonds, or other

government securities. Through whatever changes they pass, their ultimate destiny is *to be paid.* But it is the prerogative of the legislative department to determine when the fit time for payment has come. It may be long delayed, perhaps many may think it too long after the exigency has passed. But the abuse of a power, if proven, is no argument against its existence. And the courts are not responsible therefor. Questions of political expediency belong to the legislative halls, not to the judicial forum. It might subserve the present good if we should declare the legal tender act unconstitutional, and a temporary public satisfaction might be the result. But what a miserable consideration would that be for a permanent loss of one of the just and necessary powers of the government; a power which, had Congress failed to exercise it when it did, we might have had no court here to-day to consider the question, nor a government or a country to make it important to do so.

Another ground of the power to issue treasury notes or bills is the necessity of providing a proper currency for the country, and especially of providing for the failure or disappearance of the ordinary currency in times of financial pressure and threatened collapse of commercial credit. Currency is a national necessity. The operations of the government, as well as private transactions, are wholly dependent upon it. The State governments are prohibited from making money or issuing bills. Uniformity of money was one of the objects of the Constitution. The coinage of money and regulation of its value is conferred upon the General government exclusively. That government has also the power to issue bills. It follows, as a matter of necessity, as a consequence of these various provisions, that it is specially the duty of the General government to provide a National currency. The States cannot do it, except by the charter of local banks, and that remedy, if strictly legitimate and constitutional, is inadequate, fluctuating, uncertain, and insecure, and operates with all the partiality to local interests, which it was the very object of the Constitution to avoid. But regarded as a duty of the General government, it is

strictly in accordance with the spirit of the Constitution, as well as in line with the national necessities.

It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the *sword* and the *purse*, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, power of absolute control over the resources of the country. Its armies must be filled, and its navies manned, by the citizens in person. Its material of war, its munitions, equipment, and commissary stores must come from the industry of the country. This can only be stimulated into activity by a proper financial system, especially as regards the currency.

A constitutional government, notwithstanding the right of eminent domain, cannot take physical and forcible possession of all that it may need to defend the country, and is reluctant to exercise such a power when it can be avoided. *It must purchase*, and by purchase command materials and supplies, products of manufacture, labor, service of every kind. The government cannot, by physical power, compel the workshops to turn out millions of dollars' worth of manufactures in leather, and cloth, and wood, and iron, which are the very first conditions of military equipment. It must stimulate and set in motion the industry of the country. In other words, it must *purchase*. But it cannot purchase with specie. That is soon exhausted, hidden, or exported. It must purchase by *credit*. It cannot force its citizens to take its bonds. It must be able to lay its hands on the currency—that great instrument of exchange by which the people transact all their own affairs with each other; that thing which they must have, and which lies at the foundation of all industrial effort and all business in the community. When the ordinary currency disappears, as it often does in time of war, when business begins to stagnate and general bankruptcy is imminent, then the government

must have power at the same time to renovate its own resources and to revive the drooping energies of the nation by supplying it with a circulating medium. What that medium shall be, what its character and qualities, will depend upon the greatness of the exigency, and the degree of promptitude which it demands. These are legislative questions. The heart of the nation must not be crushed out. The people must be aided to pay their debts and meet their obligations. The debtor interest of the country represent its bone and sinew, and must be encouraged to pursue its avocations. If relief were not afforded universal bankruptcy would ensue, and industry would be stopped, and government would be paralyzed in the paralysis of the people. It is an undoubted fact that during the late civil war, the activity of the workshops and factories, mines and machinery, shipyards, railroads and canals of the loyal States, caused by the issue of the legal tender currency, constituted an inexhaustible fountain of strength to the National cause.

These views are exhibited, not for the purpose of showing that the power is a desirable one, and therefore ought to be assumed; much less for the purpose of giving judgment on the expediency of its exercise in any particular case; but for the purpose of showing that it is one of those vital and essential powers inhering in every national sovereignty and necessary to its self-preservation.

But the creditor interest will lose some of its gold! Is gold the one thing needful? Is it worse for the creditor to lose a little by depreciation than everything by the bankruptcy of his debtor? Nay, is it worse than to lose everything by the subversion of the government? What is it that protects him in the accumulation and possession of his wealth? Is it not the government and its laws? and can he not consent to trust that government for a brief period until it shall have vindicated its right to exist? All property and all rights, even those of liberty and life, are held subject to the fundamental condition of being liable to be impaired by providential calamities and national vicissitudes. Taxes impair my income or the value of my property. The con-

demnation of my homestead, or a valuable part of it for a public improvement, or public defence, will sometimes destroy its value to me; the conscription may deprive me of liberty and destroy my life. So with the power of government to borrow money, a power to be exercised by the consent of the lender, if possible, but to be exercised without his consent, if necessary. And when exercised in the form of legal tender notes or bills of credit, it may operate for the time being to compel the creditor to receive the *credit of the government* in place of the gold which he expected to receive from his debtor. All these are fundamental political conditions on which life, property, and money are respectively held and enjoyed under our system of government, nay, under any system of government. There are times when the exigencies of the state rightly absorb all subordinate considerations of private interest, convenience, or feeling; and at such times, the temporary though compulsory acceptance by a private creditor of the government credit, in lieu of his debtor's obligation to pay, is one of the slightest forms in which the necessary burdens of society can be sustained. Instead of being a violation of such obligation, it merely subjects it to one of those conditions under which it is held and enjoyed.

Another consideration bearing upon this objection is the fact that the power given to Congress to coin money and regulate the value thereof, includes the power to alter the metallic standard of coinage, as was done in 1834; whereby contracts made before the alteration, and payable thereafter, were satisfied by the payment of six per cent. less of pure gold than was contemplated when the contracts were made. This power and this consequence flowing from its exercise, were much discussed in the great case of Mixed Moneys, in Sir John Davies's Reports,* and it was there held to belong to the king's ordinary prerogative over the coinage of money, without any sanction from Parliament. Subsequent acts of Parliament fixed the standard of purity and weight

* Page 48.

in the coinage of the realm, which has not been altered for a hundred and fifty years past. But the same authority which fixed it in the time of Queen Anne, is competent at any time to change it. Whether it shall be changed or not is a matter of mere legislative discretion. And such is undoubtedly the public law of this country. Therefore, the mere fact that the value of debts may be depreciated by legal tender laws, is not conclusive against their validity; for that is clearly the effect of other powers which may be exercised by Congress in its discretion.

It follows as a corollary from these views, that it makes no difference in the principle of the thing, that the contract of the debtor is a specific engagement, in terms, to pay gold or silver money, or to pay in specie. So long as the money of the country, in whatever terms described, is in contemplation of the parties, it is the object of the legal tender laws to make the credit of the government a lawful substitute therefor. If the contract is for the delivery of a chattel or a specific commodity or substance, the law does not apply. If it is *bonâ fide* for so many carats of diamonds or so many ounces of gold as bullion, the specific contract must be performed. But if terms which naturally import such a contract are used by way of evasion, and money only is intended, the law reaches the case. Not but that Congress might limit the operation of the law in any way it pleased. It might make an exception of cases where the contract expressly promises gold and silver money. But if it has not done so; if the enactment is general in its terms, specific promises to pay the money in specie are just as much subject to the operation of the law as a mere promise to pay so many dollars—for that, in contemplation of law, is a promise to pay money in specie.

Hence I differ from my brethren in the decision of one of the cases now before the court, to wit, the case of *Tribilcock* v. *Wilson*,* in which the promise (made in June, 1861), was to pay, one year after date, the sum of nine hundred dollars

* See *infra*, 687.

with ten per cent. interest from date, payable in specie. Of course this difference arises from the different construction given to the legal tender acts. I do not understand the majority of the court to decide that an act so drawn as to embrace, in terms, contracts payable in specie, would not be constitutional. Such a decision would completely nullify the power claimed for the government. For it would be very easy, by the use of one or two additional words, to make all contracts payable in specie.

It follows as another corollary from the views which I have expressed that the power to make treasury notes a legal tender, whilst a mere incidental one to that of issuing the notes themselves, and to one of the forms of borrowing money, is nevertheless a power not to be resorted to except upon extraordinary and pressing occasions, such as war or other public exigencies of great gravity and importance; and should be no longer exerted than all the circumstances of the case demand.

I do not say that it is a war power, or that it is only to be called into exercise in time of war; for other public exigencies may arise in the history of a nation which may make it expedient and imperative to exercise it. But of the occasions when, and of the times how long, it shall be exercised and in force, it is for the legislative department of the government to judge. Feeling sensibly the judgments and wishes of the people, that department cannot long (if it is proper to suppose that within its sphere it ever can) misunderstand the business interests and just rights of the community.

I deem it unnecessary to enter into a minute criticism of all the sayings, wise or foolish, that have, from time to time, been uttered on this subject by statesmen, philosophers, or theorists. The writers on political economy are generally opposed to the exercise of the power. The considerations which they adduce are very proper to be urged upon the depositary of the power. The question whether the power exists in a national government, is a great practical question relating to the national safety and independence, and states-

men are better judges of this question than economists can be. Their judgment is ascertained in the history and practice of governments, and in the silence as well as the words of our written Constitution. A parade of authorities would serve but little purpose after Chief Justice Marshall's profound discussion of the powers of Congress in the great case of *McCulloch* v. *The State of Maryland.* If we speak not according to the spirit of the Constitution and authorities, and the incontrovertible logic of events, elaborate extracts cannot add weight to our decision.

Great stress has been laid on the supposed fact that England in all its great wars and emergencies, has never made its exchequer bills a legal tender. This imports a eulogium on British conservatism in relation to contracts, which that nation would hardly regard as flattering. It is well known that for over twenty years, from 1797 to 1820, the most stringent paper money system that ever existed prevailed in England, and lay at the foundation of all her elasticity and endurance. It is true that the Bank of England notes, which the bank was required to issue until they reached an amount then unprecedented, were not technically made legal tenders, except for the purpose of relieving from arrest and imprisonment for debt; but worse than that, the bank was expressly *forbidden* to redeem its notes in specie, except for a certain small amount to answer the purpose of change. The people were obliged to receive them. The government had nothing else wherewith to pay its domestic creditors. The people themselves had no specie, for that was absorbed by the Bank of England, and husbanded for the uses of government in carrying on its foreign wars and paying its foreign subsidies. The country banks depended on the Bank of England for support, and of course they could not redeem their circulation in specie. The result was that the nation was perforce obliged to treat the bank notes as a legal tender or suffer inevitable bankruptcy. In such a state of things it went very hard with any man who demanded specie in fulfilment of his contracts. A man by the name of Grigby tried it, and brought his case into court, and elicited from

Lord Alvanley the energetic expression: "Thank God, few such creditors as the present plaintiff have been found since the passing of the act."* It is to be presumed that he was the last that ever showed himself in an English court.

It is well known that since the resumption of specie payments, the act of 1833, rechartering the bank, has expressly made the Bank of England notes a legal tender.

It is unnecessary to refer to other examples. France is a notable one. Her assignats, issued at the commencement and during the Revolution, performed the same office as our Continental bills; and enabled the nation to gather up its latent strength and call out its energies. Almost every nation of Europe, at one time or another, has found it necessary, or expedient, to resort to the same method of carrying on its operations or defending itself against aggression.

It would be sad, indeed, if this great nation were now to be deprived of a power so necessary to enable it to protect its own existence, and to cope with the other great powers of the world. No doubt foreign powers would rejoice if we should deny the power. No doubt foreign creditors would rejoice. They have, from the first, taken a deep interest in the question. But no true friend to our government, to its stability and its power to sustain itself under all vicissitudes, can be indifferent to the great wrong which it would sustain by a denial of the power in question—a power to be seldom exercised, certainly; but one, the possession of which is so essential, and as it seems to me, so undoubted.

Regarding the question of power as so important to the stability of the government, I cannot acquiesce in the decision of *Hepburn* v. *Griswold*. I cannot consent that the government should be deprived of one of its just powers by a decision made at the time, and under the circumstances, in which that decision was made. On a question relating to the power of the government, where I am perfectly satisfied that it has the power, I can never consent to abide by a decision denying it, unless made with reasonable una-

* 2 Bosanquet & Puller, 528.

nimity and acquiesced in by the country. Where the decision is recent, and is only made by a bare majority of the court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the court are dissatisfied with the former decision. And in this case, with all deference and respect for the former judgment of the court, I am so fully convinced that it was erroneous, and prejudicial to the rights, interest, and safety of the general government, that I, for one, have no hesitation in reviewing and overruling it. It should be remembered, that this court, at the very term in which, and within a few weeks after, the decision in *Hepburn* v. *Griswold* was delivered, when the vacancies on the bench were filled, determined to hear the question reargued. This fact must necessarily have had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal.

In my judgment the decrees in all the cases before us should be affirmed.

The CHIEF JUSTICE, dissenting:

We dissent from the argument and conclusion in the opinion just announced.

The rule, by which the constitutionality of an act of Congress passed in the alleged exercise of an implied power is to be tried, is no longer, in this court, open to question. It was laid down in the case of *McCulloch* v. *Maryland*,* by Chief Justice Marshall, in these words: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

And it is the plain duty of the court to pronounce acts of

* 4 Wheaton, 421.

Congress not made in the exercise of an express power nor coming within the reasonable scope of this rule, if made in virtue of an implied power, unwarranted by the Constitution. Acts of Congress not made in pursuance of the Constitution are not laws.

Neither of these propositions was questioned in the case of *Hepburn* v. *Griswold*.* The judges who dissented in that case maintained that the clause in the act of February 25th, 1862, making the United States notes a legal tender in payment of debts was an appropriate, plainly adapted means to a constitutional end, not prohibited but consistent with the letter and spirit of the Constitution. The majority of the court as then constituted, five judges out of eight, felt "obliged to conclude that an act making mere promises to pay dollars a legal tender in payments of debts previously contracted is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress, is inconsistent with the spirit of the Constitution, and is prohibited by the Constitution."

In the case of the *United States* v. *De Witt*,† we held unanimously that a provision of the internal revenue law prohibiting the sale of certain illuminating oil in the States was unconstitutional, though it might increase the production and sale of other oils, and consequently the revenue derived from them, because this consequence was too remote and uncertain to warrant the court in saying that the prohibition was an appropriate and plainly adapted means for carrying into execution the power to lay and collect taxes.

We agree, then, that the question whether a law is a necessary and proper means to execution of an express power, within the meaning of these words as defined by the rule—that is to say, a means appropriate, plainly adapted, not prohibited but consistent with the letter and spirit of the Constitution,—is a judicial question. Congress may not adopt any means for the execution of an express power that Congress may see fit to adopt. It must be a necessary and

* 8 Wallace, 606. † 9 Id. 41.

proper means within the fair meaning of the rule. If not such it cannot be employed consistently with the Constitution. Whether the means actually employed in a given case are such or not the court must decide. The court must judge of the fact, Congress of the degree of necessity.

A majority of the court, five to four, in the opinion which has just been read, reverses the judgment rendered by the former majority of five to three, in pursuance of an opinion formed after repeated arguments, at successive terms, and careful consideration; and declares the legal tender clause to be constitutional; that is to say, that an act of Congress making promises to pay dollars legal tender as coined dollars in payment of pre-existing debts is a means appropriate and plainly adapted to the exercise of powers expressly granted by the Constitution, and not prohibited itself by the Constitution but consistent with its letter and spirit. And this reversal, unprecedented in the history of the court, has been produced by no change in the opinions of those who concurred in the former judgment. One closed an honorable judicial career by resignation after the case had been decided,* after the opinion had been read and agreed to in conference,† and after the day when it would have been delivered in court,‡ had not the delivery been postponed for a week to give time for the preparation of the dissenting opinion. The court was then full, but the vacancy caused by the resignation of Mr. Justice Grier having been subsequently filled and an additional justice having been appointed under the act increasing the number of judges to nine, which took effect on the first Monday of December, 1869, the then majority find themselves in a minority of the court, as now constituted, upon the question.

Their convictions, however, remain unchanged. We adhere to the opinion pronounced in *Hepburn* v. *Griswold.* Reflection has only wrought a firmer belief in the soundness of the constitutional doctrines maintained, and in the importance of them to the country.

* 27th November, 1869, † 29th January, 1870. ‡ 31st January, 1870.

We agree that much of what was said in the dissenting opinion in that case, which has become the opinion of a majority of the court as now constituted, was correctly said. We fully agree in all that was quoted from Chief Justice Marshall. We had indeed accepted, without reserve, the definition of implied powers in which that great judge summed up his argument, of which the language quoted formed a part. But if it was intended to ascribe to us "the doctrine that when an act of Congress is brought to the test of this clause of the Constitution," namely, the clause granting the power of ancillary legislation, "its necessity must be absolute, and its adaptation to the conceded purpose unquestionable," we must be permitted not only to disclaim it, but to say that there is nothing in the opinion of the then majority which approaches the assertion of any such doctrine. We did indeed venture to cite, with approval, the language of Judge Story in his great work on the Constitution, that the words necessary and proper were intended to have "a sense at once admonitory and directory," and to require that the means used in the execution of an express power "should be *bonâ fide*, appropriate to the end,"* and also ventured to say that the tenth amendment, reserving to the States or the people all powers not delegated to the United States by the Constitution, nor prohibited by it to the States, "was intended to have a like admonitory and directory sense," and to restrain the limited government established by the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated. In thus quoting Judge Story, and in this expression of our own opinion, we certainly did not suppose it possible that we could be understood as asserting that the clause in question "was designed as a restriction upon the ancillary power incidental to every grant of power in express terms." It was this proposition which "was stated and refuted" in *McCulloch* v. *Maryland*. That refutation touches nothing said by us. We assert only that the

* 1 Story on the Constitution, p. 42, § 1251.

words of the Constitution are such as admonish Congress that implied powers are not to be rashly or lightly assumed, and that they are not to be exercised at all, unless, in the words of Judge Story, they are "*bonâ fide* appropriate to the end," or, in the words of Chief Justice Marshall, "appropriate, plainly adapted" to a constitutional and legitimate end, and "not prohibited, but consistent with the letter and spirit of the Constitution."

There appears, therefore, to have been no real difference of opinion in the court as to the rule by which the existence of an implied power is to be tested, when *Hepburn* v. *Griswold* was decided, though the then minority seem to have supposed there was. The difference had reference to the application of the rule rather than to the rule itself.

The then minority admitted that in the powers relating to coinage, standing alone, there is not "a sufficient warrant for the exercise of the power" to make notes a legal tender, but thought them "not without decided weight, when we come to consider the question of the existence of this power as one necessary and proper for carrying into execution other admitted powers of the government." This weight they found in the fact that an "express power over the lawful money of the country was confided to Congress and forbidden to the States." It seemed to them not an "unreasonable inference" that, in a certain contingency, "making the securities of the government perform the office of money in the payment of debts would be in harmony with the power expressly granted to coin money." We perceive no connection between the express power to coin money and the inference that the government may, in any contingency, make its securities perform the functions of coined money, as a legal tender in payment of debts. We have supposed that the power to exclude from circulation notes not authorized by the national government might, perhaps, be deduced from the power to regulate the value of coin; but that the power of the government to emit bills of credit was an exercise of the power to borrow money, and that its power over the currency was incidental to that power and to the

power to regulate commerce. This was the doctrine of the *Veazie Bank* v. *Fenno*,* although not fully elaborated in that case. The question whether the quality of legal tender can be imparted to these bills depends upon distinct considerations.

Was, then, the power to make these notes of the government—these bills of credit—a legal tender in payments an appropriate, plainly-adapted means to a legitimate and constitutional end? or, to state the question as the opinion of the then minority stated it, "does there exist any power in Congress, or in the government, by express grant, in execution of which this legal tender act was necessary and proper in the sense here defined and under the circumstances of its passage?"

The opinion of the then minority affirmed the power on the ground that it was a necessary and proper means, within the definition of the court, in the case of *McCulloch* v. *Maryland*, to carry on war, and that it was not prohibited by the spirit or letter of the Constitution, though it was admitted to be a law impairing the obligation of contracts, and notwithstanding the objection that it deprived many persons of their property without compensation and without due process of law.

We shall not add much to what was said in the opinion of the then majority on these points.

The reference made in the opinion just read, as well as in the argument at the bar, to the opinions of the Chief Justice, when Secretary of the Treasury, seems to warrant, if it does not require, some observations before proceeding further in the discussion.

It was his fortune at the time the legal tender clause was inserted in the bill to authorize the issue of United States notes and received the sanction of Congress, to be charged with the anxious and responsible duty of providing funds for the prosecution of the war. In no report made by him to Congress was the expedient of making the notes of the

* 8 Wallace, 548.

United States a legal tender suggested. He urged the issue of notes payable on demand in coin or received as coin in payment of duties. When the State banks had suspended specie payments, he recommended the issue of United States notes receivable for all loans to the United States and all government dues except duties on imports. In his report of December, 1862, he said that "United States notes receivable for bonds bearing a secure specie interest are next best to notes convertible into coin," and after stating the financial measures which in his judgment were advisable, he added: "The Secretary recommends, therefore, no mere paper money scheme, but on the contrary a series of measures looking to a safe and gradual return to gold and silver as the only permanent basis, standard, and measure of value recognized by the Constitution." At the session of Congress before this report was made, the bill containing the legal tender clause had become a law. He was extremely and avowedly averse to this clause, but was very solicitous for the passage of the bill to authorize the issue of United States notes then pending. He thought it indispensably necessary that the authority to issue these notes, should be granted by Congress. The passage of the bill was delayed, if not jeoparded, by the difference of opinion which prevailed on the question of making them a legal tender. It was under these circumstances that he expressed the opinion, when called upon by the Committee of Ways and Means, that it was necessary;* and he was not sorry to find it sustained by the decisions of respected courts, not unanimous indeed, nor without contrary decisions of State courts equally respectable. Examination and reflection under more propitious circumstances have satisfied him that this opinion was erroneous, and he does not hesitate to declare it. He would do so, just as unhesitatingly, if his favor to the legal tender clause had been at that time decided, and his opinion as to the constitutionality of the measure clear.

* Letters of the Secretary of the Treasury to the Committee of Ways and Means, January 22 and 29, 1862; Spaulding's Financial History, pp. 27, 46, 54.

Was the making of the notes a legal tender necessary to the carrying on the war? In other words, was it necessary to the execution of the power to borrow money? It is not the question whether the issue of notes was necessary, nor whether any of the financial measures of the government were necessary. The issuing of the circulation commonly known as greenbacks was necessary, and was constitutional. They were necessary to the payment of the army and the navy and to all the purposes for which the government uses money. The banks had suspended specie payment, and the government was reduced to the alternative of using their paper or issuing its own.

Now it is a common error, and in our judgment it was the error of the opinion of the minority in *Hepburn* v. *Griswold*, and is the error of the opinion just read, that considerations pertinent to the issue of United States notes have been urged in justification of making them a legal tender. The real question is, was the making them a legal tender a necessary means to the execution of the power to borrow money? If the notes would circulate as well without as with this quality it is idle to urge the plea of such necessity. But the circulation of the notes was amply provided for by making them receivable for all national taxes, all dues to the government, and all loans. This was the provision relied upon for the purpose by the secretary when the bill was first prepared, and his reflections since have convinced him that it was sufficient. Nobody could pay a tax, or any debt, or buy a bond without using these notes. As the notes, not being immediately redeemable, would undoubtedly be cheaper than coin, they would be preferred by debtors and purchasers. They would thus, by the universal law of trade, pass into general circulation. As long as they were maintained by the government at or near par value of specie they would be accepted in payment of all dues, private as well as public. Debtors as a general rule would pay in nothing else unless compelled by suit, and creditors would accept them as long as they would lose less by acceptance than by suit. In new transactions, sellers would demand and purchasers would

pay the premium for specie in the prices of commodities. The difference to them, in the currency, whether of coin or of paper, would be in the fluctuations to which the latter is subject. So long as notes should not sink so low as to induce creditors to refuse to receive them because they could not be said to be in any just sense payments of debts due, a provision for making them a legal tender would be without effect except to discredit the currency to which it was applied. The real support of note circulation not convertible on demand into coin, is receivability for debts due the government, including specie loans, and limitation of amount. If the amount is smaller than is needed for the transactions of the country, and the law allows the use in these transactions of but one description of currency, the demand for that description will prevent its depreciation. But history shows no instance of paper issues so restricted. An approximation in limitation is all that is possible, and this was attempted when the issues of United States notes were restricted to one hundred and fifty millions. But this limit was soon extended to four hundred and fifty millions, and even this was soon practically removed by the provision for the issue of notes by the national banking associations without any provision for corresponding reduction in the circulation of United States notes; and still further by the laws authorizing the issue of interest-bearing securities, made a tender for their amount, excluding interest.

The best support for note circulation is not limitation, but receivability, especially for loans bearing coin interest. This support was given until the fall of 1864, when a loan bearing increased currency interest, payable in three years and convertible into a loan bearing less coin interest, was substituted for the six per cent. and five per cent. loans bearing specie interest, for which the notes had been previously received.

It is plain that a currency so supported cannot depreciate more than the loans; in other words, below the general credit of the country. It will rise or fall with it. At the present moment, if the notes were received for five per cent.

bonds, they would be at par. In other words, specie payments would be resumed.

Now, does making the notes a legal tender increase their value? It is said that it does, by giving them a new use. The best political economists say that it does not. When the government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent. This certainly does not improve the value of its notes. It is an element of depreciation. In addition, it creates a powerful interest in the debtor class and in the purchasers of bonds to depress to the lowest point the credit of the notes. The cheaper these become, the easier the payment of debts, and the more profitable the investments in bonds bearing coin interest.

On the other hand, the higher prices become, for everything the government needs to buy, and the greater the accumulation of public as well as private debt. It is true that such a state of things is acceptable to debtors, investors in bonds, and speculators. It is their opportunity of relief or wealth. And many are persuaded by their representations that the forced circulation is not only a necessity but a benefit. But the apparent benefit is a delusion and the necessity imaginary. In their legitimate use, the notes are hurt not helped by being made a legal tender. The legal tender quality is only valuable for the purposes of dishonesty. Every honest purpose is answered as well and better without it.

We have no hesitation, therefore, in declaring our conviction that the making of these notes a legal tender, was not a necessary or proper means to the carrying on war or to the exercise of any express power of the government.

But the absence of necessity is not our only, or our weightiest objection to this legal tender clause. We still think, notwithstanding the argument adduced to the contrary, that it does violate an express provision of the Constitution, and the spirit, if not the letter, of the whole instrument. It cannot be maintained that legislation justly

obnoxious to such objections can be maintained as the exercise of an implied power. There can be no implication against the Constitution. Legislation to be warranted as the exercise of implied powers must not be "prohibited, but consistent with the letter and spirit of the Constitution."

The fifth amendment provides that no person shall be deprived of life, liberty, or property without compensation or due process of law. The opinion of the former minority says that the argument against the validity of the legal tender clause, founded on this constitutional provision, is "too vague for their perception." It says that a "declaration of war would be thus unconstitutional," because it might depreciate the value of property; and "the abolition of tariff on sugar, or iron," because it might destroy the capital employed in those manufactures; and "the successive issues of government bonds," because they might make those already in private hands less valuable. But it seems to have escaped the attention of the then minority that to declare war, to lay and repeal taxes, and to borrow money, are all express powers, and that the then majority were opposing the prohibition of the Constitution to the claim of an implied power. Besides, what resemblance is there between the effect of the exercise of these express powers and the operation of the legal tender clause upon pre-existing debts? The former are indirect effects of the exercise of undisputed powers. The latter acts directly upon the relations of debtor and creditor. It violates that fundamental principle of all just legislation that the legislature shall not take the property of A. and give it to B. It says that B., who has purchased a farm of A. for a certain price, may keep the farm without paying for it, if he will only tender certain notes which may bear some proportion to the price, or be even worthless. It seems to us that this is a manifest violation of this clause of the Constitution.

We think also that it is inconsistent with the spirit of the Constitution in that it impairs the obligation of contracts. In the opinion of the then minority it is frankly said: "Undoubtedly it is a law impairing the obligation of contracts made

before its passage," but it is immediately added: "While the Constitution forbids the States to pass such laws, it does not forbid Congress," and this opinion, as well as the opinion just read, refers to the express authority to establish a uniform system of bankruptcy as a proof that it was not the intention of the Constitution to withhold that power. It is true that the Constitution grants authority to pass a bankrupt law, but our inference is, that in this way only can Congress discharge the obligation of contracts. It may provide for ascertaining the inability of debtors to perform their contracts, and, upon the surrender of all their property may provide for their discharge. But this is a very different thing from providing that they may satisfy contracts without payment, without pretence of inability, and without any judicial proceeding.

That Congress possesses the general power to impair the obligation of contracts is a proposition which, to use the language of Chief Justice Marshall,* "must find its vindication in a train of reasoning not often heard in courts of justice." "It may well be added," said the same great judge,† "whether the nature of society and of government does not prescribe some limits to legislative power; and, if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, can be seized without compensation? To the legislature all legislative power is granted, but the question whether the act of transferring the property of an individual to the public is in the nature of a legislative power is well worthy of serious reflection."

And if the property of an individual cannot be transferred to the public, how much less to another individual?

These remarks of Chief Justice Marshall were made in a case in which it became necessary to determine whether a certain act of the legislature of Georgia was within the constitutional prohibition against impairing the obligation of contracts. And they assert fundamental principles of society and government in which that prohibition had its origin.

* Fletcher v. Peck 6 Cranch, 132. † Ibid. 135.

They apply with great force to the construction of the Constitution of the United States. In like manner and spirit Mr. Justice Chase had previously declared* that "an act of the legislature contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." Among such acts he instances "a law that destroys or impairs the lawful private contracts of citizens." Can we be mistaken in saying that such a law is contrary to the spirit of a Constitution ordained to establish justice? Can we be mistaken in thinking that if Marshall and Story were here to pronounce judgment in this case they would declare the legal tender clause now in question to be prohibited by and inconsistent with the letter and spirit of the Constitution?

It is unnecessary to say that we reject wholly the doctrine, advanced for the first time, we believe, in this court, by the present majority, that the legislature has any "powers under the Constitution which grow out of the aggregate of powers conferred upon the government, or out of the sovereignty instituted by it." If this proposition be admitted, and it be also admitted that the legislature is the sole judge of the necessity for the exercise of such powers, the government becomes practically absolute and unlimited.

Our observations thus far have been directed to the question of the constitutionality of the legal tender clause and its operation upon contracts made before the passage of the law. We shall now consider whether it be constitutional in its application to contracts made after its passage. In other words, whether Congress has power to make anything but coin a legal tender.

And here it is well enough again to say that we do not question the authority to issue notes or to fit them for a circulating medium, or to promote their circulation by providing for their receipt in payment of debts to the government, and for redemption either in coin or in bonds; in short, to adapt them to use as currency. Nor do we question the

* Calder *v.* Bull, 3 Dallas, 388.

lawfulness of contracts stipulating for payment in such notes, or the propriety of enforcing the performance of such contracts by holding the tender of such currency, according to their terms, sufficient. The question is, has Congress power to make the notes of the government, redeemable or irredeemable, a legal tender without contract and against the will of the person to whom they are tendered? In considering this question we assume as a fundamental proposition that it is the duty of every government to establish a standard of value. The necessity of such a standard is indeed universally acknowledged. Without it the transactions of society would become impossible. All measures, whether of extent, or weight, or value, must have certain proportions of that which they are intended to measure. The unit of extent must have certain definite length, the unit of weight certain definite gravity, and the unit of value certain definite value. These units, multiplied or subdivided, supply the standards by which all measures are properly made. The selection, therefore, by the common consent of all nations, of gold and silver as the standard of value was natural, or, more correctly speaking, inevitable. For whatever definitions of value political economists may have given, they all agree that gold and silver have more value in proportion to weight and size, and are less subject to loss by wear or abrasion than any other material capable of easy subdivision and impression, and that their value changes less and by slower degrees, through considerable periods of time, than that of any other substance which could be used for the same purpose. And these are qualities indispensable to the convenient use of the standard required. In the construction of the constitutional grant of power to establish a standard of value *every presumption* is, therefore, against that which would authorize the adoption of any other materials than those sanctioned by universal consent.

But the terms of the only express grant in the Constitution of power to establish such a standard leave little room for presumptions. The power conferred is the power to coin money, and these words must be understood as they were

used at the time the Constitution was adopted. And we have been referred to no authority which at that time defined coining otherwise than as minting or stamping metals for money; or money otherwise than as metal coined for the purposes of commerce. These are the words of Johnson, whose great dictionary contains no reference to money of paper.

It is true that notes issued by banks, both in England and America, were then in circulation, and were used in exchanges, and in common speech called money, and that bills of credit, issued both by Congress and by the States, had been recently in circulation under the same general name; but these notes and bills were never regarded as real money, but were always treated as its represensatives only, and were described as currency. The legal tender notes themselves do not purport to be anything else than promises to pay money. They have been held to be securities, and therefore exempt from State taxation;* and the idea that it was ever designed to make such notes a standard of value by the framers of the Constitution is wholly new. It seems to us impossible that it could have been entertained. Its assertion seems to us to ascribe folly to the framers of our fundamental law, and to contradict the most conspicuous facts in our public history.

The power to coin money was a power to determine the fineness, weight, and denominations of the metallic pieces by which values were to be measured; and we do not perceive how this meaning can be extended without doing violence to the very words of the Constitution by imposing on them a sense they were never intended to bear. This construction is supported by contemporaneous and all subsequent action of the legislature; by all the recorded utterances of statesmen and jurists, and the unbroken tenor of judicial opinion until a very recent period, when the excitement of the civil war led to the adoption, by many, of different views.

* Bank *v.* Supervisors, 7 Wallace, 31.

The sense of the Convention which framed the Constitution is clear, from the account given by Mr. Madison of what took place when the power to emit bills of credit was stricken from the reported draft. He says distinctly that he acquiesced in the motion to strike out, because the government would not be disabled thereby from the use of public notes, so far as they would be safe and proper, while it cut off the pretext for a paper currency, and particularly for making the bills a tender either for public or private debts.* The whole discussion upon bills of credit proves, beyond all possible question, that the Convention regarded the power to make notes a legal tender as absolutely excluded from the Constitution.†

The papers of the Federalist, widely circulated in favor of the ratification of the Constitution, discuss briefly the power to coin money, as a power to fabricate metallic money, without a hint that any power to fabricate money of any other description was given to Congress;‡ and the views which it promulgated may be fairly regarded as the views of those who voted for adoption.

Acting upon the same views, Congress took measures for the establishment of a mint, exercising thereby the power to coin money, and has continued to exercise the same power, in the same way, until the present day. It established the dollar as the money unit, determined the quantity and quality of gold and silver of which each coin should consist, and prescribed the denominations and forms of all coins to be issued.§ Until recently no one in Congress ever suggested that that body possessed power to make anything else a standard of value.

Statesmen who have disagreed widely on other points have agreed in the opinion that the only constitutional measures of value are metallic coins, struck as regulated by the authority of Congress. Mr. Webster expressed not only his opinion but the universal and settled conviction of

* 3 Madison's Papers, 1346.

† See *infra*, pp. 653, 656.—REP.

‡ Dawson's Federalist, 294.

§ 1 Stat. at Large, 225, 246, and subsequent acts.

the country when he said:* "Most unquestionably there is no legal tender and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver, either the coinage of our mints or foreign coin at rates regulated by Congress. This is a constitutional principle perfectly plain and of the very highest importance. The States are prohibited from making anything but gold and silver a tender in payment of debts, and although no such express prohibition is applied to Congress, *yet as Congress has no power granted to it in this respect but to coin money and regulate the value of foreign coin*, it clearly has no power to substitute paper or anything else for coin as a tender in payment of debts and in discharge of contracts."

And this court, in *Gwin* v. *Breedlove*,† said: "*By the Constitution of the United States gold and silver coin* made current by law *can only be tendered* in payment of debts." And in *The United States* v. *Marigold*,‡ this court, speaking of the trust and duty of maintaining a uniform and pure metallic standard of uniform value throughout the Union, said: "The power of coining money and regulating its value *was delegated to Congress by the Constitution for the very purpose*, as assigned by the framers of that instrument, *of creating and preserving the uniformity and purity of such a standard of value.*"

The present majority of the court say that legal tender notes "have become the universal measure of values," and they hold that the legislation of Congress, substituting such measures for coin by making the notes a legal tender in payment, is warranted by the Constitution.

But if the plain sense of words, if the contemporaneous exposition of parties, if common consent in understanding, if the opinions of courts avail anything in determining the meaning of the Constitution, it seems impossible to doubt that the power to coin money is a power to establish a uniform standard of value, and that no other power to establish such a standard, by making notes a legal tender, is conferred upon Congress by the Constitution.

* 4 Webster's Works, 271, 280. † 2 Howard, 38. ‡ 9 Id. 567.

My brothers CLIFFORD and FIELD concur in these views, but in consideration of the importance of the principles involved will deliver their separate opinions. My brother NELSON also dissents.

Mr. Justice CLIFFORD, dissenting:

Money, in the constitutional sense, means coins of gold and silver fabricated and stamped by authority of law as a measure of value, pursuant to the power vested in Congress by the Constitution.*

Coins of copper may also be minted for small fractional circulation, as authorized by law and the usage of the government for eighty years, but it is not necessary to discuss that topic at large in this investigation.†

Even the authority of Congress upon the general subject does not extend beyond the power to coin money, regulate the value thereof and of foreign coin.‡

Express power is also conferred upon Congress to fix the standard of weights and measures, and of course that standard, as applied to future transactions, may be varied or changed to promote the public interest, but the grant of power in respect to the standard of value is expressed in more guarded language, and the grant is much more restricted.

Power to fix the standard of weights and measures is evidently a power of comparatively wide discretion, but the power to regulate the value of the money authorized by the Constitution to be coined is a definite and precise grant of power, admitting of very little discretion in its exercise, and is not equivalent, except to a very limited extent, to the power to fix the standard of weights and measures, as the money authorized by that clause of the Constitution is coined money, and as a necessary consequence must be money of actual value, fabricated from the precious metals generally used for that purpose at the period when the Constitution was framed.

* Walker's Science of Wealth, 124; Liverpool on Coins, 8.

† 7 Jefferson's Works, 462.

‡ Constitution, art. 8, clause 5.

Coined money, such as is authorized by that clause of the instrument, consists only of the coins of the United States fabricated and stamped by authority of law, and is the same money as that described in the next clause of the same section as the current coins of the United States, and is the same money also as "the gold and silver coins" described in the tenth section of the same article, which prohibits the States from coining money, emitting bills of credit, or making "anything but gold and silver coin a tender in payment of debts."

Intrinsic value exists in gold and silver, as well before as after it is fabricated and stamped as coin, which shows conclusively that the principal discretion vested in Congress under that clause of the Constitution consists in the power to determine the denomination, fineness, or value and description of the coins to be struck, and the relative proportion of gold or silver, whether standard or pure, and the proportion of alloy to be used in minting the coins, and to prescribe the mode in which the intended object of the grant shall be accomplished and carried into practical effect.

Discretion, to some extent, in prescribing the value of the coins minted, is beyond doubt vested in Congress, but the plain intent of the Constitution is that Congress, in determining that matter, shall be governed chiefly by the weight and intrinsic value of the coins, as it is clear that if the stamped value of the same should much exceed the real value of gold and silver not coined, the minted coins would immediately cease to be either current coins or a standard of value as contemplated by the Constitution.* Commercial transactions imperiously require a standard of value, and the commercial world, at a very early period in civilization, adopted gold and silver as the true standard for that purpose, and the standard originally adopted has ever since continued to be so regarded by universal consent to the present time.

Paper emissions have, at one time or another, been authorized and employed as currency by most commercial nations,

* Huskisson on Depreciation of Currency. 22 Financial Pamphlets, 579.

and by no government, past or present, more extensively than by the United States, and yet it is safe to affirm that all experience in its use as a circulating medium has demonstrated the proposition that it cannot by any legislation, however stringent, be made a standard of value or the just equivalent of gold and silver. Attempts of the kind have always failed, and no body of men, whether in public or private stations, ever had more instructive teachings of the truth of that remark than the patriotic men who framed the Federal Constitution, as they had seen the power to emit bills of credit freely exercised during the war of the Revolution, not only by the Confederation, but also by the States, and knew from bitter experience its calamitous effects and the utter worthlessness of such a circulating medium as a standard of value. Such men so instructed could not have done otherwise than they did do, which was to provide an irrepealable standard of value, to be coined from gold and silver, leaving as little upon the subject to the discretion of Congress as was consistent with a wise forecast and an invincible determination that the essential principles of the Constitution should be perpetual as the means to secure the blessings of liberty to themselves and their posterity.

Associated as the grant to coin money and regulate the value thereof is with the grant to fix the standard of weights and measures, the conclusion, when that fact is properly weighed in connection with the words of the grant, is irresistible that the purpose of the framers of the Constitution was to provide a permanent standard of value which should, at all times and under all circumstances, consist of coin, fabricated and stamped, from gold and silver, by authority of law, and that they intended at the same time to withhold from Congress, as well as from the States, the power to substitute any other money as a standard of value in matters of finance, business, trade, or commerce.

Support to that view may also be drawn from the last words of the clause giving Congress the unrestricted power to regulate the value of foreign coin, as it would be difficult if not impossible to give full effect to the standard of value

prescribed by the Constitution, in times of fluctuation, if the circulating medium could be supplied by foreign coins not subject to any congressional regulation as to their value.

Exclusive power to regulate the alloy and value of the coin struck by their own authority, or by the authority of the States, was vested in Congress under the Confederation, but the Congress was prohibited from enacting any regulation as to the value of the coins unless nine States assented to the proposed regulation.

Subject to the power of Congress to pass such regulations it is unquestionably true that the States, under the Confederation as well as the United States, possessed the power to coin money, but the Constitution, when it was adopted, denied to the States all authority upon the subject, and also ordained that they should not make anything but gold and silver coin a tender in payment of debts.

Beyond all doubt the framers of the Constitution intended that the money unit of the United States, for measuring values, should be one dollar, as the word dollar in the plural form is employed in the body of the Constitution, and also in the seventh amendment, recommended by Congress at its first session after the Constitution was adopted. Two years before that, to wit, July 6, 1785, the Congress of the Confederation enacted that the money unit of the United States should "be one dollar," and one year later, to wit, August 8, 1786, they established the standard for gold and silver, and also provided that the money of account of the United States should correspond with the coins established by law.*

On the 4th of March, 1789, Congress first assembled under the Constitution, and proceeded without unnecessary delay to enact such laws as were necessary to put the government in operation which the Constitution had ordained and established. Ordinances had been passed during the Confedera-

* 1 Laws of the U. S., 1st ed., 646; 1 Curtis's History of the Constitution, 443; 10 Journals of Congress (Dunlap's ed.), 225; 1 Life of Gouverneur Morris, 273; 11 Journals of Congress, 179.

tion to organize the executive departments, and for the establishment of a mint, but the new Constitution did not perpetuate any of those laws, and yet Congress continued to legislate for a period of three years before any new law was passed prescribing the money unit or the money of account, either for "the public offices" or for the courts. Throughout that period it must have been understood that those matters were impliedly regulated by the Constitution, as tariffs were enacted, tonnage duties imposed, laws passed for the collection of duties, the several executive departments created, and the judiciary of the United States organized and empowered to exercise full jurisdiction under the Constitution.

Duties of tonnage and import duties were required, by the act of the 31st of July, 1789, to be paid "in gold and silver coin," and Congress in the same act adopted comprehensive regulations as to the value of foreign coin, but no provision was made for coining money or for a standard of value, except so far as that subject is involved in the regulation as to the value of foreign coin, or for a money unit, nor was any regulation prescribed as to the money of account. Revenue for the support of the government, under those regulations, was to be derived solely from duties of tonnage and import duties, and the express provision was that those duties should be collected in gold and silver coin.*

Legislation under the Constitution had proceeded thus far before the Treasury Department was created. Treasury regulations for the collection, safe-keeping, and disbursement of the public moneys became indispensable, and Congress, on the 2d September, 1789, passed the act to establish the Treasury Department, which has ever since remained in force.† By that act, the Secretary of the Treasury is declared to be the head of the department, and it is made his duty, among other things, to digest and prepare plans for the improvement and management of the public finances

* 1 Stat. at Large, 24; Ib. 29. † Ib. 65.

and for the support of the public credit; to prepare and report estimates of the public revenue and of the public expenditures; to superintend the collection of the revenue; to prescribe forms of keeping and stating accounts and for making returns; to grant all warrants for moneys to be issued from the treasury, in pursuance of appropriations by law, and to perform all such services relative to the finances as he shall be directed to perform.

Moneys collected from duties of tonnage and from import duties constituted at that period the entire resources of the national treasury, and the antecedent act of Congress, providing for the collection of those duties, imperatively required that all such duties should be paid in gold and silver coin, from which it follows that the moneys mentioned in the act creating the Treasury Department were moneys of gold and silver coin which were collected as public revenue from the duties of tonnage and import duties imposed by the before-mentioned prior acts of Congress. Appropriations made by Congress were understood as appropriations of moneys in the treasury, and all warrants issued by the Secretary of the Treasury were understood to be warrants for the payment of gold and silver coin. Forms for keeping and stating accounts, and for making returns and for warrants for moneys to be issued from the treasury were prescribed, and in all those forms the Secretary of the Treasury adopted the money unit recognized in the Constitution, and which had been ordained four years before by the Congress of the Confederation.

Argument to show that the national treasury was organized on the basis that the gold and silver coins of the United States were to be the standard of value is unnecessary, as it is a historical fact which no man or body of men can ever successfully contradict. Public attention had been directed to the necessity of establishing a mint for the coinage of gold and silver, several years before the Convention met to frame the Constitution, and a committee was appointed by the Congress of the Confederation to consider and report upon the subject. They reported on the 21st February,

1782, more than a year before the treaty of peace, in favor of creating such an establishment, and on the 16th of October, 1786, the Congress adopted an ordinance providing that a mint should be established for the coinage of gold, silver, and copper, agreeably to the resolves of Congress previously mentioned, which prescribed the standard of gold and silver, and recognized the money unit established by the resolves passed in the preceding year.*

Congressional legislation organizing the new government had now progressed to the point where it became necessary to re-examine that subject and to make provision for the exercise of the power to coin money, as authorized by the Constitution. Pursuant to that power Congress, on April 2d, 1792, passed the act establishing a mint for the purpose of a national coinage, and made provision, among other things, that coins of gold and silver, of certain fineness and weight, and of certain denominations, value and descriptions, should be from time to time struck and coined at the said mint. Specific provision is there made for coining gold and silver coins, as follows: First, gold coins, to wit: Eagles of the value of ten dollars or units; half-eagles of the value of five dollars; quarter-eagles of the value of two and a half dollars, the act specifying in each case the number of grains and fractions of a grain the coin shall contain, whether fabricated from pure or standard gold. Second, silver coins, to wit: "DOLLARS OR UNITS," each to contain 371 grains and $\frac{4}{10}$ths parts of a grain of pure silver, or 416 grains of standard silver. Like provision is also made for the coinage of half-dollars, quarter-dollars, dimes, and half-dimes, and also for the coinage of certain copper coins, but it is not necessary to enter much into those details in this case.

Provision, it must be conceded, is not there made, in express terms, that the money unit of the United States shall be one dollar, as in the ordinance passed during the Confederation, but the act under consideration assumes throughout that the

* 1 Laws of the U. S. 647; 10 Journals of Congress, 225; 11 Id. 254; 8 Stat. at Large, 80.

coin called dollar is the coin employed for that purpose, as is obvious from the fact that the words dollars and units are treated as synonymous, and that all the gold coins previously described in the same section are measured by that word as the acknowledged money unit of the Constitution. Very strong doubts are entertained whether an act of Congress is absolutely necessary to constitute the gold and silver coins of the United States, fabricated and stamped as such by the proper executive officers of the mint, a legal tender in payment of debts. Constituted as such coins are by the Constitution, the standard of value, the better opinion would seem to be that they become legal tender for that purpose, if minted of the required weight and fineness, as soon as they are coined and put in circulation by lawful authority, but it is unnecessary to decide that question in this case, as the Congress, by the 16th section of the act establishing a mint, provided that all the gold and silver coins which shall have been struck at, and issued from, the said mint shall be a lawful tender in all payments whatsoever—those of full weight "according to the respective values herein declared, and those of less than full weight at values proportioned to their respective weights." Such a regulation is at all events highly expedient, as all experience shows that even gold and silver coins are liable to be diminished in weight by wear and abrasion, even if it is not absolutely necessary in order to constitute the coins, if of full weight, a legal tender.

Enough has already been remarked to show that the money unit of the United States is the coined dollar, described in the act establishing the mint, but if more be wanted it will be found in the 20th section of that act, which provides that the money of account of the United States shall be expressed in dollars or units, dimes or tenths, &c., and that all accounts in the public offices and all proceedings in the Federal courts shall be kept and had in conformity to that regulation.*

Completed, as the circle of measures adopted by Congress

* 1 Stat. at Large, 248, 250.

were, to put the new government into successful operation, by the passage of that act, it will be instructive to take a brief review of the important events which occurred within the period of ten years next preceding its passage, or of the ten years next following the time when that measure was first proposed in the Congress of the Confederation. Two reasons suggest the 21st of February, 1782, as the time to commence the review, in addition to the fact that it was on that day that the committee of Congress made their report approving of the project to establish a national mint.* They are as follows: (1) Because that date just precedes the close of the War of the Revolution; and (2), because the date at the same time extends back to a period when all America had come to the conclusion that all the paper currency in circulation was utterly worthless, and that nothing was fit for a standard of value but gold and silver coin fabricated and stamped by the national authority. Discussion upon the subject was continued, and the ordinance was passed, but the measure was not put in operation, as the Convention met the next year, and the Constitution was framed, adopted, and ratified, the President and the members of Congress were elected, laws were passed, the judicial system was organized, the executive departments were created, the revenue system established, and provision was made to execute the power vested in Congress to coin money and provide a standard of value, as ordained by the Constitution.

Perfect consistency characterizes the measures of that entire period in respect to the matter in question, and it would be strange if it had been otherwise, as the whole series of measures were to a very large extent the doings of the same class of men, whether the remark is applied to the old Congress, or the Convention which framed the Constitution, or to the first and second sessions of the new Congress which passed the laws referred to and put the new system of government under the Constitution into full operation. Wise and complete as those laws were, still some

* 7 Journals of Congress, 286.

difficulties arose, as the several States had not adopted the money unit of the United States, nor the money of account prescribed by the twentieth section of the act establishing the mint. Such embarrassments, however, were chiefly felt in the Federal courts, and they were not of long continuance, as the several States, one after another, in pretty rapid succession, adopted the new system established by Congress both as to the money unit and the money of account. Virginia, December 19th, 1792, re-enacted that section in the act of Congress without any material alteration, and New Hampshire, on the 20th of February, 1794, passed a similar law.* Massachusetts adopted the same provision the next year, and so did Rhode Island and South Carolina.† Georgia concurred on the 22d of February, 1796, and New York on the 27th of January, 1797, and all the other States adopted the same regulation in the course of a few years.‡ State concurrence was essential in those particulars to the proper working of the new system, and it was cheerfully accorded by the State legislatures without unnecessary delay.

Congress established as the money unit the coin mentioned in the Constitution, and the one which had been adopted as such seven years before in the resolve passed by the Congress of the Confederation. Dollars, and decimals of dollars, were adopted as the money of account by universal consent, as may be inferred from the unanimity exhibited by the States in following the example of Congress. Nothing remained for Congress to do to perfect the new system but to execute the power to coin money and regulate the value thereof, as it is clear that the Constitution makes no provision for a standard of value unless the power to establish it is conferred by that grant.

Power to fix the standard of weights and measures is vested in Congress by the Constitution in plain and unam-

* 13 Hening's Statutes (Va.), 478; Laws of New Hampshire, 240.

† 2 Laws of Massachusetts, 657; Revised Laws of Rhode Island, p. 319; 5 Statutes of South Carolina, 262.

‡ M. & C. Dig. (Ga.), 33; 3 Laws of New York, Greeln. ed. 363.

biguous terms, and it was never doubted, certainly not until within a recent period, that the power conferred to coin money or to fabricate and stamp coins from gold and silver, which in the constitutional sense is the same thing, together with the power to determine the fineness, weight, and denominations of the moneys coined, was intended to accomplish the same purpose as to values. Indubitably it was so understood by Congress in prescribing the various regulations contained in the act establishing the national mint, and it continued to be so understood by all branches of the government—executive, legislative, and judicial—and by the whole people of the United States, for the period of seventy years, from the passage of that act.

New regulations became necessary, and were passed in the meantime increasing slightly the proportion of alloy used in fabricating the gold coins, but if those enactments are carefully examined it will be found that no one of them contains anything inconsistent in principle with the views here expressed. Gold, at the time the act establishing the mint became a law, was valued 15 to 1 as compared with silver, but the disparity in value gradually increased, and to such an extent that the gold coins began to disappear from circulation, and to remedy that evil Congress found it necessary to augment the *relative* proportion of alloy by diminishing the required amount of gold, whether pure or standard. Eagles coined under that act were required to contain each 232 grains of pure gold, or 258 grains of standard gold.* Three years later Congress enacted that the standard for both gold and silver coins should thereafter be such that, of 1000 parts by weight, 900 should be of pure metal and 100 of alloy, by which the gross weight of the dollar was reduced to 412½ grains, but the fineness of the coins was correspondingly increased, so that the money unit remained of the same intrinsic value as under the original act. Apply that rule to the eagle and it will be seen that its gross weight would be increased, as it was in fact by that act, but it con-

* 4 Stat. at Large, 699.

tinued to contain, as under the preceding act, 232 grains of pure gold and no more, showing conclusively that no change was made in the value of the coins.*

Double eagles and gold dollars were authorized to be "struck and coined" at the mint, by the act of March 3d, 1849, but the standard established for other gold coins was not changed, and the provision was that the new coins should also be legal tender for their coined value.†

Fractional silver coins were somewhat reduced in value by the act of February 21st, 1853, but the same act provided to the effect that the silver coins issued in conformity thereto should not be a legal tender for any sum exceeding five dollars, showing that the purpose of the enactment was to prevent the fractional coins, so essential for daily use, from being hoarded or otherwise withdrawn from circulation.‡

Suppose it be conceded, however, that the effect of that act was slightly to debase the fractional silver coins struck and coined under it, still it is quite clear that the amount was too inconsiderable to furnish any solid argument against the proposition that the standard of value in the United States was fixed by the Constitution, and that such was the understanding, both of the government and of the people of the United States, for a period of more than seventy years from the time the Constitution was adopted and put in successful operation under the laws of Congress. Throughout that period the value of the money unit was never diminished, and it remains to-day, in respect to value, what it was when it was defined in the act establishing the mint, and it is safe to affirm that no one of the changes made in the other coins, except perhaps the fractional silver coins, ever extended one whit beyond the appropriate limit of constitutional regulation.

Treasury notes, called United States notes, were authorized to be issued by the act of February 25th, 1862, to the amount of $150,000,000, on the credit of the United States, but they were not to bear interest, and were to be made

* 5 Stat. at Large, 137. † 9 Id. 397. ‡ 10 Id. 160

payable to bearer at the treasury. They were to be issued by the Secretary of the Treasury, and the further provision was that the notes so issued should be lawful money and legal tender in payment of all debts, public and private, within the United States, except duties on imports and interest upon bonds and notes of the United States, which the act provides "shall be paid in coin."* Subsequent acts passed for a similar purpose also except "certificates of indebtedness and of deposit," but it will not be necessary to refer specially to the other acts, as the history of that legislation is fully given in the prior decision of this court upon the same subject.†

Strictly examined it is doubtful whether either of the cases before the court present any such questions as those which have been discussed in the opinion of the majority of the court just read; but suppose they do, which is not admitted, it then becomes necessary to inquire in the first place whether those questions are not closed by the recorded decisions of this court. Two questions are examined in the opinion of the majority of the court: (1.) Whether the legal tender acts are constitutional as to contracts made before the acts were passed. (2.) Whether they are valid if applied to contracts made since their passage.

Assume that the views here expressed are correct, and it matters not whether the contract was made before or after the act of Congress was passed, as it necessarily follows that Congress cannot, under any circumstances, make paper promises, of any kind, a legal tender in payment of debts. Prior to the decision just pronounced it is conceded that the second question presented in the record was never determined by this court, except as it is involved in the first question, but it is admitted by the majority of the court that the first question, that is the question whether the acts under consideration are constitutional as to contracts made before their passage, was fully presented in the case of *Hepburn* v.

* 12 Stat. at Large, 345.

† Hepburn v. Griswold, 8 Wallace, 618; 12 Stat. at Large, 370, 582, 710, 822.

Griswold, and that the court decided that an act of Congress making mere paper promises to pay dollars a legal tender in payment of debts previously contracted is unconstitutional and void.

Admitted or not, it is as clear as anything in legal decision can be that the judgment of the court in that case controls the first question presented in the cases before the court, unless it be held that the judgment in that case was given for the wrong party and that the opinion given by the Chief Justice ought to be overruled.

Attempt is made to show that the second question is an open one, but the two, in my judgment, involve the same considerations, as Congress possesses no other power upon the subject than that which is derived from the grant to coin money, regulate the value thereof and of foreign coin. By that remark it is not meant to deny the proposition that Congress in executing the express grants may not pass all laws which shall be necessary and proper for carrying the same into execution, as provided in another clause of the same section of the Constitution. Much consideration of that topic is not required, as the discussion was pretty nearly exhausted by the Chief Justice in the case of *Hepburn* v. *Griswold*,* which arose under the same act and in which he gave the opinion. In that case the contract bore date prior to the passage of the law, and he showed conclusively that it could never be necessary and proper, within the meaning of the Constitution, that Congress, in executing any of the express powers, should pass laws to compel a creditor to accept paper promises as fulfilling a contract for the payment of money expressed in dollars. Obviously the decision was confined to the case before the court, but I am of the opinion that the same rule must be applied whether the contract was made before or after the passage of the law, as the contract for the payment of money, expressed in dollars, is a contract to make the payment in such money as the Constitution recognizes and establishes as a standard of value. Money

* 8 Wallace, 614, 625.

values can no more be measured without a standard of value than distances without a standard of extent, or quantities without a standard of weights or measures, and it is as necessary that there should be a money unit as that there should be a unit of extent, or of weight, or quantity.*

Credit currency, whether issued by the States or the United States, or by private corporations or individuals, is not recognized by the Constitution as a standard of value, nor can it be made such by any law which Congress or the States can pass, as the laws of trade are stronger than any legislative enactment. Commerce requires a standard of value, and all experience warrants the prediction that commerce will have it, whether the United States agree or disagree, as the laws of commerce in that respect are stronger than the laws of any single nation of the commercial world.† Values cannot be measured without a standard any more than time or duration, or length, surface, or solidity, or weight, gravity, or quantity. Something in every such case must be adopted as a unit which bears a known relation to that which is to be measured, as the dollar for values, the hour for time or duration, the foot of twelve inches for length, the yard for cloth measure, the square foot or yard for surface, the cubic foot for solidity, the gallon for liquids, and the pound for weights; the pound avoirdupois being used in most commercial transactions and the pound troy "for weighing gold and silver and precious stones, except diamonds."‡

Unrestricted power "to fix the standard of weights and measures" is vested in Congress, but until recently Congress had not enacted any general regulations in execution of that power.§ Regulations upon the subject existed in the States at the adoption of the Constitution, the same as those

* 7 Jefferson's Works, 472; 22 Financial Pamphlets, 417; Horner's Bullion Report.

† McCullock, Commercial Dictionary, edition of 1869, 330.

‡ 2 Bouvier's Law Dictionary, 648; 7 Jefferson's Works, 472; 8 Jefferson's Correspondence, 133.

§ 4 Stat. at Large, 278; 5 Id. 133; 14 Id. 339.

which prevailed at that time in the parent country, and Judge Story says that the understanding was that those regulations remained in full force and that the States, until Congress should legislate, possessed the power to fix their own weights and measures.*

Power to coin money and regulate the value of domestic and foreign coin was vested in the national government to produce uniformity of value and to prevent the embarrassments of a perpetually fluctuating and variable currency.†

Money, says the same commentator, is the universal medium *or common standard* by a comparison with which the value of all merchandise may be ascertained; and he also speaks of it as "a sign which represents the respective values of all other commodities."‡ Such a power, that is the power to coin money, he adds, is one of the ordinary prerogatives of sovereignty, and is almost universally exercised in order to preserve a proper circulation of good coin, of a known value, in the home market.§

Interests of such magnitude and pervading importance as those involved in providing for a uniform standard of value throughout the Union were manifestly entitled to the protection of the national authority, and in view of the evils experienced for the want of such a standard during the war of the Revolution, when the country was inundated with floods of depreciated paper, the members of the Convention who framed the Constitution did not hesitate to confide the power to Congress not only to coin money and regulate the value thereof, but also the power to regulate the value of foreign coin, which was denied to the Congress of the Confederation.‖

Influenced by these considerations and others expressed

* 2 Story on the Constitution (3d ed.), § 1122; Rawle on the Constitution, 102; Cooley on Constitutional Limitations, 596; Pomeroy on the Constitution, 263.

† 2 Story on the Constitution, § 1122.

‡ 2 Story on the Constitution, § 1118.

§ Mill, Political Economy, 294.

‖ 2 Phillips's Paper Currency, 135; 9 Jefferson's Works, 254, 289; 6 Sparks, Washington's Letters, 321.

in the opinion of the Chief Justice, this court decided in the case referred to, that the act of Congress making the notes in question "lawful money and a legal tender in payment of debts" could not be vindicated as necessary and proper means for carrying into effect the power vested in Congress to coin money and regulate the value thereof, or any other express power vested in Congress under the Constitution. Unless that case, therefore, is overruled, it is clear in my judgment, that both the cases before the court are controlled by that decision. Controversies determined by the Supreme Court are finally and conclusively settled, as the decisions are numerous that the court cannot review and reverse their own judgments.*

But where the parties are different, it is said the court, in a subsequent case, may overrule a former decision, and it must be admitted that the proposition, in a technical point of view, is correct. Such examples are to be found in the reported decisions of the court, but they are not numerous, and it seems clear that the number ought never to be increased, especially in a matter of so much importance, unless the error is plain and upon the clearest convictions of judicial duty.

Judgment was rendered for the plaintiff in that case on the 17th of September, 1864, in the highest court of the State, and on the 23d of June in the succeeding year the defendants sued out a writ of error, and removed the cause into this court for re-examination.† Under the regular call of the docket the case was first argued at the December Term, 1867, but at the suggestion of the Attorney-General an order was passed that it be re-argued, and the case was accordingly continued for that purpose. Able counsel appeared at the next term, and it was again elaborately argued on both sides. Four or five other cases were also on the calendar, supposed at that time to involve the same consti-

* Sibbald *v.* United States, 12 Peters, 492; Bridge Co. *v.* Stewart, 3 Howard, 424; Peck *v.* Sanderson, 18 Id. 42; Noonan *v.* Bradley, 12 Wallace, 121.

† Griswold *v.* Hepburn, 2 Duvall, 20.

tutional questions, and those cases were also argued, bringing to the aid of the court an unusual array of counsel of great learning and eminent abilities. Investigation and deliberation followed, authorities were examined, and oft-repeated consultations among the justices ensued, and the case was held under advisement as long as necessary to the fullest examination by all the justices of the court, before the opinion of the court was delivered. By law the Supreme Court at that time consisted of the Chief Justice and seven associate justices, the act of Congress having provided that no vacancy in the office of associate justice should be filled until the number should be reduced to six.* Five of the number, including the Chief Justice, concurred in the opinion in that case, and the judgment of the State court was affirmed, three of the associate justices dissenting. Since that time one of the justices who concurred in that opinion of the court has resigned, and Congress having increased the number of the associate justices to eight, the two cases before the court have been argued, and the result is that the opinion delivered in the former case is overruled, five justices concurring in the present opinion and four dissenting. Five justices concurred in the first opinion, and five have overruled it.† Persuaded that the first opinion was right, for the reasons already assigned, it is not possible that I should concur in the second, even if it were true that no other reasons of any weight could be given in support of the judgment in the first case, and that the conclusion there reached must stand or fall without any other support. Many other reasons, however, may be invoked to fortify that conclusion, equally persuasive and convincing with those to which reference has been made.

All writers upon political economy agree that money is the universal standard of value, and the measure of exchange, foreign and domestic, and that the power to coin and regulate the value of money is an essential attribute of national sovereignty. Goods and chattels were directly bar-

* 14 Stat. at Large, 209.

† 16 Id. 44.

tered, one for another, when the division of labor was first introduced, but gold and silver were adopted to serve the purpose of exchange by the tacit concurrence of all nations at a very early period in the history of commercial transactions.* Commodities of various kinds were used as money at different periods in different countries, but experience soon showed the commercial nations that gold and silver embodied the qualities desirable in money in a much greater degree than any other known commodity or substance.† Daily experience shows the truth of that proposition, and supersedes the necessity of any remarks to enforce it, as all admit that a commodity to serve as a standard of value and a medium of exchange must be easily divisible into small portions; that it must admit of being kept for an indefinite period without deteriorating; that it must possess great value in small bulk, and be capable of being easily transported from place to place; that a given denomination of money should always be equal in weight and quality, or fineness to other pieces of money of the same denomination, and that its value should be the same or as little subject to variation as possible.‡ Such qualities, all agree, are united in a much greater degree in gold and silver than in any other known commodity, which was as well known to the members of the Convention who framed the Constitution as to any body of men since assembled, and intrusted to any extent with the public affairs. They not only knew that the money of the commercial world was gold and silver, but they also knew, from bitter experience, that paper promises, whether issued by the States or the United States, were utterly worthless as a standard of value for any practical purpose.

Evidence of the truth of these remarks, of the most convincing character, is to be found in the published proceedings of that Convention. Debate upon the subject first arose when an amendment was proposed to prohibit the States

* Walker's Science of Wealth, 127.

† 1 Smith's Wealth of Nations, 35.

‡ McCullock's Commercial Dictionary (ed. 1869), 894; Mill's Political Economy, 294; 7 Jefferson's Works, 490.

from emitting bills of credit or making anything but gold and silver coin a tender in payment of debts, and from the character of that debate, and the vote on the amendment, it became apparent that paper money had but few, if any friends in the Convention.* Article seven of the draft of the Constitution, as reported to the Convention, contained the clause, "and emit bills on the credit of the United States," appended to the grant of power vested in Congress to borrow money, and it was on the motion to strike out that clause that the principal discussion in respect to paper money took place. Mr. Madison inquired if it would not be sufficient to prohibit the making such bills a tender, as that would remove the temptation to emit them with unjust views. Promissory notes, he said, in that shape, that is when not a tender, "may in some emergencies be best." Some were willing to acquiesce in the modification suggested by Mr. Madison, but Mr. Morris, who submitted the motion, objected, insisting that if the motion prevailed there would still be room left for the notes of a responsible minister, which, as he said, "would do all the good without the mischief." Decided objections were advanced by Mr. Ellsworth, who said he thought the moment a favorable one "to shut and bar the door against paper money;" and others expressed their opposition to the clause in equally decisive language, even saying that they would sooner see the whole plan rejected than retain the three words, "and emit bills." Suffice it to say, without reproducing the discussion, that the motion prevailed—nine States to two—and the clause was stricken out and no attempt was ever made to restore it. Paper money, as legal tender, had few or no advocates in the Convention, and it never had more than one open advocate throughout the period the Constitution was under discussion, either in the Convention which framed it, or in the conventions of the States where it was ratified. Virginia voted in the affirmative on the motion to strike out that clause, Mr. Madison being satisfied that if the motion pre-

* 3 Madison Papers, 1442.

vailed it would not have the effect to disable the government from the use of treasury notes, and being himself in favor of cutting "*off the pretext for a paper currency, and particularly for making the bills a tender, either for public or private debts.*"* When the draft for the Constitution was reported the clause prohibiting the States from making anything but gold and silver a tender in payment of debts contained an exception, "in case Congress consented," but the Convention struck out the exception, and made the prohibition absolute, one of the members remarking that it was a favorable moment to crush out paper money, and all or nearly all of the Convention seemed to concur in the sentiment.†

Contemporaneous acts are certainly evidence of intention, and if so, it is difficult to see what more is needed to show that the members of that Convention intended to withhold from the States, and from the United States, all power to make anything but gold and silver a standard of value, or a tender in payment of debts. Equally decisive proof to the same effect is found in the debates which subsequently occurred in the conventions of the several States, to which the Constitution, as adopted, was submitted for ratification.‡ Mr. Martin thought that the States ought not to be totally deprived of the right to emit bills of credit, but he says "that the Convention was so smitten with the paper money dread that they insisted that the prohibition should be absolute."§

Currency is a word much more comprehensive than the word money, as it may include bank bills and even bills of exchange as well as coins of gold and silver, but the word money, as employed in the grant of power under consideration, means the coins of gold and silver, fabricated and stamped as required by law, which, by virtue of their intrinsic value, as universally acknowledged, and their official origin, become the medium of exchange and the standard

* 3 Madison Papers, 1344; 5 Elliott's Debates, 434, 485.

† 2 Curtis's History of the Constitution, 364.

‡ 1 Elliott's Debates, 492; 2 Id. 486; 4 Id. 184; Ib. 334, 336; 8 Id. 290, 472, 478; 1 Id. 369, 370.

§ 1 Id. 376.

by which all other values are expressed and discharged. Support to the proposition that the word money, as employed in that clause, was intended to be used in the sense here supposed is also derived from the language employed in certain numbers of the Federalist, which, as is well known, were written and published during the period the question whether the States would ratify the Constitution was pending in their several conventions. Such men as the writers of those essays never could have employed such language if they had entertained the remotest idea that Congress possessed the power to make paper promises a legal tender.*

Like support is also derived from the language of Mr. Hamilton in his celebrated report recommending the incorporation of a national bank. He first states the objection to the proposed measure, that banks tend to banish the gold and silver of the country; and secondly he gives the answer to that objection made by the advocates of the bank, that it is immaterial what serves the purpose of money, and then says that the answer is not entirely satisfactory, as the permanent increase or decrease of the precious metals in a country can hardly ever be a matter of indifference. "As the commodity taken in lieu of every other, it (coin) is a species of the most effective wealth, and as the money of the world it is of great concern to the state that it possesses a sufficiency of it to face any demands which the protection of its external interests may create." He favored the incorporation of a national bank, with power to issue bills and notes *payable on demand in gold and silver*, but he expressed himself as utterly opposed to paper emissions by the United States, characterizing them as so liable to abuse and even so certain of being abused that the government ought never to trust itself "with the use of so seducing and dangerous an element."† Opposed as he was to paper emissions by the United States, under any circumstances, it is past belief that he could ever have concurred in the proposition to make

* Federalist, No. 44; Ibid. No. 42.

† Hist. of the Bank of the United States, 21, 24, 32.

such emissions a tender in payment of debts, either as a member of the Convention which framed the Constitution or as the head of the Treasury Department. Treasury notes, however, have repeatedly been authorized by Congress, commencing with the act of 30th of June, 1812, but it was never supposed before the time when the several acts in question were passed that Congress could make such notes a legal tender in payment of debts.* Such notes, it was enacted, should be received in payment of all duties and taxes laid, and in payment for public lands sold, by the Federal authority. Provision was also made in most or all of the acts that the Secretary of the Treasury, with the approbation of the President, might cause treasury notes to be issued, at the par value thereof, in payment of services, of supplies, or of debts for which the United States were or might be answerable by law, to such person or persons as should be *willing to accept the same* in payment, but it never occurred to the legislators of that day that such notes could be made a legal tender in discharge of such indebtedness, or that the public creditor could be compelled to accept them in payment of his just demands.†

Financial embarrassments, second only in their disastrous consequences to those which preceded the adoption of the Constitution, arose towards the close of the last war with Great Britain, and it is matter of history that those embarrassments were too great and pervading to be overcome by the use of treasury notes or any other paper emissions without a specie basis. Expedients of various kinds were suggested, but it never occurred either to the executive or to Congress that a remedy could be found by making treasury notes, as then authorized, a legal tender, and the result was that the second Bank of the United States was incorporated.‡ Paper currency, it may be said, was authorized by that act, which is undoubtedly true; and it is also true that the bills or notes of the bank were made receivable in all payments to the United States, if the same were at the time

* 2 Stat. at Large, 766; 3 Id. 100. † 3 Id. 315. ‡ Ib. 266.

payable on demand, but the act provided that the corporation should not refuse, under a heavy penalty, the payment in gold and silver, of any of its notes, bills, or obligations, nor of any moneys received upon deposit in the bank or in any of its offices of discount and deposit.

Serious attempt is made, strange to say, to fortify the proposition that the acts in question are constitutional from the fact that Congress, in providing for the use of treasury notes, and in granting the charters to the respective national banks, made the notes and bills receivable in payment of duties and taxes, but the answer to the suggestion is so obvious that it is hardly necessary to pause to suggest its refutation.* Creditors may exact gold and silver or they may waive the right to require such money, and accept credit currency, or commodities, other than gold and silver, and the United States, as creditors, or in the exercise of their express power to lay and collect taxes, duties, imposts, and excises, may, if they see fit, accept the treasury notes or bank bills in such payments as substitutes for the constitutional currency. Further discussion of the proposition is unnecessary, as it is plainly destitute of any merit whatever.†

Resort was also had to treasury notes in the revulsion of 1837, and during the war with Mexico, and also in the great revulsion of 1857, but the new theory that Congress could make treasury notes a legal tender was not even suggested, either by the President or by any member of Congress.‡

Seventy years are included in this review, even if the computation is only carried back to the passage of the act establishing the mint, and it is clear that there is no trace of any act, executive or legislative, within that period, which affords the slightest support to the new constitutional theory that Congress can by law constitute paper emissions a tender in payment of debts. Even Washington, the father of our country, refused to accept paper money in payment of debts, contracted before the War of Independence, and the proof

* Metropolitan Bank *v.* Van Dyck, 27 New York, 42.

† 4 Webster's Works, 271; Thorndike *v.* United States, 2 Mason, 18.

‡ 5 Stat. at Large, 201; Ib. 469; 9 Id. 118; 11 Id. 257.

is full to the point that Hamilton, as well as Jefferson and Madison, was opposed to paper emissions by the national authority.*

Sufficient also is recorded in the reports of the decisions of this court to show that the court, from the organization of the judicial system to the day when the judgments in the cases before the court were announced,† held opinions utterly opposed to such a construction of the Constitution as would authorize Congress to make paper promises a legal tender as between debtor and creditor. Throughout that period the doctrine of the court has been, and still is, unless the opinion of the court just read constitutes an exception, that the government of the United States, as ordained and established by the Constitution, is a government of enumerated powers; that all the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people; that every power vested in the Federal government under the Constitution is in its nature sovereign, and that Congress may pass all laws necessary and proper to carry the same into execution, or, in other words, that the power being sovereign includes, by force of the term, the requisite means, fairly applicable to the attainment of the contemplated end, which are not precluded by restrictions or exceptions expressed or necessarily implied, and not contrary to the essential ends of political society.‡

Definitions slightly different have been given by different jurists to the words "necessary and proper," employed in the clause of the Constitution conferring upon Congress the power to pass laws for carrying the express grants of power into execution, but no one ever pretended that a construction or definition could be sustained that the general clause would authorize the employment of such means in the execution of one express grant as would practically

* 2 Phillips's Paper Currency, 135; 6 Sparks's Letters of Washington, 321.

† Legal Tender Cases, 11 Wallace, 682.

‡ History of the Bank of the United States, 95.

nullify another or render another utterly nugatory. Circumstances made it necessary that Mr. Hamilton should examine that phrase at a very early period after the Constitution was adopted, and the definition he gave to it is as follows: "All the means requisite and fairly applicable to the attainment of the end of such power which are not precluded by restrictions and exceptions specified in the Constitution, and not contrary to the essential ends of political society." Twenty-five years later the question was examined by the Supreme Court* and authoritatively settled, the Chief Justice giving the opinion. His words were: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, and which are not prohibited but consistent with the letter and spirit of the Constitution, are constitutional."

Substantially the same definition was adopted by the present Chief Justice in the former case, in which he gave the opinion of the court, and there is nothing contained in the Federal reports giving the slightest sanction to any broader definition of those words. Take the definition given by Mr. Hamilton, which, perhaps, is the broadest, if there is any difference, and still it is obvious that it would give no countenance whatever to the theory that Congress, in passing a law to execute one express grant of the Constitution, could authorize means which would nullify another express grant, or render it nugatory for the attainment of the end which the framers of the Constitution intended it should accomplish.

Authority to coin money was vested in Congress to pro vide a permanent national standard of value, everywhere the same, and subject to no variation except what Congress shall make under the power to regulate the value thereof, and it is not possible to affirm, with any hope that the utterance will avail in the argument, that the power to coin money is not an express power, and if those premises are

* McCulloch *v.* Maryland, 4 Wheaton, 421.

conceded it cannot be shown that Congress can so expand any other express power by implication as to nullify or defeat the great purposes which the power to coin money and establish a standard of value was intended to accomplish.

Government notes, it is conceded, may be issued as a means of borrowing money, because the act of issuing the notes may be, and often is, a requisite means to execute the granted power, and being fairly applicable to the attainment of the end, the notes, as means, may be employed, as they are not precluded by any restrictions or exceptions, and are not repugnant to any other express grant contained in the Constitution. Light-houses, buoys, and beacons may be erected under the power to regulate commerce, but Congress cannot authorize an officer of the government to take private property for such a purpose without just compensation, as the exercise of such a power would be repugnant to the fifth amendment. Power to lay and collect taxes is conferred upon Congress, but the Congress cannot tax the salaries of the State judges, as the exercise of such a power is incompatible with the admitted power of the States to create courts, appoint judges, and provide for their compensation.*

Congress may also impose duties, imposts, and excises to pay the debts and provide for the common defence and general welfare, but the Congress cannot lay any tax or duty on articles exported from any State, nor can Congress give any preference by any regulation of commerce or revenue to the ports of one State over those of another, as the exercise of any such power is prohibited by the Constitution. Exclusive power is vested in Congress to declare war, to raise and support armies, to provide and maintain a navy, and to make rules for the government and regulation of the land and naval forces. Appropriations to execute those powers may be made by Congress, but no appropriations of money to that use can be made for a longer term than two years, as an appropriation for a longer term is expressly

* Collector *v.* Day, 11 Wallace, 113; Ward *v.* Maryland, 12 Id. 418.

prohibited by the same clause which confers the power to raise and support armies. By virtue of those grants of power Congress may erect forts and magazines, may construct navy-yards and dock-yards, manufacture arms and munitions of war, and may establish depots and other needful buildings for their preservation, but the Congress cannot take private property for that purpose without making compensation to the owner, as the Constitution provides that private property shall not be taken for public use without just compensation.

Legislative power under the Constitution can never be rightfully extended to the exercise of a power not granted nor to that which is prohibited, and it makes no difference whether the prohibition is express or implied, as an implied prohibition, when once ascertained, is as effectual to negative the right to legislate as one that is expressed; the rule being that Congress, in passing laws to carry the express powers granted into execution, cannot select any means as requisite for that purpose or as fairly applicable to the attainment of the end, which are precluded by restrictions or exceptions contained in the Constitution, or which are contrary to the essential ends of political society.*

Concede these premises, and it follows that the acts of Congress in question cannot be regarded as valid unless it can be held that the power to make paper emissions a legal tender in payment of debts can properly be implied from the power to coin money, and that such emissions, when enforced by such a provision, become the legal standard of value under the Constitution. Extended discussion of the first branch of the proposition would seem to be unnecessary, as the dissenting justices in the former case abandoned that point and frankly stated in the dissenting opinion delivered that they were not able to see in those clauses, "standing alone, a sufficient warrant for the exercise of this power." Through their organ on the occasion they referred to the power to declare war, to suppress insurrection, to

* History of the Bank of the United States, 95.

raise and support armies, to provide and maintain a navy, to borrow money, to pay the debts of the Union, and to provide for the common defence and general welfare, as grants of power conferred in separate clauses of the Constitution. Reference was then made in very appropriate terms to the exigencies of the treasury during that period and the conclusion reached, though expressed interrogatively, appears to be that the provision making the notes a legal tender was a necessary and proper one as conducing "towards the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection," or, as expressed in another part of the same opinion, the provision was regarded as "necessary and proper to enable the government to borrow money to carry on the war."*

Suggestions or intimations are made in one or more of the opinions given in the State courts that the power assumed by Congress may be vindicated as properly implied from the power to coin money, but inasmuch as that assumption was not the ground of the dissent in the former case, and as the court is not referred to any case where a court affirming the validity of the acts of Congress in question has ventured to rest their decision upon that theory, it does not appear to be necessary to protract the discussion upon that point.

Such notes are not declared in the acts of Congress to be a standard of value, and if they were the provision would be as powerless to impart that quality to the notes as were the processes of the alchemist to convert chalk into gold, or the contrivances of the mechanic to organize a machine and give it perpetual motion. Gold and silver were adopted as the standard of value, even before civil governments were organized, and they have always been regarded as such to the present time, and it is safe to affirm that they will continue to be such by universal consent, in spite of legislative enactments and of judicial decisions. Treasury notes, or the notes in question, called by what name they may be, never

performed that office, even for a day, and it may be added that neither legislative enactments nor judicial decisions can compel the commercial world to accept paper emissions of any kind as the standard of value by which all other values are to be measured.* Nothing but money will in fact perform that office, and it is clear that neither legislative enactments nor judicial decisions can perform commercial impossibilities. Commodities undoubtedly may be exchanged as matter of barter, or the seller may accept paper promises instead of money, but it is nevertheless true, as stated by Mr. Huskisson, that money is not only the *common measure* and *common representative* of all other commodities, but also the common and universal equivalent. Whoever buys, gives, whoever sells, receives such a quantity of pure gold or silver as is equivalent to the article bought or sold; or if he gives or receives paper instead of money, he gives or receives that which is valuable only as it stipulates the payment of a given quantity of gold or silver.†

"Most unquestionably," said Mr. Webster,‡ "there is no legal tender, and there can be no legal tender, in this country, under the authority of this government, or any other, but gold and silver. . . . This is a constitutional principle, perfectly plain and of the very highest importance." He admitted that no such express prohibition was contained in the Constitution, and then proceeded to say: "As Congress has no power granted to it in this respect but to coin money and to regulate the value of foreign coins, *it clearly has no power to substitute paper* or anything else for coin as a tender in payment of debts and in discharge of contracts," adding that "Congress has exercised the power fully in both its branches. It has coined money and still coins it, it has regulated the value of foreign coins and still regulates their value. The legal tender, therefore, THE CONSTITUTIONAL STANDARD OF VALUE, IS ESTABLISHED AND CANNOT BE OVERTHROWN." Beyond peradventure he was of the opinion that gold and silver, at rates fixed by Congress, constituted the

* Hepburn *v.* Griswold, 8 Wallace, 608.

† 22 Financial Pamphlets, 580. ‡ 4 Webster's Works, 271.

legal standard of value, and that neither Congress nor the States had authority to establish any other standard in its place.*

Views equally decisive have been expressed by this court in a case where the remarks were pertinent to the question presented for decision.† Certain questions were certified here which arose in the Circuit Court in the trial of an indictment in which the defendant was charged with having brought into the United States from a foreign place, with intent to pass, utter, publish, and sell certain false, forged, and counterfeit coins, made, forged, and counterfeited in the resemblance and similitude of the coins struck at the mint. Doubts were raised at the trial whether Congress had the power to pass the law on which the indictment was founded. Objection was made that the acts charged were only a fraud in traffic, and, as such, were punishable, if at all, under the State law. Responsive to that suggestion the court say that the provisions of the section "appertain rather to the execution of an important trust invested by the Constitution, and to the obligation to fulfil that trust on the part of the government, namely, the trust and the duty of creating and maintaining *a uniform and pure metallic standard of value throughout the Union;* that the power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose of *creating and preserving the uniformity and purity of such a standard of value*, and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power." Appropriate suggestions follow as to the right of the government to adopt measures to exclude counterfeits and prevent the true coin from being substituted by others

* 4 Id. 280. † United States *v.* Marigold, 9 Howard, 567.

of no intrinsic value, and the justice delivering the opinion then proceeds to say, that Congress "having emitted a circulating medium, *a standard of value indispensable for the purposes of the community* and for the action of the government itself, the Congress is accordingly authorized and bound in duty to prevent its debasement and expulsion and the destruction of the general confidence and convenience by the influx and substitution of a spurious coin in lieu of the constitutional currency."

Equally decisive views were expressed by the court six years earlier, in the case of *Gwin* v. *Breedlove*,* in which the opinion of the court was delivered by the late Mr. Justice Catron, than whom no justice who ever sat in the court was more opposed to the expression of an opinion on a point not involved in the record.

No State shall coin money, emit bills of credit, or make anything but gold and silver a tender in payment of debts. These prohibitions, said Mr. Justice Washington,† associated with the powers granted to Congress to coin money and regulate the value thereof and of foreign coin, most obviously constitute members of the same family, being upon the same subject and governed by the same policy. This policy, said the learned justice, was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. Language so well chosen and so explicit cannot be misunderstood, and the views expressed by Mr. Justice Johnson in the same case are even more decisive. He said the prohibition in the Constitution to make anything but gold or silver coin a tender in payment of debts is *express and universal.* The framers of the Constitution regarded it as an evil to be repelled without modification, and that they have therefore left nothing to be inferred or deduced from construction on the subject.‡

* 2 Howard, 38. † Ogden v. Saunders, 12 Wheaton, 265. ‡ Ib. 288.

Recorded as those opinions have been for forty-five years, and never questioned, they are certainly entitled to much weight, especially as the principles which are there laid down were subsequently affirmed in two cases by the unanimous opinion of this court.*

Strong support to the view here taken is also derived from the case of *Craig* v. *Missouri*, last cited, in which the opinion was given by the Chief Justice. Loan certificates issued by the State were the consideration of the note in suit in that case, and the defence was that the certificates were bills of credit and that the consideration of the note was illegal. Responsive to that defence the plaintiff insisted that the certificates were not bills of credit, because they had not been made a legal tender, to which the court replied, that the emission of bills of credit and the enactment of tender laws were distinct operations, independent of each other; that both were forbidden by the Constitution; that the evils of paper money did not result solely from the quality of its being made a tender in payment of debts; that that quality might be the *most pernicious* one, but that it was not an essential quality of bills of credit nor the only mischief resulting from such emissions.†

Remarks of the Chief Justice in the case of *Sturges* v. *Crowninshield*‡ may also be referred to as even more explicit and decisive to the same conclusion than anything embodied in the other cases. He first describes, in vivid colors, the general distress which followed the war in which our independence was established. Paper money, he said, was issued, worthless lands and other property of no use to the creditor were made a tender in payment of debts, and the time of payment stipulated in the contract was extended by law. Mischief to such an extent was done, and so much more was apprehended, that general distrust prevailed and all

* United States *v.* Marigold, 9 Howard, 567; Gwin *v.* Breedlove, 2 Id 38; Craig *v.* Missouri, 4 Peters, 434.

† Briscoe *v.* Bank of Kentucky, 11 Peters, 317; Fox *v.* Ohio, 5 Howard, 433.

‡ 4 Wheaton, 204.

confidence between man and man was destroyed. Special reference was made to those grievances by the Chief Justice because it was insisted that the prohibition to pass laws impairing the obligation of contracts ought to be confined by the court to matters of that description, but the court was of a different opinion, and held that the Convention intended to establish a great principle, that contracts should be inviolable, that the provision was intended "to prohibit the use of any means by which the same mischief might be produced." He admitted that that provision was not intended to prevent the issue of paper money, as that evil was remedied and the practice prohibited by the clause forbidding the States to "emit bills of credit," inserted in the Constitution expressly for that purpose, and he also admitted that the prohibition to emit bills of credit was not intended to restrain the States from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, "because for that subject also particular provision is made" in the Constitution; but he added, "NOTHING BUT GOLD AND SILVER COIN CAN BE MADE A TENDER IN PAYMENT OF DEBTS."*

Utterances of the kind are found throughout the reported decisions of this court, but there is not a sentence or word to be found within those volumes, from the organization of the court to the passage of the acts of Congress in question, to support the opposite theory.

Power, as before remarked, was vested in the Congress under the Confederation to borrow money and emit bills of credit, and history shows that the power to emit such bills had been exercised, before the Convention which framed the Constitution assembled, to an amount exceeding $350,000,000.† Still the draft of the Constitution, as reported, contained the words "and to emit bills" appended

* Sturges *v.* Crowninshield, 4 Wheaton, 205.

† 2 Story on the Constitution, 3d ed. 249; Briscoe *v.* Bank of Kentucky, 11 Peters, 337; 1 Jefferson's Correspondence, 401; American Almanac for 1830, p. 183.

to the clause authorizing Congress to borrow money. When that clause was reached, says Mr. Martin, a motion was made to strike out the words "to emit *bills of credit;*" and his account of what followed affords the most persuasive and convincing evidence that the Convention, and nearly every member of it, intended to put an end to the exercise of such a power. Against the motion, he says, we urged that it would be improper to deprive the Congress of that power; that it would be a novelty unprecedented to establish a government which should not have such authority; that it was impossible to look forward into futurity so far as to decide that events might not happen that would render the exercise of such a power absolutely necessary, &c. But a majority of the Convention, he said, being wise beyond every event, and being willing to risk any political evil rather than admit the idea of a paper emission *in any possible case*, refused to trust the authority to a government to which they were lavishing the most unlimited powers of taxation, and to the mercy of which they were willing blindly to trust the liberty and property of the citizens of every State in the Union, *and "they erased that clause from the system."**

More forcible vindication of the action of the Convention could hardly be made than is expressed in the language of the Federalist,† and the authority of Judge Story warrants the statement that the language there employed is "justified by almost every contemporary writer," and is "attested in its truth by facts" beyond the influence of every attempt at contradiction. Having adverted to those facts the commentator proceeds to say, "that the same reasons which show the necessity of denying to the States the power of regulating coin, prove with equal force that they ought not to be at liberty to substitute a paper medium instead of coin."

Emissions of the kind were not declared by the Continental Congress to be a legal tender, but Congress passed a resolution declaring that they ought to be a tender in payment of all private and public debts, and that a refusal to

* 1 Elliott's Debates, 369.

† Federalist, No. 44.

receive the tender ought to be an extinguishment of the debt, and recommended the States to pass such laws. They even went further and declared that whoever should refuse to receive the paper as gold or silver should be deemed an enemy to the public liberty; but our commentator says that these measures of violence and terror, so far from aiding the circulation of the paper, led on to still further depreciation.* New emissions followed and new measures were adopted to give the paper credit by pledging the public faith for its redemption. Effort followed effort in that direction until the idea of redemption at par was abandoned. Forty for one was offered and the States were required to report the bills under that regulation, but few of the old bills were ever reported, and of course few only of the contemplated new notes were issued, and the bills in a brief period ceased to circulate, and in the course of that year quietly died in the hands of their possessors.†

Bills of credit were made a tender by the States, but all such, as well as those issued by the Congress, were dead in the hands of their possessors before the Convention assembled to frame the Constitution. Intelligent and impartial belief in the theory that such men, so instructed, in framing a government for their posterity as well as for themselves, would deliberately vest such a power, either in Congress or the States, as a part of their perpetual system, can never in my judgment be secured in the face of the recorded evidences to the contrary which the political and judicial history of our country affords. Such evidence, so persuasive and convincing as it is, must ultimately bring all to the conclusion that neither the Congress nor the States can make anything but gold or silver coin a tender in payment of debts.

Exclusive power to coin money is certainly vested in Congress, but "no amount of reasoning can show that executing a promissory note and ordering it to be taken in pay-

* 2 Journals of Congress, 21; 3 Id. 20; 2 Pitkin's History, 155-6.

† 2 Story on the Constitution, 3d ed., §§ 1359, 1360; 2 Pitkin's History, 157; 1 Jefferson's Correspondence, 402.

ment of public and private debts is a species of coining money."*

Complete refutation of such theory is also found in the dissenting opinion in the former case, in which the justice who delivered the opinion states that he is not able to deduce the power to pass the laws in question from that clause of the Constitution, and in which he admits, without qualification, that the provision making such notes a legal tender does undoubtedly impair the "obligation of contracts made before its passage." Extended argument, therefore, to show that the acts in question impair the obligation of contracts made before their passage is unnecessary, but the admission stops short of the whole truth, as it leaves the implication to be drawn that the obligation of subsequent contracts is not impaired by such legislation. Contracts for the payment of money, whether made before or after the passage of such a provision, are contracts, if the promise is expressed in dollars, to pay the specified amount in the money recog nized and established by the Constitution as the standard of value, and any act of Congress which in theory compels the creditor to accept paper emissions, instead of the money so recognized and established, impairs the obligation of such a contract, no matter whether the contract was made before or after the act compelling the creditor to accept such payment, as the Constitution in that respect is a part of the contract, and by its terms entitles the creditor to demand payment in the medium which the Constitution recognizes and establishes as the standard of value.

Evidently the word dollar, as employed in the Constitution, means the money recognized and established in the express power vested in Congress to coin money, regulate the value thereof and of foreign coin, the framers of the Constitution having borrowed and adopted the word as used by the Continental Congress in the ordinance of the 6th of July, 1785, and of the 8th August, 1786, in which it was enacted that the money unit of the United States should be

* Pomeroy on the Constitution, § 409.

"one dollar," and that the money of account should be dollars and fractions of dollars, as subsequently provided in the ordinance establishing a mint.*

Repeated decisions of this court, of recent date,† have established the rule that contracts to pay coined dollars can only be satisfied by the payment of such money, which is precisely equivalent to a decision that such notes as those described in the acts of Congress in question are not the money recognized and established by the Constitution as the standard of value, as the money so recognized and established, if the contract is expressed in dollars, will satisfy any and every contract between party and party. Beyond all question the cases cited recognize "the fact accepted by all men throughout the world, that value is inherent in the precious metals; that gold and silver are in themselves values, and being such, and being in other respects best adapted to the purpose, are *the only proper measures of value;* that these values are determined by weight and purity, and that form and impress are simply certificates of value, worthy of absolute reliance only because of the known integrity and good faith of the government which" put them in circulation.‡

When the intent of the parties as to the medium of payment is clearly expressed in a contract, the court decide, in *Butler* v. *Horwitz*, above cited, that damages for the breach of it, whether made before or since the enactment of these laws, may be properly assessed so as to give effect to that intent, and no doubt is entertained that that rule is correct. Parties may contract to accept payment in treasury notes, or specific articles, or in bank bills, and if they do so they are bound to accept the medium for which they contracted, provided the notes, specific articles, or bills are tendered on the day the payment under the contract becomes due, and it is clear that such a tender, if seasonable and sufficient in

* 10 Journals of Congress, 225; 11 Id. 179.

† Bronson *v.* Rodes, 7 Wallace, 248; Butler *v.* Horwitz, Ib. 259; Bank *v.* Supervisors, Ib. 28.

‡ Dewing *v.* Sears, 11 Id. 379; Lane Co. *v.* Oregon, 7 Id. 73; Willard *v.* Tayloe, 8 Id. 568.

amount, is a good defence to the action. Decided cases also carry the doctrine much further, and hold, even where the contract is payable in money and the promise is expressed in dollars, that a tender of bank bills is a good tender if the party to whom it was made placed his objections to receiving it wholly upon the ground that the amount was not sufficient.*

Grant all that, and still it is clear that where the contract is for the payment of a certain sum of money, and the promise is expressed in dollars, or in coined dollars, the promisee, if he sees fit, may lawfully refuse to accept payment in any other medium than gold and silver, made a legal tender by act of Congress passed in pursuance of that provision of the Constitution which vests in Congress the power to coin money, regulate the value thereof and of foreign coin.

Foreign coin of gold and silver may be made a legal tender, as the power to regulate the value thereof is vested in Congress as well as the power to regulate the value of the coins fabricated and stamped at the mint.

Opposed, as the new theory is by such a body of evidence, covering the whole period of our constitutional history, all tending to the opposite conclusion, and unsupported as the theory is by a single historical fact, entitled to any weight, it would seem that the advocates of the theory ought to be able to give it a fixed domicile in the Constitution, or else be willing to abandon it as a theory without any solid constitutional foundation. Vagrancy in that behalf, if conceded, is certainly a very strong argument at this day, that the power does not reside in the Constitution at all, as if the fact were otherwise, the period of eighty-five years which has elapsed since the Constitution was adopted is surely long enough to have enabled its advocates to discover its locality and to be able to point out its home to those whose researches have been less successful and whose conscientious

* Bank of the United States *v.* Bank of Georgia, 10 Wheaton, 347; Thompson *v.* Riggs, 5 Wallace, 678; Robinson *v.* Noble, 8 Peters, 198; Wright *v.* Reid, 3 Term, 554; Snow *v.* Perry, 9 Pickering, 542; 2 Greenleaf on Evidence, § 601.

convictions lead them to the conclusion that, as applied to the Constitution, it is a myth without a habitation or a name.

Unless the power to enact such a provision can be referred to some one or more of the express grants of power to Congress, as the requisite means, or as necessary and proper for carrying such express power or powers into execution, it is usually conceded that the provision must be regarded as unconstitutional, as it is not pretended that the Constitution contains any express grant of power authorizing such legislation. Powers not granted cannot be exercised by Congress, and certainly all must agree that no powers are granted except what are expressed or such as are fairly applicable as requisite means to attain the end of a power which is granted, or, in other words, are necessary and proper to carry those which are expressed into execution.*

Pressed by these irrepealable rules of construction, as applied to the Constitution, those who maintain the affirmative of the question under discussion are forced to submit a specification. Courts in one or more cases have intimated that the power in question may be implied from the express power to coin money, but inasmuch as no decided case is referred to where the judgment of the court rests upon that ground, the suggestion will be dismissed without further consideration, as one involving a proposition too latitudinous to require refutation. Most of the cases referred to attempt to deduce the power to make such paper emissions a legal tender from the express power to borrow money, or from the power to declare war, or from the two combined, as in the dissenting opinion in the case which is now overruled.

Authority, it is conceded, exists in Congress to pass laws providing for the issue of treasury notes, based on the national credit, as necessary and proper means for fulfilling the end of the express power to borrow money, nor can it be doubted at this day, that such notes, when issued by the

* Martin *v.* Hunter's Lessee, 1 Wheaton, 326; McCulloch *v.* Maryland, 4 Id. 405; 1 Story on the Constitution (3d ed.), § 417.

proper authority, may lawfully circulate as credit currency, and that they may, in that conventional character, be lawfully employed, if the act authorizing their issue so provides, to pay duties, taxes, and all the public exactions required to be paid into the national treasury. Public creditors may also be paid in such currency by their own consent, and they may be used in all other cases, where the payment in such notes comports with the terms of the contract. Established usage founded upon the practice of the government, often repeated, has sanctioned these rules, until it may now be said that they are not open to controversy, but the question in the cases before the court is whether the Congress may declare such notes to be lawful money, make them a legal tender, and impart to such a currency the quality of being a standard of value, and compel creditors to accept the payment of their debts in such a currency as the equivalent of the money recognized and established by the Constitution as the standard of value by which the value of all other commodities is to be measured. Financial measures, of various kinds, for borrowing money to supply the wants of the treasury, beyond the receipts from taxation and the sales of the public lands, have been adopted by the government since the United States became an independent nation. Subscriptions for a loan of twelve millions of dollars were, on the 4th of August, 1790, directed to be opened at the treasury, to be made payable in certificates issued for the debt according to their specie value.* Measures of the kind were repeated in rapid succession for several years, and laws providing for loans in one form or another appear to have been the preferred mode of borrowing money, until the 30th of June, 1812, when the first act was passed "to authorize the issue of treasury notes."†

Loans had been previously authorized in repeated instances, as will be seen by the following references, to which many more might be added.‡

* 1 Stat. at Large, 139. † 2 Stat. at Large, 766.

‡ 1 Id. 142; Ib. 187; Ib. 345; Ib. 433; Ib. 607; 2 Id. 60; Ib. 245; Ib. 349; Ib. 610; Ib. 656; Ib. 694.

Earnest opposition was made to the passage of the first act of Congress authorizing the issue of treasury notes, but the measure prevailed, and it may be remarked that the vote on the occasion was ever after regarded as having settled the question as to the constitutionality of such an act. Five millions of dollars were directed to be issued by that act, and the Secretary of the Treasury, with the approbation of the President, was empowered to cause such portion of the notes as he might deem expedient to be issued at par "to such public creditors *or other persons as may choose to receive such notes in payment*," it never having occurred to any one that even a public creditor could be compelled to receive such notes in payment except by his own consent. Twenty other issues of such notes were authorized by Congress in the course of the fifty years next after the passage of that act and before the passage of the acts making such notes a legal tender, and every one of such prior acts, being twenty in all, contains either in express words or by necessary implication, an equally decisive negation to the new constitutional theory that Congress can make paper emissions, either a standard of value or a legal tender.* Superadded to the conceded fact that the Constitution contains no express words to support such a theory, this long and unbroken usage, that treasury notes shall not be constituted a standard of value nor be made a tender in payment of debts, is entitled to great weight, and when taken in connection with the persuasive and convincing evidence, derived from the published proceedings of the Convention, that the framers of the Constitution never intended to grant any such power, and from the recorded sentiments of the great men whose arguments in favor of the reported draft procured its ratification, and supported as that view is by the repeated decisions of this court, and by the infallible rule of interpretation that the language of one express power shall not be

* 5 Id. 202; 9 Id. 64; 4 Id. 765; 2 Id. 766; Ib. 801; 3 Id. 161; Ib. 213, 5 Id. 201; Ib. 228; Ib. 323; Ib. 469; Ib. 474; Ib. 581; Ib. 614; 9 Id. 39; Ib. 118; 11 Id. 257; 12 Id. 121; Ib. 179; Ib. 259; Ib. 313; Ib. 338.

so expanded as to nullify the force and effect of another express power in the same instrument, it seems to me that it ought to be deemed final and conclusive that Congress cannot constitute such notes or any other paper emissions a constitutional standard of value, or make them a legal tender in payment of debts—especially as it covers the period of two foreign wars, the creation of the second national bank, and the greatest financial revulsions through which our country has ever passed.

Guided by the views expressed in the dissenting opinion in the former case it must be taken for granted that the legal tender feature in the acts in question was placed emphatically, by those who enacted the provision, upon the necessity of the measure to the further borrowing of money and maintaining the army and navy, and such appears to be the principal ground assumed in the present opinion of the court. Enough also appears in some of the interrogative sentences of the dissenting opinion to show that the learned justice who delivered it intended to place the dissent very largely upon the same ground.

Nothing need be added, it would seem, to show that the power to make such notes a standard of value and a legal tender cannot be derived from the power to borrow money, without so expanding it by implication as to nullify the power to coin money and regulate its value, nor without extending the scope and operation of the power to borrow money to an object never contemplated by the framers of the Constitution; and if so, then it only remains to inquire whether it may be implied from the power to declare war, to raise and support armies, or to provide and maintain a navy, or "to enable the government to borrow money to carry on the war," as the phrase is in the dissenting opinion in the former case.

Money is undoubtedly the sinews of war, but the power to raise money to carry on war, under the Constitution, is not an implied power, and whoever adopts that theory commits a great constitutional error. Congress may declare war and Congress may appropriate all moneys in the treas-

ury to carry on the war, or Congress may coin money for that purpose, or borrow money to any amount for the same purpose, or Congress may lay and collect taxes, duties, imposts, and excises to replenish the treasury, or may dispose of the public lands or other property belonging to the United States, and may in fact, by the exercise of the express powers of the Constitution, command the whole wealth and substance of the people to sustain the public credit and prosecute the war to a successful termination. Two foreign wars were successfully conducted by means derived from those sources, and it is not doubted that those express powers will always enable Congress to maintain the national credit and defray the public expenses in every emergency which may arise, even though the national independence should be assailed by the combined forces of all the rest of the civilized world. All remarks, therefore, in the nature of entreaty or appeal, in favor of an implied power to fulfil the great purpose of national defence or to raise money to prosecute a war, are a mere waste of words, as the most powerful and comprehensive means to accomplish the purpose for which the appeal is made are found in the express powers vested in Congress to lay and collect taxes, duties, imposts, and excises without limitation as to amount, to borrow money also without limitation, and to coin money, dispose of the public lands, and to appropriate all moneys in the public treasury to that purpose.

Weighed in the light of these suggestions, as the question under discussion should be, it is plain, not only that the exercise of such an implied power is unnecessary to supply the sinews of war, but that the framers of the Constitution never intended to trust a matter of such great and vital importance as that of raising means for the national defence or for the prosecution of a war to any implication whatever, as they had learned from bitter experience that the great weakness of the Confederation during the war for independence consisted in the want of such express powers. Influenced by those considerations the framers of the Constitution not only authorized Congress to lay and collect taxes, duties,

imposts, and excises to any and every extent, but also to coin money and to borrow money without any limitation as to amount, showing that the argument that to deny the implied power to make paper emissions a legal tender will be to cripple the government, is a mere chimera, without any solid constitutional foundation for its support.

Comprehensive, however, as the power of Federal taxation is, being without limitation as to amount, still there are some restrictions as to the manner of its exercise, and some exceptions as to the objects to which it may be applied. Bills for raising revenue must originate in the House of Representatives; duties, imposts, and excises must be uniform throughout the United States; direct taxes must be apportioned according to numbers; regulations of commerce and revenue shall not give any preference to the ports of one State over those of another; nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another; nor shall any tax or duty be laid on articles exported from any State.

Preparation for war may be made in peace, but neither the necessity for such preparation nor the actual existence of war can have the effect to abrogate or supersede those restrictions, or to empower Congress to tax the articles excepted from taxation by the Constitution. Implied exceptions also exist, limiting the power of Federal taxation as well as that of the States, and when an exception of that character is ascertained the objects falling within it are as effectually shielded from taxation as those falling within an express exception, for the plain reason that the "government of the United States is acknowledged by all to be one of enumerated powers," from which it necessarily follows that powers not granted cannot be exercised.*

Moneys may be raised by taxes, duties, imposts, and excises to carry on war as well as to pay the public debt or to provide for the common defence and general welfare, but no appropriation of money to that use can be made for a

* McCulloch v. Maryland, 4 Wheaton, 405.

period longer than two years, nor can Congress, in exercising the power to levy taxes for that purpose, or any other, abrogate or supersede those restrictions, exceptions, and limitations, as they are a part of the Constitution, and as such are as obligatory in war as in peace, as any other rule would subvert, in time of war, every restriction, exception, limitation, and prohibition in the Constitution, and invest Congress with unlimited power, even surpassing that possessed by the British Parliament.

Congress may also borrow money to carry on war, without limitation, and in exercising that express power may issue treasury notes as the requisite means for carrying the express power into execution, but Congress cannot constitute such notes a standard of value nor make them a legal tender, neither in time of war nor in time of peace, for at least two reasons, either of which is conclusive that the exercise of such a power is not warranted by the Constitution: (1) Because the published proceedings of the Convention which adopted the Constitution, and of the State conventions which ratified it, show that those who participated in those deliberations never intended to confer any such power. (2) Because such a power, if admitted to exist, would nullify the effect and operation of the express power to coin money, regulate the value thereof and of foreign coin; as it would substitute a paper medium in the place of gold and silver coin, which in itself, as compared with coin, possesses no value, is not money, either in the constitutional or commercial sense, but only a promise to pay money, is never worth par, and often much less, even as domestic exchange, and is always fluctuating and never acknowledged either as a medium of exchange or a standard of value in any foreign market known to American commerce.

Power to issue such notes, it is conceded, exists without limitation, but the question is whether the framers of the Constitution intended that Congress, in the exercise of that power or the power to borrow money, whether in peace or war, should be empowered to constitute paper emissions, of any kind, a standard of value, and make the same a legal

tender in payment of debts. Mere convenience, or even a financial necessity in a single case, cannot be the test, but the question is what did the framers of the Constitution intend at the time the instrument was adopted and ratified?

Constitutional powers, of the kind last mentioned—that is, the power to ordain a standard of value and to provide a circulating medium for a legal tender—are subject to no mutations of any kind. They are the same in peace and in war. What the grants of power meant when the Constitution was adopted and ratified they mean still, and their meaning can never be changed except as described in the fifth article providing for amendments, as the Constitution "is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men and under all circumstances."*

Delegated power ought never to be enlarged beyond the fair scope of its terms, and that rule is emphatically applicable in the construction of the Constitution. Restrictions may at times be inconvenient, or even embarrassing, but the power to remove the difficulty by amendment is vested in the people, and if they do not exercise it the presumption is that the inconvenience is a less evil than the mischief to be apprehended if the restriction should be removed and the power extended, or that the existing inconvenience is the least of the two evils; and it should never be forgotten that the government ordained and established by the Constitution is a government "of limited and enumerated powers," and that to depart from the true import and meaning of those powers is to establish a new Constitution or to do for the people what they have not chosen to do for themselves, and to usurp the functions of a legislator and desert those of an expounder of the law. Arguments drawn from impolicy or inconvenience, says Judge Story, ought here to be of no weight, as "the only sound principle is to declare *ita lex scripta est*, to follow and to obey."†

* Ex parte Milligan, 4 Wallace, 120.

† 1 Story on the Constitution, 3d ed., § 426.

For these reasons I am of the opinion that the judgment in each of the cases before the court should be reversed.

Mr. Justice FIELD, dissenting:

Whilst I agree with the Chief Justice in the views expressed in his opinion in these cases, the great importance which I attach to the question of legal tender induces me to present some further considerations on the subject.

Nothing has been heard from counsel in these cases, and nothing from the present majority of the court, which has created a doubt in my mind of the correctness of the judgment rendered in the case of *Hepburn* v. *Griswold*,* or of the conclusions expressed in the opinion of the majority of the court as then constituted. That judgment was reached only after repeated arguments were heard from able and eminent counsel, and after every point raised on either side had been the subject of extended deliberation.

The questions presented in that case were also involved in several other cases, and had been elaborately argued in them. It is not extravagant to say that no case has ever been decided by this court since its organization, in which the questions presented were more fully argued or more maturely considered. It was hoped that a judgment thus reached would not be lightly disturbed. It was hoped that it had settled forever that under a Constitution ordained, among other things, "to establish justice," legislation giving to one person the right to discharge his obligations to another by nominal instead of actual fulfilment, could never be justified.

I shall not comment upon the causes which have led to a reversal of that judgment. They are patent to every one. I will simply observe that the Chief Justice and the associate justices, who constituted the majority of the court when that judgment was rendered, still adhere to their former convictions. To them the reasons for the original decision are as cogent and convincing now as they were when that

* 8 Wallace, 603.

decision was pronounced; and to them its justice, as applied to past contracts, is as clear to-day as it was then.

In the cases now before us the questions stated, by order of the court, for the argument of counsel, do not present with entire accuracy the questions actually argued and decided. As stated, the questions are: 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 act thus designated as the legal tender act is the act of Congress of February 25th, 1862, authorizing the issue of United States notes, and providing for their redemption or funding, and for funding the floating debt of the United States;* and the questions, as stated, would seem to draw into discussion the validity of the entire act; whereas, the only questions intended for argument, and actually argued and decided, relate—1st, to the validity of that provision of the act which declares that these notes shall be a legal tender in payment of debts, as applied to private debts and debts of the government contracted previous to the passage of the act; and 2d, to the validity of the provision as applied to similar contracts subsequently made. The case of *Parker* v. *Davis* involves the consideration of the first question; and the case of *Knox* v. *Lee* is supposed by a majority of the court to present the second question.

No question was raised as to the validity of the provisions of the act authorizing the issue of the notes, and making them receivable for dues to the United States; nor do I perceive that any objection could justly be made at this day to these provisions. The issue of the notes was a proper exercise of the power to borrow money, which is granted to Congress without limitation. The extent to which the power may be exercised depends, in all cases, upon the judgment of that body as to the necessities of the government. The power to borrow includes the power to give evidences of indebtedness and obligations of repayment.

* 12 Stat. at Large, 345.

Instruments of this character are among the securities of the United States mentioned in the Constitution. These securities are sometimes in the form of certificates of indebtedness, but they may be issued in any other form, and in such form and in such amounts as will fit them for general circulation, and to that end may be made payable to bearer and transferable by delivery. The form of notes, varying in amounts to suit the convenience or ability of the lender, has been found by experience a convenient form, and the one best calculated to secure the readiest acceptance and the largest loan. It has been the practice of the government to use notes of this character in raising loans and obtaining supplies from an early period in its history, their receipt by third parties being in all cases optional.

In June, 1812, Congress passed an act which provided for the issue of treasury notes, and authorized the Secretary of the Treasury, with the approbation of the President, "to borrow from time to time, not under par, such sums" as the President might think expedient, "on the credit of such notes."*

In February, 1813, Congress passed another act for the issue of treasury notes, declaring "that the amount of money borrowed or obtained by virtue of the notes" issued under its second section should be a part of the money authorized to be borrowed under a previous act of the same session.† There are numerous other acts of a similar character on our statute-books. More than twenty, I believe, were passed previous to the legal tender act.‡

* 2 Stat. at Large, 766. † 2 Stat. at Large, 801.

‡ Acts of Congress authorizing the issue of treasury notes: 2 Stat. at Large, 766, approved June 30, 1812; Id. 801, approved February 25, 1813; 3 Stat. at Large, 100, approved March 4, 1814; Id. 161, approved December 26, 1814; Id. 213, approved February 24, 1815; 5 Stat. at Large, 201, approved October 12, 1837; Id. 228, approved May 21, 1838; Id. 323, approved March 2, 1839; Id. 370, approved March 31, 1840; Id. 411, approved February 15, 1841; Id. 469, approved January 31, 1842; Id. 473, approved April 15, 1842; Id. 581, approved August 31, 1842; Id. 614, approved March 3, 1843; 9 Stat. at Large, 39, approved July 22, 1846; Id. 64, approved August 6, 1846; Id. 118, approved January 28, 1847; 11 Stat. at Large, 257, approved December 28, 1857; Id. 430, approved March 3d, 1859.

In all of them the issue of the notes was authorized as a means of borrowing money, or obtaining supplies, or paying the debts of the United States, and in all of them the receipt of the notes by third parties was purely voluntary. Thus, in the first act, of June, 1812, the Secretary of the Treasury was authorized, not only to borrow on the notes, but to issue such notes as the President might think expedient "in payment of supplies or debts due by the United States to such public creditors or other persons" as might "*choose to receive such notes in payment at par.*" Similar provisions are found in all the acts except where the notes are authorized simply to take up previous loans.

The issue of the notes for supplies purchased or services rendered at the request of the United States is only giving their obligations for an indebtedness thus incurred; and the same power which authorizes the issue of notes for money must also authorize their issue for whatever is received as an equivalent for money. The result to the United States is the same as if the money were actually received for the notes and then paid out for the supplies or services.

The notes issued under the act of Congress of February 25th, 1862, differ from the treasury notes authorized by the previous acts to which I have referred, in the fact that they do not bear interest and do not designate on their face a period at which they shall be paid, features which may affect their value in the market but do not change their essential character. There cannot be, therefore, as already stated, any just objection at this day to the issue of the notes, nor to their adaptation in form for general circulation.

Nor can there be any objection to their being made receivable for dues to the United States. Their receivability in this respect is only the application to the demands of the government, and demands against it, of the just principle which is applied to the demands of individuals against each other, that cross-demands shall offset and satisfy each other to the extent of their respective amounts. No rights of third parties are in any respect affected by the application of the rule here, and the purchasing and borrowing power

of the notes are greatly increased by making them thus receivable for the public dues. The objection to the act does not lie in these features; it lies in the provision which declares that the notes shall be "a legal tender in payment of all debts, public and private," so far as that provision applies to private debts, and debts owing by the United States.

In considering the validity and constitutionality of this provision, I shall in the first place confine myself to the provision in its application to private debts. Afterwards I shall have something to say of the provision in its application to debts owing by the government.

In the discussions upon the subject of legal tender the advocates of the measure do not agree as to the power in the Constitution to which it shall be referred; some placing it upon the power to borrow money, some on the coining power, and some on what is termed a resulting power from the general purposes of the government; and these discussions have been accompanied by statements as to the effect of the measure, and the consequences which must have followed had it been rejected, and which will now occur if its validity be not sustained, which rest upon no solid foundation, and are not calculated to aid the judgment in coming to a just conclusion.

In what I have to say I shall endeavor to avoid any such general and loose statements, and shall direct myself to an inquiry into the nature of these powers to which the measure is referred, and the relation of the measure to them.

Now if Congress can, by its legislative declaration, make the notes of the United States a legal tender in payment of private debts—that is, can make them receivable against the will of the creditor in satisfaction of debts due to him by third parties—its power in this respect is not derived from its power to borrow money, under which the notes were issued. That power is not different in its nature or essential incidents from the power to borrow possessed by individuals, and is not to receive a larger definition. Nor is it different from the power often granted to public and private corporations. The grant, it is true, is usually accompanied in these

latter cases with limitations as to the amount to be borrowed, and a designation of the objects to which the money shall be applied—limitations which in no respect affect the nature of the power. The terms "power to borrow money" have the same meaning in all these cases, and not one meaning when used by individuals, another when granted to corporations, and still a different one when possessed by Congress. They mean only a power to contract for a loan of money upon considerations to be agreed between the parties. The amount of the loan, the time of repayment, the interest it shall bear, and the form in which the obligation shall be expressed are simply matters of arrangement between the parties. They concern no one else. It is no part or incident of a contract of this character that the rights or interests of third parties, strangers to the matter, shall be in any respect affected. The transaction is completed when the lender has parted with his money, and the borrower has given his promise of repayment at the time, and in the manner, and with the securities stipulated between them.

As an inducement to the loan, and security for its repayment, the borrower may of course pledge such property or revenues, and annex to his promises such rights and privileges as he may possess. His stipulations in this respect are necessarily limited to his own property, rights, and privileges, and cannot extend to those of other persons.

Now, whether a borrower—be the borrower an individual, a corporation, or the government—can annex to the bonds, notes, or other evidences of debt given for the money borrowed, any quality by which they will serve as a means of satisfying the contracts of other parties, must necessarily depend upon the question whether the borrower possesses any right to interfere with such contracts, and determine how they shall be satisfied. The right of the borrower in this respect rests upon no different foundation than the right to interfere with any other property of third parties. And if it will not be contended, as I think I may assume it will not be, that the borrower possesses any right, in order to make a loan, to interfere with the tangible and visible property of

third parties, I do not perceive how it can be contended that he has any right to interfere with their property when it exists in the form of contracts. A large part of the property of every commercial people exists in that form, and the principle which excludes a stranger from meddling with another's property which is visible and tangible, equally excludes him from meddling with it when existing in the form of contracts.

That an individual or a corporation borrowing possesses no power to annex to his evidences of indebtedness any quality by which the holder will be enabled to change his contracts with third parties, strangers to the loan, is admitted; but it is contended that Congress possesses such power because, in addition to the express power to borrow money, there is a clause in the Constitution which authorizes Congress to make all laws "necessary and proper" for the execution of the powers enumerated. This clause neither augments nor diminishes the expressly designated powers. It only states in terms what Congress would equally have had the right to do without its insertion in the Constitution. It is a general principle that a power to do a particular act includes the power to adopt all the ordinary and appropriate means for its execution. "Had the Constitution," says Hamilton, in the Federalist, speaking of this clause, "been silent on this head, there can be no doubt that all the particular powers requisite as a means of executing the general powers would have resulted to the government by unavoidable implication. No axiom is more clearly established in law or in reason, that whenever the end is required the means are authorized; whenever a general power to do a thing is given, every particular power necessary for doing it is included."*

The subsidiary power existing without the clause in question, its insertion in the Constitution was no doubt intended, as observed by Mr. Hamilton, to prevent "all cavilling refinements" in those who might thereafter feel a disposition

* The Federalist, No. 44.

to curtail and evade the legitimate authorities of the Union; and also, I may add, to indicate the true sphere and limits of the implied powers.

But though the subsidiary power would have existed without this clause, there would have been the same perpetually recurring question as now, as to what laws are necessary and proper for the execution of the expressly enumerated powers.

The particular clause in question has at different times undergone elaborate discussion in Congress, in cabinets, and in the courts. Its meaning was much debated in the first Congress upon the proposition to incorporate a national bank, and afterwards in the cabinet of Washington, when that measure was presented for his approval. Mr. Jefferson, then Secretary of State, and Mr. Hamilton, then Secretary of the Treasury, differed widely in their construction of the clause, and each gave his views in an elaborate opinion. Mr. Jefferson held that the word "necessary" restricted the power of Congress to the use of those means, without which the grant would be nugatory, thus making necessary equivalent to indispensable.

Mr. Hamilton favored a more liberal, and in my judgment, a more just interpretation, and contended that the terms "necessary and proper" meant no more than that the measures adopted must have an obvious relation as a means to the end intended. "If the end," he said, "be clearly comprehended within any of the specified powers, and if the measure have an obvious relation to that end, and is not forbidden by any particular provision of the Constitution, it may safely be deemed to come within the compass of the national authority." "There is also," he added, "this further criterion which may materially assist the decision. Does the proposed measure abridge a pre-existing right of any State, or of any individual? If it does not, there is a strong presumption in favor of its constitutionality; and slighter relations to any declared object may be permitted to turn the scale." From the criterion thus indicated it

would seem that the distinguished statesman was of opinion that a measure which did interfere with a pre-existing right of a State or an individual would not be constitutional.

The interpretation given by Mr. Hamilton was substantially followed by Chief Justice Marshall, in *McCulloch* v. *The State of Maryland*, when, speaking for the court, he said that if the end to be accomplished by the legislation of Congress be legitimate, and within the scope of the Constitution, "all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, but are consistent with the letter and spirit of the Constitution, are constitutional." The Chief Justice did not, it is true, in terms declare that legislation which is not thus appropriate, and plainly adapted to a lawful end, is unconstitutional, but such is the plain import of the argument advanced by him; and that conclusion must also follow from the principle that, when legislation of a particular character is specially authorized, the opposite of such legislation is inhibited.

Tested by the rule given by Mr. Hamilton, or by the rule thus laid down by this court through Mr. Chief Justice Marshall, the annexing of a quality to the promises of the government for money borrowed, which will enable the holder to use them as a means of satisfying the demands of third parties, cannot be sustained as the exercise of an appropriate means of borrowing. That is only appropriate which has some relation of fitness to an end. Borrowing, as already stated, is a transaction by which, on one side, the lender parts with his money, and on the other the borrower agrees to repay it in such form and at such time as may be stipulated. Though not a necessary part of the contract of borrowing, it is usual for the borrower to offer securities for the repayment of the loan. The fitness which would render a means appropriate to this transaction thus considered must have respect to the terms which are essential to the contract, or to the securities which the borrower may furnish as an inducement to the loan. The quality of legal tender does not touch the terms of the contract of borrowing, nor does it stand as a security for the loan. A security supposes

some right or interest in the thing pledged, which is subject to the disposition of the borrower.

There has been much confusion on this subject from a failure to distinguish between the adaptation of particular means to an end and the effect, or supposed effect, of those means in producing results desired by the government. The argument is stated thus: the object of borrowing is to raise funds; the annexing of the quality of legal tender to the notes of the government induces parties the more readily to loan upon them; the result desired by the government—the acquisition of funds—is thus accomplished; therefore, the annexing of the quality of legal tender is an appropriate means to the execution of the power to borrow. But it is evident that the same reasoning would justify, as appropriate means to the execution of this power, any measures which would result in obtaining the required funds. The annexing of a provision by which the notes of the government should serve as a free ticket in the public conveyances of the country, or for ingress into places of public amusement, or which would entitle the holder to a percentage out of the revenues of private corporations, or exempt his entire property, as well as the notes themselves, from State and municipal taxation, would produce a ready acceptance of the notes. But the advocate of the most liberal construction would hardly pretend that these measures, or similar measures touching the property of third parties, would be appropriate as a means to the execution of the power to borrow. Indeed, there is no invasion by government of the rights of third parties which might not thus be sanctioned upon the pretence that its allowance to the holder of the notes would lead to their ready acceptance and produce the desired loan.

The actual effect of the quality of legal tender in inducing parties to receive them was necessarily limited to the amount required by existing debtors, who did not scruple to discharge with them their pre-existing liabilities. For moneys desired from other parties, or supplies required for the use of the army or navy, the provision added nothing to the value of the notes. Their borrowing power or purchasing

power depended, by a general and a universal law of currency, not upon the legal tender clause, but upon the confidence which the parties receiving the notes had in their ultimate payment. Their exchangeable value was determined by this confidence, and every person dealing in them advanced his money and regulated his charges accordingly.

The inability of mere legislation to control this universal law of currency is strikingly illustrated by the history of the bills of credit issued by the Continental Congress during our Revolutionary War. From June, 1775, to March, 1780, these bills amounted to over $300,000,000. Depreciation followed as a natural consequence, commencing in 1777, when the issues only equalled $14,000,000. Previous to this time, in January, 1776, when the issues were only $5,000,000, Congress had, by resolution, declared that if any person should be "so lost to all virtue and regard to his country" as to refuse to receive the bills in payment, he should, on conviction thereof by the committee of the city, county, or district, or, in case of appeal from their decision, by the assembly, convention, council, or committee of safety of the colony where he resided, be "deemed, published, and treated as an enemy of his country, and precluded from all trade or intercourse with the inhabitants" of the colonies.*

And in January, 1777, when as yet the issues were only $14,000,000, Congress passed this remarkable resolution:

"*Resolved*, That all bills of credit emitted by authority of Congress ought to pass current in all payments, trade, and dealings in these States, and be deemed in value equal to the same nominal sums in Spanish milled dollars, and that whosoever shall offer, ask, or receive more in the said bills for any gold or silver coins, bullion, or any other species of money whatsoever, than the nominal sum or amount thereof in Spanish milled dollars, or more in the said bills for any lands, houses, goods, or commodities whatsoever than the same could be purchased at of the same person or persons in gold, silver, or any other species of money whatsoever,

* 2 Journals of Congress, 21.

or shall offer to sell any goods or commodities for gold or silver coins or any other species of money whatsoever and refuse to sell the same for the said continental bills, every such person ought to be deemed an enemy to the liberty of these United States and to forfeit the value of the money so exchanged, or house, land, or commodity so sold or offered for sale. And it is recommended to the legislatures of the respective States to enact laws inflicting such forfeitures and other penalties on offenders as aforesaid as will prevent such pernicious practices. That it be recommended to the legislatures of the United States to pass laws to make the bills of credit issued by the Congress a lawful tender in payments of public and private debts, and a refusal thereof an extinguishment of such debts; that debts payable in sterling money be discharged with continental dollars at the rate of 4*s.* 6*d.* sterling per dollar, and that in discharge of all other debts and contracts continental dollars pass at the rate fixed by the respective States for the value of Spanish milled dollars."

The several States promptly responded to the recommendations of Congress and made the bills a legal tender for debts and the refusal to receive them an extinguishment of the debt.

Congress also issued, in September, 1779, a circular addressed to the people on the subject, in which they showed that the United States would be able to redeem the bills, and they repelled with indignation the suggestion that there could be any violation of the public faith. "The pride of America," said the address, "revolts from the idea; her citizens know for what purposes these emissions were made, and have repeatedly plighted their faith for the redemption of them; they are to be found in every man's possession, and every man is interested in their being redeemed; they must, therefore, entertain a high opinion of American credulity who suppose the people capable of believing, on due reflection, that all America will, against the faith, the honor, and the interest of all America, be ever prevailed upon to countenance, support, or permit so ruinous, so disgraceful a

measure. We are convinced that the efforts and arts of our enemies will not be wanting to draw us into this humiliating and contemptible situation. Impelled by malice and the suggestions of chagrin and disappointment at not being able to bend our necks to the yoke, they will endeavor to force or seduce us to commit this unpardonable sin in order to subject us to the punishment due to it, and that we may thenceforth be a reproach and a byword among the nations. Apprised of these consequences, knowing the value of national character, and impressed with a due sense of the immutable laws of justice and honor, it is impossible that America should think without horror of such an execrable deed."*

Yet in spite of the noble sentiments contained in this address, which bears the honored name of John Jay, then President of Congress and afterwards the first Chief Justice of this court, and in spite of legal tender provisions and harsh penal statutes, the universal law of currency prevailed. Depreciation followed until it became so great that the very idea of redemption at par was abandoned.

Congress then proposed to take up the bills by issuing new bills on the credit of the several States, guaranteed by the United States, not exceeding one-twentieth of the amount of the old issue, the new bills to draw interest and be redeemable in six years. But the scheme failed and the bills became, during 1780, of so little value that they ceased to circulate and "quietly died," says the historian of the period, "in the hands of their possessors."†

And it is within the memory of all of us that during the late rebellion the notes of the United States issued under the Legal Tender Act rose in value in the market as the successes of our arms gave evidence of an early termination of the war, and that they fell in value with every triumph of the Confederate forces. No legislation of Congress declaring these notes to be money instead of representatives

* 5 Journals of Congress, p. 351. This address was written by Mr. Jay (See Flanders's Lives and Times of the Chief Justices, vol. 1, p. 256.)

† Pitkin's History, vol. 2, p. 157.

of money or credit could alter this result one jot or tittle. Men measured their value not by congressional declaration, which could not alter the nature of things, but by the confidence reposed in their ultimate payment.

Without the legal tender provision the notes would have circulated equally well and answered all the purposes of government—the only direct benefit resulting from that provision arising, as already stated, from the ability it conferred upon unscrupulous debtors to discharge with them previous obligations. The notes of State banks circulated without possessing that quality and supplied a currency for the people just so long as confidence in the ability of the banks to redeem the notes continued. The notes issued by the national bank associations during the war, under the authority of Congress, amounting to $300,000,000, which were never made a legal tender, circulated equally well with the notes of the United States. Neither their utility nor their circulation was diminished in any degree by the absence of a legal tender quality. They rose and fell in the market under the same influences and precisely to the same extent as the notes of the United States, which possessed this quality.

It is foreign, however, to my argument to discuss the utility of the legal tender clause. The utility of a measure is not the subject of judicial cognizance, nor, as already intimated, the test of its constitutionality. But the relation of the measure as a means to an end, authorized by the Constitution, is a subject of such cognizance, and the test of its constitutionality, when it is not prohibited by any specific provision of that instrument, and is consistent with its letter and spirit. "The degree," said Hamilton, "in which a measure is necessary can never be a test of the *legal right* to adopt it. That must be a matter of opinion, and can only be a test of expediency. The relation between the means and the end, between the nature of a *means* employed toward the execution of the power and the *object* of that power, must be the criterion of unconstitutionality; not the more or less of necessity or utility."

If this were not so, if Congress could not only exercise, as it undoubtedly may, unrestricted liberty of choice among the means which are appropriate and plainly adapted to the execution of an express power, but could also judge, without its conclusions being subject to question in cases involving private rights, what means are thus appropriate and adapted, our government would be, not what it was intended to be, one of limited, but one of unlimited powers.

Of course Congress must inquire in the first instance and determine for itself not only the expediency, but the fitness to the end intended, of every measure adopted by its legislation. But the power of this tribunal to revise these determinations in cases involving private rights has been uniformly asserted, since the formation of the Constitution to this day, by the ablest statesmen and jurists of the country.

I have thus dwelt at length upon the clause of the Constitution investing Congress with the power to borrow money on the credit of the United States, because it is under that power that the notes of the United States were issued, and it is upon the supposed enhanced value which the quality of legal tender gives to such notes, as the means of borrowing, that the validity and constitutionality of the provision annexing this quality are founded. It is true that, in the arguments of counsel, and in the several opinions of different State courts, to which our attention has been called, and in the dissenting opinion in *Hepburn* v. *Griswold*, reference is also made to other powers possessed by Congress, particularly to declare war, to suppress insurrection, to raise and support armies, and to provide and maintain a navy; all of which were called into exercise and severely taxed at the time the Legal Tender Act was passed. But it is evident that the notes have no relation to these powers, or to any other powers of Congress, except as they furnish a convenient means for raising money for their execution. The existence of the war only increased the urgency of the government for funds. It did not add to its powers to raise such funds, or change, in any respect, the nature of those powers or the transactions which they authorized. If the

power to engraft the quality of legal tender upon the notes existed at all with Congress, the occasion, the extent, and the purpose of its exercise were mere matters of legislative discretion; and the power may be equally exerted when a loan is made to meet the ordinary expenses of government in time of peace, as when vast sums are needed to raise armies and provide navies in time of war. The wants of the government can never be the measure of its powers.

The Constitution has specifically designated the means by which funds can be raised for the uses of the government, either in war or peace. These are taxation, borrowing, coining, and the sale of its public property. Congress is empowered to levy and collect taxes, duties, imposts, and excises to any extent which the public necessities may require. Its power to borrow is equally unlimited. It can convert any bullion it may possess into coin, and it can dispose of the public lands and other property of the United States or any part of such property. The designation of these means exhausts the powers of Congress on the subject of raising money. The designation of the means is a negation of all others, for the designation would be unnecessary and absurd if the use of any and all means were permissible without it. These means exclude a resort to forced loans, and to any compulsory interference with the property of third persons, except by regular taxation in one of the forms mentioned.

But this is not all. The power "to coin money" is, in my judgment, inconsistent with and repugnant to the existence of a power to make anything but coin a legal tender. To coin money is to mould metallic substances having intrinsic value into certain forms convenient for commerce, and to impress them with the stamp of the government indicating their value. Coins are pieces of metal, of definite weight and value, thus stamped by national authority. Such is the natural import of the terms "to coin money" and "coin;" and if there were any doubt that this is their meaning in the Constitution, it would be removed by the language which immediately follows the grant of the "power

to coin," authorizing Congress to regulate the value of the money thus coined, and also "of foreign coin," and by the distinction made in other clauses between coin and the obligations of the General government and of the several States.

The power of regulation conferred is the power to determine the weight and purity of the several coins struck, and their consequent relation to the monetary unit which might be established by the authority of the government—a power which can be exercised with reference to the metallic coins of foreign countries, but which is incapable of execution with reference to their obligations or securities.

Then, in the clause of the Constitution immediately following, authorizing Congress "to provide for the punishment of counterfeiting the securities and current coin of the United States," a distinction between the obligations and coins of the General government is clearly made. And in the tenth section, which forbids the States to "coin money, emit bills of credit, and make anything but gold and silver coin a tender in payment of debts," a like distinction is made between coin and the obligations of the several States. The terms gold and silver as applied to the coin exclude the possibility of any other conclusion.

Now, money in the true sense of the term is not only a medium of exchange, but it is a standard of value by which all other values are measured. Blackstone says, and Story repeats his language, "Money is a universal medium or common standard, by a comparison with which the value of all merchandise may be ascertained, or it is a sign which represents the respective values of all commodities."* Money being such standard, its coins or pieces are necessarily a legal tender to the amount of their respective values for all contracts or judgments payable in money, without any legislative enactment to make them so. The provisions in the different coinage acts that the coins to be struck shall be such legal tender, are merely declaratory of their effect when offered in payment, and are not essential to give them that character.

* 1 Blackstone's Commentaries, 276; 1 Story on the Constitution, § 1118.

The power to coin money is, therefore, a power to fabricate coins out of metal as money, and thus make them a legal tender for their declared values as indicated by their stamp. If this be the true import and meaning of the language used, it is difficult to see how Congress can make the paper of the government a legal tender. When the Constitution says that Congress shall have the power to make metallic coins a legal tender, it declares in effect that it shall make nothing else such tender. The affirmative grant is here a negative of all other power over the subject.

Besides this, there cannot well be two different standards of value, and consequently two kinds of legal tender for the discharge of obligations arising from the same transactions. The standard or tender of the lower actual value would in such case inevitably exclude and supersede the other, for no one would use the standard or tender of higher value when his purpose could be equally well accomplished by the use of the other. A practical illustration of the truth of this principle we have all seen in the effect upon coin of the act of Congress making the notes of the United States a legal tender. It drove coin from general circulation, and made it, like bullion, the subject of sale and barter in the market.

The inhibition upon the States to coin money and yet to make anything but gold and silver coin a tender in payment of debts, must be read in connection with the grant of the coinage power to Congress. The two provisions taken together indicate beyond question that the coins which the National government was to fabricate, and the foreign coins, the valuation of which it was to regulate, were to consist principally, if not entirely, of gold and silver.

The framers of the Constitution were considering the subject of money to be used throughout the entire Union when these provisions were inserted, and it is plain that they intended by them that metallic coins fabricated by the National government, or adopted from abroad by its authority, composed of the precious metals, should everywhere be the standard and the only standard of value by which exchanges could be regulated and payments made.

At that time gold and silver moulded into forms convenient for use, and stamped with their value by public authority, constituted, with the exception of pieces of copper for small values, the money of the entire civilized world. Indeed these metals divided up and thus stamped always have constituted money with all people having any civilization, from the earliest periods in the history of the world down to the present time. It was with "four hundred shekels of silver, current money with the merchant," that Abraham bought the field of Machpelah, nearly four thousand years ago.* This adoption of the precious metals as the subject of coinage,—the material of money by all peoples in all ages of the world,—has not been the result of any vagaries of fancy, but is attributable to the fact that they of all metals alone possess the properties which are essential to a circulating medium of uniform value.

"The circulating medium of a commercial community," says Mr. Webster, "must be that which is also the circulating medium of other commercial communities, or must be capable of being converted into that medium without loss. It must also be able not only to pass in payments and receipts among individuals of the same society and nation, but to adjust and discharge the balance of exchanges between different nations. It must be something which has a value abroad as well as at home, by which foreign as well as domestic debts can be satisfied. The precious metals alone answer these purposes. They alone, therefore, are money, and whatever else is to perform the functions of money must be their representative and capable of being turned into them at will. So long as bank paper retains this quality it is a substitute for money. Divested of this nothing can give it that character."†

The statesmen who framed the Constitution understood this principle as well as it is understood in our day. They had seen in the experience of the Revolutionary period the demoralizing tendency, the cruel injustice, and the intoler-

* Genesis 23 : 16.

† Webster's Works, vol. 3, page 41.

able oppression of a paper currency not convertible on demand into money, and forced into circulation by legal tender provisions and penal enactments. When they therefore were constructing a government for a country, which they could not fail to see was destined to be a mighty empire, and have commercial relations with all nations, a government which they believed was to endure for ages, they determined to recognize in the fundamental law as the standard of value, that which ever has been and always must be recognized by the world as the true standard, and thus facilitate commerce, protect industry, establish justice, and prevent the possibility of a recurrence of the evils which they had experienced and the perpetration of the injustice which they had witnessed. "We all know," says Mr. Webster, "that the establishment of a sound and uniform currency was one of the greatest ends contemplated in the adoption of the present Constitution. If we could now fully explore all the motives of those who framed and those who supported that Constitution, perhaps we should hardly find a more powerful one than this."*

And how the framers of the Constitution endeavored to establish this "sound and uniform currency" we have already seen in the clauses which they adopted providing for a currency of gold and silver coins. Their determination to sanction only a metallic currency is further evident from the debates in the Convention upon the proposition to authorize Congress to emit bills on the credit of the United States. By bills of credit, as the terms were then understood, were meant paper issues, intended to circulate through the community for its ordinary purposes as money, bearing upon their face the promise of the government to pay the sums specified thereon at a future day. The original draft contained a clause giving to Congress power "to borrow money and emit bills on the credit of the United States," and when the clause came up for consideration, Mr. Morris moved to strike out the words "and emit bills on the credit

* Webster's Works, vol. 3, p. 395.

of the United States," observing that "if the United States had credit, such bills would be unnecessary; if they had not, unjust and useless." Mr. Madison inquired whether it would not be "sufficient to prohibit the making them a legal tender." "This will remove," he said, "the temptation to emit them with unjust views, and promissory notes in that shape may in some emergencies be best." Mr. Morris replied that striking out the words would still leave room for "notes of a responsible minister," which would do "all the good without the mischief." Mr. Gorham was for striking out the words without inserting any prohibition. If the words stood, he said, they might "suggest and lead to the measure," and that the power, so far as it was necessary or safe, was "involved in that of borrowing." Mr. Mason said he was unwilling "to tie the hands of Congress," and thought Congress "would not have the power unless it were expressed." Mr. Ellsworth thought it "a favorable moment to shut and bar the door against paper money." "The mischiefs," he said, "of the various experiments which had been made were now fresh in the public mind and had excited the disgust of all the respectable part of America. By withholding the power from the new government, more friends of influence would be gained to it than by almost anything else. Paper money can in no case be necessary. Give the government credit, and other resources will offer. The power may do harm, never good." Mr. Wilson thought that "it would have a most salutary influence on the credit of the United States to remove the possibility of paper money." "This expedient," he said, "can never succeed whilst its mischiefs are remembered, and as long as it can be resorted to it will be a bar to other resources." Mr. Butler was urgent for disarming the government of such a power, and remarked "that paper was a legal tender in no country in Europe." Mr. Mason replied that if there was no example in Europe there was none in which the government was restrained on this head, and he was averse "to tying up the hands of the legislature altogether." Mr. Langdon preferred to reject the whole plan than retain the words.

Of those who participated in the debates, only one, Mr. Mercer, expressed an opinion favorable to paper money, and none suggested that if Congress were allowed to issue the bills their acceptance should be compulsory—that is, that they should be made a legal tender. But the words were stricken out by a vote of nine States to two. Virginia voted for the motion, and Mr. Madison has appended a note to the debates, stating that her vote was occasioned by his acquiescence, and that he "became satisfied that striking out the words would not disable the government from the use of public notes, as far as they could be safe and proper; and would only cut off the pretext for a *paper currency* and particularly for making the bills *a tender* either for public or private debts."*

If anything is manifest from these debates it is that the members of the Convention intended to withhold from Congress the power to issue bills to circulate as money—that is, to be receivable in compulsory payment, or, in other words, having the quality of legal tender—and that the express power to issue the bills was denied, under an apprehension that if granted it would give a pretext to Congress, under the idea of declaring their effect, to annex to them that quality. The issue of notes simply as a means of borrowing money, which of course would leave them to be received at the option of parties, does not appear to have been seriously questioned. The circulation of notes thus issued as a voluntary currency and their receipt in that character in payment of taxes, duties, and other public expenses, was not subject to the objections urged.

I am aware of the rule that the opinions and intentions of individual members of the Convention, as expressed in its debates and proceedings, are not to control the construction of the plain language of the Constitution or narrow down the powers which that instrument confers. Members, it is said, who did not participate in the debate may have entertained different views from those expressed. The several

* Madison Papers, vol. 3, page 1346.

State conventions to which the Constitution was submitted may have differed widely from each other and from its framers in their interpretation of its clauses. We all know that opposite opinions on many points were expressed in the conventions, and conflicting reasons were urged both for the adoption and the rejection of that instrument. All this is very true, but it does not apply in the present case, for on the subject now under consideration there was everywhere, in the several State conventions and in the discussions before the people, an entire uniformity of opinion, so far as we have any record of its expression, and that concurred with the intention of the Convention, as disclosed by its debates, that the Constitution withheld from Congress all power to issue bills to circulate as money, meaning by that bills made receivable in compulsory payment, or, in other words, having the quality of legal tender. Every one appears to have understood that the power of making paper issues a legal tender, by Congress or by the States, was absolutely and forever prohibited.

Mr. Luther Martin, a member of the Convention, in his speech before the Maryland legislature, as reported in his letter to that body, states the arguments urged against depriving Congress of the power to emit bills of credit, and then says that a "majority of the Convention, being wise beyond every event and being willing to risk any political evil rather than admit the idea of a paper emission in any possible case, refused to trust this authority to a government to which they were lavishing the most unlimited powers of taxation and to the mercy of which they were willing blindly to trust the liberty and property of the citizens of every State in the Union, *and they erased that clause from the system.*"

Not only was this construction given to the Constitution by its framers and the people in their discussions at the time it was pending before them, but until the passage of the act of 1862, a period of nearly three-quarters of a century, the soundness of this construction was never called in question by any legislation of Congress or the opinion of any judicial tribunal. Numerous acts, as already stated,

were passed during this period, authorizing the issue of notes for the purpose of raising funds or obtaining supplies, but in none of them was the acceptance of the notes made compulsory. Only one instance have I been able to find in the history of congressional proceedings where it was even suggested that it was within the competency of Congress to annex to the notes the quality of legal tender, and this occurred in 1814. The government was then greatly embarrassed from the want of funds to continue the war existing with Great Britain, and a member from Georgia introduced into the House of Representatives several resolutions directing an inquiry into the expediency of authorizing the Secretary of the Treasury to issue notes convenient for circulation and making provision for the purchase of supplies in each State. Among the resolutions was one declaring that the notes to be issued should be a legal tender for debts due or subsequently becoming due between citizens of the United States and between citizens and foreigners. The House agreed to consider all the resolutions but the one containing the legal tender provision. That it refused to consider by a vote of more than two to one.*

As until the act of 1862 there was no legislation making the acceptance of notes issued on the credit of the United States compulsory, the construction of the clause of the Constitution containing the grant of the coinage power never came directly before this court for consideration, and the attention of the court was only incidentally drawn to it. But whenever the court spoke on the subject, even incidentally, its voice was in entire harmony with that of the Convention.

Thus, in *Gwin* v. *Breedlove*,† where a marshal of Mississippi, commanded to collect a certain amount of dollars on execution, received the amount in bank notes, it was held that he was liable to the plaintiff in gold and silver. "By the Constitution of the United States," said the court, "gold or silver coin made current by law can only be tendered in payment of debts."

* Benton's Abridg., vol. 5, p. 361.

† 2 Howard, 38.

And in the case of the *United States* v. *Marigold*,* where the question arose whether Congress had power to enact certain provisions of law for the punishment of persons bringing into the United States counterfeit coin with intent to pass it, the court said: These provisions "appertain to the execution of an important trust invested by the Constitution, and to the obligation to fulfil that trust on the part of the government, namely, the trust and the duty of creating and maintaining a uniform and pure metallic standard of value throughout the Union. The power of coining money and of regulating its value was delegated to Congress by the Constitution for the very purpose, as assigned by the framers of that instrument, of creating and preserving the uniformity and purity of such a standard of value, and on account of the impossibility which was foreseen of otherwise preventing the inequalities and the confusion necessarily incident to different views of policy, which in different communities would be brought to bear on this subject. The power to coin money being thus given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power."

It is difficult to perceive how the trust and duty here designated, of "creating and maintaining a uniform and metallic standard of value throughout the Union," is discharged, when another standard of lower value and fluctuating character is authorized by law, which necessarily operates to drive the first from circulation.

In addition to all the weight of opinion I have mentioned we have, to the same purport, from the adoption of the Constitution up to the passage of the act of 1862, the united testimony of the leading statesmen and jurists of the country. Of all the men who, during that period, participated with any distinction in the councils of the nation, not one can be named who ever asserted any different power in Congress than what I have mentioned. As observed by the Chief Justice, statesmen who disagreed widely on other points agreed on this.

* 9 Howard, 567.

Mr. Webster, who has always been regarded by a large portion of his countrymen as one of the ablest and most enlightened expounders of the Constitution, did not seem to think there was any doubt on the subject, although he belonged to the class who advocated the largest exercise of powers by the General government. From his first entrance into public life, in 1812, he gave great consideration to the subject of the currency, and in an elaborate speech in the Senate, in 1836, he said: "Currency, in a large and perhaps just sense, includes not only gold and silver and bank bills, but bills of exchange also. It may include all that adjusts exchanges and settles balances in the operations of trade and business; but if we understand by currency the legal money of the country, and that which constitutes a lawful tender for debts, and is the statute measure of value, then undoubtedly nothing is included but gold and silver. Most unquestionably there is no legal tender, and there can be no legal tender in this country, under the authority of this government or any other, but gold and silver—either the coinage of our own mints or foreign coins, at rates regulated by Congress. This is a constitutional principle perfectly plain, and of the very highest importance. The States are expressly prohibited from making anything but gold and silver a tender in payment of debts, and, although no such express prohibition is applied to Congress, yet, as Congress has no power granted to it in this respect but to coin money, and to regulate the value of foreign coins, it clearly has no power to substitute paper, or anything else, for coin as a tender in payment of debts and in discharge of contracts. Congress has exercised this power fully in both its branches. It has coined money, and still coins it; it has regulated the value of foreign coins, and still regulates their value. The legal tender, therefore, the constitutional standard of value, is established and cannot be overthrown. To overthrow it would shake the whole system."

If, now, we consider the history of the times when the Constitution was adopted; the intentions of the framers of that instrument, as shown in their debates; the contempora-

neous exposition of the coinage power in the State conventions assembled to consider the Constitution, and in the public discussions before the people; the natural meaning of the terms used; the nature of the Constitution itself as creating a government of enumerated powers; the legislative exposition of nearly three-quarters of a century; the opinions of judicial tribunals, and the recorded utterances of statesmen, jurists, and commentators, it would seem impossible to doubt that the only standard of value authorized by the Constitution was to consist of metallic coins struck or regulated by the direction of Congress, and that the power to establish any other standard was denied by that instrument.

There are other considerations besides those I have stated, which are equally convincing against the constitutionality of the legal tender provision of the act of February 25th, 1862, so far as it applies to private debts and debts by the government contracted previous to its passage. That provision operates directly to impair the obligation of such contracts. In the dissenting opinion, in the case of *Hepburn* v. *Griswold*, this is admitted to be its operation, and the position is taken that, while the Constitution forbids the States to pass such laws, it does not forbid Congress to do this, and the power to establish a uniform system of bankruptcy, which is expressly conferred, is mentioned in support of the position. In some of the opinions of the State courts, to which our attention has been directed, it is denied that the provision in question impairs the obligation of previous contracts, it being asserted that a contract to pay money is satisfied, according to its meaning, by the payment of that which is money when the payment is made, and that if the law does not interfere with this mode of satisfaction, it does not impair the obligation of the contract. This position is true so long as the term money represents the same thing in both cases or their actual equivalents, but it is not true when the term has different meanings. Money is a generic term, and contracts for money are not made without a specification of the coins or denominations of money, and the

number of them intended, as eagles, dollars, or cents; and it will not be pretended that a contract for a specified number of eagles can be satisfied by a delivery of an equal number of dollars, although both eagles and dollars are money; nor would it thus be contended, though at the time the contract matured the legislature had determined to call dollars eagles. Contracts are made for things, not names or sounds, and the obligation of a contract arises from its terms and the means which the law affords for its enforcement.

A law which changes the terms of the contract, either in the time or mode of performance, or imposes new conditions, or dispenses with those expressed, or authorizes for its satisfaction something different from that provided, is a law which impairs its obligation, for such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement.

The notion that contracts for the payment of money stand upon any different footing in this respect from other contracts appears to have had its origin in certain old English cases, particularly that of mixed money,* which were decided upon the force of the prerogative of the king with respect to coin, and have no weight as applied to powers possessed by Congress under our Constitution. The language of Mr. Chief Justice Marshall in *Faw* v. *Marsteller*,† which is cited in support of this notion, can only be made to express concurrence with it when detached from its context and read separated from the facts in reference to which it was used.

It is obvious that the act of 1862 changes the terms of contracts for the payment of money made previous to its passage, in every essential particular. All such contracts had reference to metallic coins, struck or regulated by Congress, and composed principally of gold and silver, which constituted the legal money of the country. The several

* Davies's Reports, 18. † 2 Cranch, 20.

coinage acts had fixed the weight, purity, forms, impressions, and denominations of these coins, and had provided that their value should be certified by the form and impress which they received at the mint.

They had established the dollar as the money unit, and prescribed the grains of silver it should contain, and the grains of gold which should compose the different gold coins. Every dollar was therefore a piece of gold or silver certified to be of a specified weight and purity, by its form and impress. A contract to pay a specified number of dollars was then a contract to deliver the designated number of pieces of gold or silver of this character; and by the laws of Congress and of the several States the delivery of such dollars could be enforced by the holder.

The act of 1862 changes all this; it declares that gold or silver dollars need not be delivered to the creditor according to the stipulations of the contract; that they need not be delivered at all; that promises of the United States, with which the creditor has had no relations, to pay these dollars, at some uncertain future day, shall be received in discharge of the contracts—in other words, that the holder of such contracts shall take in substitution for them different contracts with another party, less valuable to him, and surrender the original.

Taking it, therefore, for granted that the law plainly impairs the obligation of such contracts, I proceed to inquire whether it is for that reason subject to any constitutional objection. In the dissenting opinion in *Hepburn* v. *Griswold*, it is said, as already mentioned, that the Constitution does not forbid legislation impairing the obligation of contracts.

It is true there is no provision in the Constitution forbidding in express terms such legislation. And it is also true that there are express powers delegated to Congress, the execution of which necessarily operates to impair the obligation of contracts. It was the object of the framers of that instrument to create a National government competent to represent the entire country in its relations with foreign nations and to accomplish by its legislation measures of

common interest to all the people, which the several States in their independent capacities were incapable of effecting, or if capable, the execution of which would be attended with great difficulty and embarrassment. They, therefore, clothed Congress with all the powers essential to the successful accomplishment of these ends, and carefully withheld the grant of all other powers. Some of the powers granted, from their very nature, interfere in their execution with contracts of parties. Thus war suspends intercourse and commerce between citizens or subjects of belligerent nations; it renders during its continuance the performance of contracts previously made, unlawful. These incidental consequences were contemplated in the grant of the war power. So the regulation of commerce and the imposition of duties may so affect the prices of articles imported or manufactured as to essentially alter the value of previous contracts respecting them; but this incidental consequence was seen in the grant of the power over commerce and duties. There can be no valid objection to laws passed in execution of express powers that consequences like these follow incidentally from their execution. But it is otherwise when such consequences do not follow incidentally, but are directly enacted.

The only express authority for any legislation affecting the obligation of contracts is found in the power to establish a uniform system of bankruptcy, the direct object of which is to release insolvent debtors from their contracts upon the surrender of their property. From this express grant in the Constitution I draw a very different conclusion from that drawn in the dissenting opinion in *Hepburn* v. *Griswold*, and in the opinion of the majority of the court just delivered. To my mind it is a strong argument that there is no general power in Congress to interfere with contracts, that a special grant was regarded as essential to authorize a uniform system of bankruptcy. If such general power existed the delegation of an express power in the case of bankrupts was unnecessary. As very justly observed by counsel, if this sovereign power could be taken in any case without express

grant, it could be taken in connection with bankruptcies, which might be regarded in some respects as a regulation of commerce made in the interest of traders.

The grant of a limited power over the subject of contracts necessarily implies that the framers of the Constitution did not intend that Congress should exercise unlimited power, or any power less restricted. The limitation designated is the measure of congressional power over the subject. This follows from the nature of the instrument as one of enumerated powers.

The doctrine that where a power is not expressly forbidden it may be exercised, would change the whole character of our government. As I read the writings of the great commentators and the decisions of this court, the true doctrine is the exact reverse, that if a power is not in terms granted, and is not necessary and proper for the exercise of a power thus granted, it does not exist.

The position that Congress possesses some undefined power to do anything which it may deem expedient, as a resulting power from the general purposes of the government, which is advanced in the opinion of the majority, would of course settle the question under consideration without difficulty, for it would end all controversy by changing our government from one of enumerated powers to one resting in the unrestrained will of Congress.

"The government of the United States," says Mr. Chief Justice Marshall, speaking for the court in *Martin* v. *Hunter's Lessee*,* "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." This implication, it is true, may follow from the grant of several express powers as well as from one alone, but the power implied must, in all cases, be subsidiary to the execution of the powers expressed. The language of the Constitution respecting the writ of habeas corpus, declaring that it shall not be suspended unless, when in cases

* 1 Wheaton, 326.

of rebellion or invasion, the public safety may require it, is cited as showing that the power to suspend such writ exists somewhere in the Constitution; and the adoption of the amendments is mentioned as evidence that important powers were understood by the people who adopted the Constitution to have been created by it, which are not enumerated, and are not included incidentally in any of those enumerated.

The answer to this position is found in the nature of the Constitution, as one of granted powers, as stated by Mr. Chief Justice Marshall. The inhibition upon the exercise of a specified power does not warrant the implication that, but for such inhibition, the power might have been exercised. In the Convention which framed the Constitution a proposition to appoint a committee to prepare a bill of rights was unanimously rejected, and it has been always understood that its rejection was upon the ground that such a bill would contain various exceptions to powers not granted, and on this very account would afford a pretext for asserting more than was granted.* In the discussions before the people, when the adoption of the Constitution was pending, no objection was urged with greater effect than this absence of a bill of rights, and in one of the numbers of the Federalist, Mr. Hamilton endeavored to combat the objection. After stating several reasons why such a bill was not necessary, he said: "I go further and affirm that bills of rights, in the sense and to the extent they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted, and on this very account would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed? I will not

* Journal of the Convention, 369; Story on the Constitution, §§ 1861, 1862, and note.

contend that such a provision would confer a regulating power, but it is evident that it would furnish to men disposed to usurp a plausible pretence for claiming that power. They might urge, with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication that a right to prescribe proper regulations concerning it was intended to be vested in the National government. This may serve as a specimen of the numerous handles which would be given to the doctrine of constructive powers by the indulgence of an injudicious zeal for bills of right."*

When the amendments were presented to the States for adoption they were preceded by a preamble stating that the conventions of a number of the States had, at the time of their adopting the Constitution, expressed a desire "in order to prevent *misconception or abuse* of its powers, that further declaratory and restrictive clauses should be added."

Now, will any one pretend that Congress could have made a law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or the right of the people to assemble and petition the government for a redress of grievances, had not prohibitions upon the exercise of any such legislative power been embodied in an amendment?

How truly did Hamilton say that had a bill of rights been inserted in the Constitution, it would have given a handle to the doctrine of constructive powers. We have this day an illustration in the opinion of the majority of the very claim of constructive power which he apprehended, and it is the first instance, I believe, in the history of this court, when the possession by Congress of such constructive power has been asserted.

The interference with contracts by the legislation of the several States previous to the adoption of the Constitution

* The Federalist, No. 84.

was the cause of great oppression and injustice. "Not only," says Story,* "was paper money issued and declared to be a tender in payment of debts, but laws of another character, well known under the appellation of tender laws, appraisement laws, instalment laws, and suspension laws, were from time to time enacted, which prostrated all private credit and all private morals. By some of these laws the due payment of debts was suspended; debts were, in violation of the very terms of the contract, authorized to be paid by instalments at different periods; property of any sort, however worthless, either real or personal, might be tendered by the debtor in payment of his debts, and the creditor was compelled to take the property of the debtor, which he might seize on execution, at an appraisement wholly disproportionate to its known value. Such grievances and oppressions and others of a like nature were the ordinary results of legislation during the Revolutionary War and the intermediate period down to the formation of the Constitution. They entailed the most enormous evils on the country and introduced a system of fraud, chicanery, and profligacy, which destroyed all private confidence and all industry and enterprise."

To prevent the recurrence of evils of this character not only was the clause inserted in the Constitution prohibiting the States from issuing bills of credit and making anything but gold and silver a tender in payment of debts, but also the more general prohibition, from passing any law impairing the obligation of contracts. "To restore public confidence completely," says Chief Justice Marshall,† "it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The Convention appears to have intended to establish a great principle, that contracts should be inviolable."

It would require very clear evidence, one would suppose, to induce a belief that with the evils resulting from what Marshall terms the system of lax legislation following the

* Commentaries on the Constitution, 8, sec. 1371.

† Sturgis *v.* Crowninshield, 4 Wheaton, 206.

Revolution, deeply impressed on their minds, the framers of the Constitution intended to vest in the new government created by them this dangerous and despotic power, which they were unwilling should remain with the States, and thus widen the possible sphere of its exercise.

When the possession of this power has been asserted in argument (for until now it has never been asserted in any decision of this court), it has been in cases where a supposed public benefit resulted from the legislation, or where the interference with the obligation of the contract was very slight. Whenever a clear case of injustice, in the absence of such supposed public good, is stated, the exercise of the power by the government is not only denounced but the existence of the power is denied. No one, indeed, is found bold enough to contend that if A. has a contract for one hundred acres of land, or one hundred pounds of fruit, or one hundred yards of cloth, Congress can pass a law compelling him to accept one-half of the quantity in satisfaction of the contract. But Congress has the same power to establish a standard of weights and measures as it has to establish a standard of value, and can, from time to time, alter such standard. It can declare that the acre shall consist of eighty square rods instead of one hundred and sixty, the pound of eight ounces instead of sixteen, and the foot of six inches instead of twelve, and if it could compel the acceptance of the same *number* of acres, pounds, or yards, after such alteration, instead of the actual *quantity* stipulated, then the acceptance of one-half of the quantity originally designated could be directly required without going through the form of altering the standard. No just man could be imposed upon by this use of words in a double sense, where the same names were applied to denote different quantities of the same thing, nor would his condemnation of the wrong committed in such case be withheld, because the attempt was made to conceal it by this jugglery of words.

The power of Congress to interfere with contracts for the payment of money is not greater or in any particular different from its power with respect to contracts for lands or

goods. The contract is not fulfilled any more in one case than in the other by the delivery of a thing which is not stipulated, because by legislative action it is called by the same name. Words in contracts are to be construed in both cases in the sense in which they were understood by the parties at the time of the contract.

Let us for a moment see where the doctrine of the power asserted will lead. Congress has the undoubted right to give such denominations as it chooses to the coins struck by its authority, and to change them. It can declare that the dime shall hereafter be called a dollar, or, what is the same thing, it may declare that the dollar shall hereafter be composed of the grains of silver which now compose the dime. But would anybody pretend that a contract for dollars, composed as at present, could be satisfied by the delivery of an equal number of dollars of the new issue? I have never met any one who would go to that extent. The answer always has been that would be too flagrantly unjust to be tolerated. Yet enforcing the acceptance of paper promises or paper dollars, if the promises can be so called, in place of gold or silver dollars, is equally enforcing a departure from the terms of the contract, the injustice of the measure depending entirely upon the actual value at the time of the promises in the market. Now reverse the case. Suppose Congress should declare that hereafter the eagle should be called a dollar, or that the dollar should be composed of as many grains of gold as the eagle, would anybody for a moment contend that a contract for dollars, composed as now of silver, should be satisfied by dollars composed of gold? I am confident that no judge sitting on this bench, and, indeed, that no judge in Christendom could be found who would sanction the monstrous wrong by decreeing that the debtor could only satisfy his contract in such case by paying ten times the value originally stipulated. The natural sense of right which is implanted in every mind would revolt from such supreme injustice. Yet there cannot be one law for debtors and another law for creditors. If the contract can at one time be changed by congressional

legislation for the benefit of the debtor it may at another time be changed for the benefit of the creditor.

For acts of flagrant injustice such as those mentioned there is no authority in any legislative body, even though not restrained by any express constitutional prohibition. For as there are unchangeable principles of right and morality, without which society would be impossible, and men would be but wild beasts preying upon each other, so there are fundamental principles of eternal justice, upon the existence of which all constitutional government is founded, and without which government would be an intolerable and hateful tyranny. There are acts, says Mr. Justice Chase, in *Calder* v. *Bull*,* which the Federal and State legislatures cannot do, without exceeding their authority. Among these he mentions a law which punishes a citizen for an innocent action; a law that destroys or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; and a law that takes the property from A. and gives it to B. "It is against all reason and right," says the learned justice, "for a people to intrust a legislature with such powers; and therefore it cannot be presumed that they have done it. The genius, the nature, and the spirit of our State governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbid them. The legislature may enjoin, permit, forbid, and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, or violate the rights of an antecedent lawful private contract, or the right of private property. To maintain that our Federal or State legislatures possess such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy, altogether inadmissible in our free republican governments."

In *Ogden* v. *Saunders*,† Mr. Justice Thompson, referring to the provisions in the Constitution forbidding the States

* 3 Dallas, 388.

† 12 Wheaton, 308.

to pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, says: "Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of government. No State court would, I presume, sanction and enforce an *ex post facto* law if no such prohibition was contained in the Constitution of the United States; so, neither would retrospective laws, taking away vested rights, be enforced. Such laws are repugnant to those fundamental principles upon which every just system of laws is founded. It is an elementary principle, adopted and sanctioned by the courts of justice in this country and in Great Britain, whenever such laws have come under consideration, and yet retrospective laws are clearly within this prohibition."

In *Wilkeson* v. *Leland*,* Mr. Justice Story, whilst commenting upon the power of the legislature of Rhode Island under the charter of Charles II, said: "The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being without very strong and direct expressions of such an intention."

Similar views to these cited from the opinions of Chase, Thompson, Story, and Marshall, are found scattered through the opinions of the judges who have preceded us on this bench. As against their collective force the remark of Mr. Justice Washington, in the case of *Evans* v. *Eaton*,† is without significance. That was made at *nisi prius* in answer to

* 2 Peters, 657. † 1 Peters's Circuit Court, 828.

a motion for a nonsuit in an action brought for an infringement of a patent right. The State of Pennsylvania had, in March, 1787, which was previous to the adoption of the Constitution, given to the plaintiff the exclusive right to make, use, and vend his invention for fourteen years. In January, 1808, the United States issued to him a patent for the invention for fourteen years from that date. It was contended, for the nonsuit, that after the expiration of the plaintiff's privilege granted by the State, the right to his invention became invested in the people of the State, by an implied contract with the government, and, therefore, that Congress could not consistently with the Constitution grant to the plaintiff an exclusive right to the invention. The court replied that neither the premises upon which the motion was founded, nor the conclusion, could be admitted; that it was not true that the grant of an exclusive privilege to an invention for a limited time implied a binding and irrevocable contract with the people that at the expiration of the period limited the invention should become their property; and that even if the premises were true, there was nothing in the Constitution which forbade Congress to pass laws violating the obligation of contracts.

The motion did not merit any consideration, as the Federal court had no power to grant a nonsuit against the will of the plaintiff in any case. The expression under these circumstances of any reason why the court would not grant the motion, if it possessed the power, was aside the case, and is not, therefore, entitled to any weight whatever as authority. It was true, however, as observed by the court, that no such contract with the public, as stated, was implied, and inasmuch as Congress was expressly authorized by the Constitution to secure for a limited time to inventors the exclusive right to their discoveries, it had the power in that way to impair the obligation of such a contract, if any had existed. And this is perhaps, all that Mr. Justice Washington meant. It is evident from his language in *Ogden* v. *Saunders*, that he repudiated the existence of any general power in Congress to destroy or impair vested private rights.

What I have heretofore said respecting the power of Congress to make the notes of the United States a legal tender in payment of debts contracted previous to the act of 1862, and to interfere with contracts, has had reference to debts and contracts between citizens. But the same power which is asserted over these matters is also asserted with reference to previous debts owing by the government, and must equally apply to contracts between the government and the citizen. The act of 1862 declares that the notes issued shall be a legal tender in payment of *all debts, public and private*, with the exception of duties on imports and interest on the public debt. If they are a legal tender for antecedent private debts, they are also a legal tender for such debts owing by the United States, except in the cases mentioned. That any exception was made was a mere matter of legislative discretion. Express contracts for the payment of gold or silver have been maintained by this court, and specifically enforced on the ground that, upon a proper construction of the act of 1862, in connection with other acts, Congress intended to except these contracts from the operation of the legal tender provision. But the power covers all cases if it exist at all. The power to make the notes of the United States the legal equivalent to gold and silver necessarily includes the power to cancel with them specific contracts for gold as well as money contracts generally. Before the passage of the act of 1862, there was no legal money except that which consisted of metallic coins, struck or regulated by the authority of Congress. Dollars then meant, as already said, certain pieces of gold or silver, certified to be of a prescribed weight and purity by their form and impress received at the mint. The designation of dollars, in previous contracts, meant gold or silver dollars as plainly as if those metals were specifically named.

It follows, then, logically, from the doctrine advanced by the majority of the court as to the power of Congress over the subject of legal tender, that Congress may borrow gold coin upon a pledge of the public faith to repay gold at the maturity of its obligations, and yet, in direct disregard of its

pledge, in open violation of faith, may compel the lender to take, in place of the gold stipulated, its own promises; and that legislation of this character would not be in violation of the Constitution, but in harmony with its letter and spirit.

The government is, at the present time, seeking, in the markets of the world, a loan of several hundred millions of dollars in gold upon securities containing the promises of the United States to repay the money, principal and interest, in gold; yet this court, the highest tribunal of the country, this day declares, by its solemn decision, that should such loan be obtained, it is entirely competent for Congress to pay it off, not in gold, but in notes of the United States themselves, payable at such time and in such manner as Congress may itself determine, and that legislation sanctioning such gross breach of faith would not be repugnant to the fundamental law of the land.

What is this but declaring that repudiation by the government of the United States of its solemn obligations would be constitutional? Whenever the fulfilment of the obligation in the manner stipulated is refused, and the acceptance of something different from that stipulated is enforced against the will of the creditor, a breach of faith is committed; and to the extent of the difference of value between the thing stipulated and the thing which the creditor is compelled to receive, there is repudiation of the original obligation. I am not willing to admit that the Constitution, the boast and glory of our country, would sanction or permit any such legislation. Repudiation in any form, or to any extent, would be dishonor, and for the commission of this public crime no warrant, in my judgment, can ever be found in that instrument.

Some stress has been placed in argument in support of the asserted power of Congress over the subject of legal tender in the fact that Congress can regulate the alloy of the coins issued under its authority, and has exercised its power in this respect, without question, by diminishing in some instances, the actual quantity of gold or silver they contain. Congress, it is assumed, can thus put upon the coins issued

other than their intrinsic value; therefore, it is argued, Congress may, by its declaration, give a value to the notes of the United States, issued to be used as money, other than that which they actually possess.

The assumption and the inference are both erroneous, and the argument thus advanced is without force, and is only significant of the weakness of the position which has to rest for its support on an assumed authority of the government to debase the coin of the country.

Undoubtedly Congress can alter the value of the coins issued by its authority by increasing or diminishing, from time to time, the alloy they contain, just as it may alter, at its pleasure, the denominations of the several coins issued, but there its power stops. It cannot make these altered coins the equivalent of the coins in their previous condition; and, if the new coins should retain the same names as the original, they would only be current at their true value. Any declaration that they should have any other value would be inoperative in fact, and a monstrous disregard by Congress of its constitutional duty. The power to coin money, as already declared by this court,* is a great trust devolved upon Congress, carrying with it the duty of creating and maintaining a uniform standard of value throughout the Union, and it would be a manifest abuse of this trust to give to the coins issued by its authority any other than their real value. By debasing the coins, when once the standard is fixed, is meant giving to the coins, by their form and impress, a certificate of their having a relation to that standard different from that which, in truth, they possess; in other words, giving to the coins a false certificate of their value. Arbitrary and profligate governments have often resorted to this miserable scheme of robbery, which Mill designates† as a shallow and impudent artifice, the "least covert of all modes of knavery, which consists in calling a shilling a pound, that a debt of one hundred pounds may be cancelled by the payment of one hundred shillings."

* United States *v.* Marigold, 9 Howard, 567.

† Mill's Political Economy, vol. 2, p. 20.

In this country no such debasement has ever been attempted, and I feel confident that none will ever be tolerated. The changes in the quantity of alloy in the different coins has been made from time to time, not with any idea of debasing them, but for the purpose of preserving the proper relative value between gold and silver. The first coinage act, passed in 1792, provided that the coins should consist of gold, silver, and copper—the coins of cents and half-cents consisting of copper, and the other coins consisting of gold and silver—and that the relative value of gold and silver should be as fifteen to one, that is, that an ounce of gold should be taken as the equal in value of fifteen ounces of silver.

In progress of time, owing to the increased production of silver, particularly from the mines of Mexico and South America, this relative value was changed. Silver declined in relative value to gold until it bore the relation of one to sixteen instead of one to fifteen. The result was that the gold was bought up as soon as coined, being worth intrinsically sixteen times the value of silver, and yet passing by law only at fifteen times such value, and was sent out of the country to be recoined. The attention of Congress was called to this change in the relative value of the two metals and the consequent disappearance of gold coin. This led, in 1834,* to an act adjusting the rate of gold coin to its true relation to silver coin.

The discovery of gold in California, some years afterwards, and the great production of that metal, again changed in another direction the relative value of the two metals. Gold declined, or in other words, silver was at a premium, and as gold coin before 1834 was bought up, so now silver coin was bought up, and a scarcity of small coin for change was felt in the community. Congress again interfered, and in 1853 reduced the amount of silver in coins representing fractional parts of a dollar, but even then these coins were restricted from being a legal tender for sums exceeding five

* 4 Stat. at Large, 699.

dollars, although the small silver coins of previous issue continued to be a legal tender for any amount. Silver pieces of the denomination of three cents had been previously authorized in 1851, but were only made a tender for sums of thirty cents and under. These coins did not express their actual value, and their issue was soon stopped, and in 1853 their value was increased to the standard of coins of other fractional parts of a dollar.

The whole of this subject has been fully and satisfactorily explained in the very able and learned argument of the counsel who contended for the maintenance of the original decision of this court in *Hepburn* v. *Griswold*. He showed by the debates that Congress has been moved, in all its actions under the coinage power, only by an anxious desire to ascertain the true relative value of the two precious metals, and to fix the coinage in accordance with it; and that in no case has any deviation from intrinsic value been permitted except in coins for fractional parts of a dollar, and even that has been only of so slight a character as to prevent them from being converted into bullion, the actual depreciation being made up by their portability and convenience.

It follows, from this statement of the action of Congress in altering at different times the alloy of certain coins, that the assumption of power to stamp metal with an arbitrary value and give it currency, does not rest upon any solid foundation, and that the argument built thereon goes with it to the ground.

I have thus far spoken of the legal tender provision with particular reference to its application to debts contracted previous to its passage. It only remains to say a few words as to its validity when applied to subsequent transactions.

So far as subsequent contracts are made payable in notes of the United States, there can of course be no objection to their specific enforcement by compelling a delivery of an equal amount of the notes, or by a judgment in damages for their value as estimated in gold or silver dollars, nor would there be any objection to such enforcement if the legal tender provision had never existed. From the general use

of the notes throughout the country and the disappearance of gold and silver coin from circulation, it may perhaps be inferred, in most cases, that notes of the United States are intended by the parties where gold or silver dollars are not expressly designated, except in contracts made in the Pacific States, where the constitutional currency has always continued in use. As to subsequent contracts, the legal tender provision is not as unjust in its operation as when applied to past contracts, and does not impair to the same extent private rights. But so far as it makes the receipt of the notes, in absence of any agreement of the parties, compulsory in payment of such contracts, it is, in my judgment, equally unconstitutional. This seems to me to follow necessarily from the duty already mentioned cast upon Congress by the coinage power,—to create and maintain a uniform metallic standard of value throughout the Union. Without a standard of value of some kind, commerce would be difficult, if not impossible, and just in proportion to the uniformity and stability of the standard is the security and consequent extent of commercial transactions. How is it possible for Congress to discharge its duty by making the acceptance of paper promises compulsory in all future dealings—promises which necessarily depend for their value upon the confidence entertained by the public in their ultimate payment, and the consequent ability of the holder to convert them into gold or silver—promises which can never be uniform throughout the Union, but must have different values in different portions of the country; one value in New York, another at New Orleans, and still a different one at San Francisco.

Speaking of paper money issued by the States,—and the same language is equally true of paper money issued by the United States—Chief Justice Marshall says, in *Craig* v. *The State of Missouri:** "Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose in-

* 4 Peters, 432.

dividuals to immense loss, are the sources of ruinous specu lations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States, and which deeply affected the interest and prosperity of all, the people declared in their Constitution that no State should emit bills of credit."

Mr. Justice Washington, after referring, in *Ogden* v. *Saunders*,* to the provision of the Constitution declaring that no State shall coin money, emit bills of credit, make anything but gold and silver coin a tender in payment of debts, says: "These prohibitions, associated with the powers granted to Congress 'to coin money and to regulate the value thereof, and of foreign coin,' most obviously constitute members of the same family, being upon the same subject and governed by the same policy. This policy was to provide a fixed and uniform standard of value throughout the United States, by which the commercial and other dealings between the citizens thereof, or between them and foreigners, as well as the moneyed transactions of the government, should be regulated. For it might well be asked, why vest in Congress the power to establish a uniform standard of value by the means pointed out, if the States might use the same means, and thus defeat the uniformity of the standard, and consequently the standard itself? And why establish a standard at all for the government of the various contracts which might be entered into, if those contracts might afterwards be discharged by a different standard, or by that which is not money, under the authority of State tender laws? It is obvious, therefore, that these prohibitions in the tenth section are entirely homogeneous, and are essential to the establishment of a uniform standard of value in the formation and discharge of contracts."

It is plain that this policy cannot be carried out, and this fixed and uniform metallic standard of value throughout the United States be maintained, so long as any other standard is adopted, which of itself has no intrinsic value and is forever fluctuating and uncertain.

* 12 Wheaton, 265.

For the reasons which I have endeavored to unfold, I am compelled to dissent from the judgment of the majority of the court. I know that the measure, the validity of which I have called in question, was passed in the midst of a gigantic rebellion, when even the bravest hearts sometimes doubted the safety of the Republic, and that the patriotic men who adopted it did so under the conviction that it would increase the ability of the government to obtain funds and supplies, and thus advance the National cause. Were I to be governed by my appreciation of the character of those men, instead of my views of the requirements of the Constitution, I should readily assent to the views of the majority of the court. But, sitting as a judicial officer, and bound to compare every law enacted by Congress with the greater law enacted by the people, and being unable to reconcile the measure in question with that fundamental law, I cannot hesitate to pronounce it as being, in my judgment, unconstitutional and void.

In the discussions which have attended this subject of legal tender there has been at times what seemed to me to be a covert intimation, that opposition to the measure in question was the expression of a spirit not altogether favorable to the cause, in the interest of which that measure was adopted. All such intimations I repel with all the energy I can express. I do not yield to any one in honoring and reverencing the noble and patriotic men who were in the councils of the nation during the terrible struggle with the rebellion. To them belong the greatest of all glories in our history,—that of having saved the Union, and that of having emancipated a race. For these results they will be remembered and honored so long as the English language is spoken or read among men. But I do not admit that a blind approval of every measure which they may have thought essential to put down the rebellion is any evidence of loyalty to the country. The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a

General statement of the case.

right to command. So thought our great Master when he said to his disciples: "If ye love me, keep my commandments."

BRONSON'S EXECUTOR *v.* CHAPPELL.

Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or, by his conduct, adopts and sanctions such acts after they are done, he will be bound, though no previous authority exist, in all respects as though the requisite power had been given in the most formal way. This doctrine applied to a case depending on special facts.

APPEAL from the Circuit Court for the District of Wisconsin.

Bronson, of New York, being owner as executor of lands in Wisconsin, sold a tract to E. and J. Chappell, residing near Galena, in that State, the sale being negotiated by one W. C. Bostwick, of the last-named place. A portion of the purchase-money was secured by mortgage; and as it became due it was paid by the Chappells to Bostwick, under the assumption by them that Bostwick, who had advertised himself during a term of twelve or fourteen years as the agent of Bronson, was the duly constituted agent of Bronson to receive it. Bostwick having failed, and appropriated the money to his own use, Bronson now filed a bill against the Chappells in the court below to foreclose the mortgage. The defendants set up the payments to Bostwick; and the question involved was thus a pure question of agency. The defendants relied upon a correspondence between Bronson and Bostwick, and particularly, as sufficient of itself, on a letter from the latter to the former, dated 9th February, 1860, and a reply to it of the 15th. These two letters are quoted and the general character of the others, with the leading facts of the case, stated in different parts of the opinion. The court below dismissed the bill, and Bronson took the appeal.

Statement of the case in the opinion.

Mr. J. J. Townsend, for the appellant; Messrs. Cothren and Laken, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

But a single question has been argued in this court, and that is one arising upon the facts as developed in the record. This opinion will be confined to that subject.

William C. Bostwick, acting for Frederick Bronson, negotiated the sale of a tract of land in Wisconsin to the defendants. According to his custom in such cases, Bronson forwarded to Bostwick the draft of a contract to be executed by the buyers. At the foot of the draft was a note in these words:

"William C. Bostwick, Esq., of Galena, is authorized to receive and receipt for the first payment on this contract. All subsequent payments to be made to F. Bronson, in the city of New York."

The defendants expressed to Bostwick a preference to receive a deed and give a mortgage. This was communicated to Bronson, who acceded to the proposition and forwarded to Bostwick a deed and the draft of a bond and mortgage. On the 25th of March, 1865, the defendants paid to Bostwick $1500 of the purchase-money, and executed the bond and mortgage to secure the payment of the balance. According to the condition of the bond it was to be paid to the obligee in the city of New York, in instalments, as follows: $781.20 on the 13th of November, 1865, and the remaining sum of $4562.40 in seven equal annual payments, from the 12th of February, 1865, with interest thereon at the rate of 7 per cent. per annum. The contract was erroneously construed by Bronson as requiring the interest on all the instalments to be paid with each one as it fell due. The other parties seem to have acquiesced in this construction. On the 4th of December, 1865, the defendants paid to Bostwick, as the agent of Bronson, $825.36, in discharge of the amount claimed to be due on the 30th of November, 1865, and took his receipt accordingly. On the 28th of February, 1866,

they paid Bostwick $980 to meet the second instalment and interest, as claimed, with exchange, and took his receipt as before. Bostwick failed in December, 1866. These moneys were never paid over to Bronson. He denied the authority of Bostwick to receive them, and demanded payment from the defendants. They refused, and Bronson thereupon filed this bill to foreclose the mortgage. The validity of these payments is the question presented for our determination.

Agents are special, general, or universal. Where written evidence of their appointment is not required, it may be implied from circumstances. These circumstances are the acts of the agent and their recognition, or acquiescence, by the principal. The same considerations fix the category of the agency and the limits of the authority conferred. Where one, without objection, suffers another to do acts which proceed upon the ground of authority from him, or by his conduct adopts and sanctions such acts after they are done, he will be bound, although no previous authority exist, in all respects as if the requisite power had been given in the most formal manner. If he has justified the belief of a third party that the person assuming to be his agent was authorized to do what was done, it is no answer for him to say that no authority had been given, or that it did not reach so far, and that the third party had acted upon a mistaken conclusion. He is estopped to take refuge in such a defence. If a loss is to be borne, the author of the error must bear it. If business has been transacted in certain cases it is implied that the like business may be transacted in others. The inference to be drawn is, that everything fairly within the scope of the powers exercised in the past may be done in the future, until notice of revocation or disclaimer is brought home to those whose interests are concerned. Under such circumstances the presence or absence of authority in point of fact, is immaterial to the rights of third persons whose interests are involved. The seeming and reality are followed by the same consequences. In either case the legal result is the same.

Bronson, as executor, had a large body of lands in Wisconsin for sale. For several years prior to the purchase by the defendants, Bronson had been in the habit of receiving and forwarding propositions to Bostwick. If approved, Bronson executed and forwarded contracts for the property, to be executed by the other parties. In the early part of the year 1860 Bostwick was startled by a memorandum touching payments, on a draft sent out by Bronson, like that in the draft sent to Bostwick for execution by the defendants. On the 9th of February he addressed a letter to Bronson, in which he said:

"My attention was naturally arrested by the note at bottom of the contract of Tormey, and if it is to be interpreted as an intimation that a withdrawal of my agency is contemplated, it would cause me not less surprise than pain, not so much by any means from the pecuniary consideration connected with it, as from the implied dissatisfaction on your part with the manner in which I have transacted your business; and it occasions the more surprise that I have always endeavored to attend with fidelity and promptness to your business and interests, and have never before had any intimation whatsoever from you that you were not entirely satisfied. I am wholly at a loss to conceive wherein I have given dissatisfaction, or failed to do all that was necessary to do, or could be done under the particular circumstances of any case involving your business or interests in my hands."

On the 15th of the same month Bronson replied as follows:

"The memorandum at the foot of Tormey's contract I have recently put on all of my land contracts to repel the construction lately sought to be put on them, that the first *or other payments, if received by the agent*, is an implied waiver of the claim for exchange, and of the stipulation in the body of the contract, that the money is to be paid to me in the city of New York. In other words, it is but a repetition of a clause in the contract, as applicable to all except the first payment."

This correspondence suggests several remarks:

Bostwick speaks of his employment as having been, and then being, an "*agency*" for Bronson. He inquires whether

it was contemplated by Bronson to revoke it. Bronson does not deny or revoke it. He says the object of the memorandum was to repel the construction that the receipt of "the first *or other payments by the agent*" was "an implied waiver of the claim for exchange," and which was the same thing in effect—a waiver of the stipulation in the contract that the money was to be paid to him "in the city of New York." It recognizes the authority of the agent to receive the subsequent payments as well as the first one, provided exchange were paid upon the former by the debtor.

The language employed by Bronson will admit of no other construction. It applies with full force to the bond of these defendants. They paid exchange as well as the principal and interest of the instalments in question. There is no evidence in the record that the authority thus admitted to exist was ever withdrawn. It must be presumed to have continued until the relations of the parties were terminated by Bostwick's failure and insolvency. Bostwick says in his deposition: "I advertised myself as the agent of the Bronson lands, which advertising was continued for a period of twelve or fourteen years." His testimony upon this subject is uncontradicted.

There are found in the record thirty-four letters from Bronson to Bostwick, all relating to business connected with the Bronson lands. The first letter bears date on the 12th of December, 1855, the last one on the 27th of November, 1865. They are in all respects such as would naturally be addressed by a principal to an agent in whose judgment, integrity, and diligence he had the fullest confidence. They refer to sales, to the delivery of deeds and contracts, the payment and collection of taxes, and a variety of other matters in the same connection. Ten of the letters authorize the delivery of contracts on the receipt of the first payment by Bostwick. Fourteen of them authorize the collection, or acknowledge the transmission, of other moneys. Bronson was absent in Europe from the 9th of October, 1861, until about the middle of December, 1864. During that time his business was attended to by his attorney, E. S. Smith, Esq.,

of the city of New York. There are in the record twenty-one letters from him to Bostwick. They are of the same character with those from Bronson. Twelve of them acknowledge the collection and transmission of moneys for Bostwick. It is not stated whether they were the first or later payments. But the circumstances show clearly that they were in most, if not in all instances, of the latter character. All collections were made, and all business relating to the lands was transacted through Bostwick. In one of these letters, Smith says:

"P. S.—Mr. Bronson, in a letter received, writes: 'I am willing to sell lands through Mr. Bostwick upon an advance of price equal to the depreciation of paper money at the time of sale,'" &c.

A further analysis of the letters of these parties would develop a large array of additional facts bearing in the same direction and hardly less cogent than those to which we have adverted. There is no intimation in any of them that Bostwick was regarded as the agent of the buyers, that he was not regarded as the agent of Bronson, or that he had in any instance exceeded his authority. It is unnecessary to pursue the subject further. Viewed in the light of the law, we think the evidence abundantly establishes two propositions:

1. That Bostwick was the agent of Bronson, and as such authorized to receive the payments in question.

2. If this were not so—that the conduct of Bronson—numerous transactions between him and Bostwick and the course of business by the latter—authorized or known to and acquiesced in by the former—justified the belief by the defendants that Bostwick had such authority and that Bronson was bound accordingly.

DECREE AFFIRMED.

Statement of the case.

TREBILCOCK *v.* WILSON ET UX.

1. Where a plaintiff in error set up in the court below that he was entitled to have a note held by him and made by the defendant in error, paid in gold or silver coin under the Constitution, upon a proper construction of various clauses of that instrument, and the decision of the court below was against the right thus set up, this court has appellate jurisdiction under the 25th section of the Judiciary Act of 1789, or the 2d section of the amendatory Judiciary Act of 1867, to review the decision. The case of *Roosevelt* v. *Meyer* (1 Wallace, 512) overruled.
2. Where a note is for dollars, payable by its terms, *in specie*, the terms "*in specie*" are merely descriptive of the kind of dollars in which the note is payable, there being more than one kind of dollars current recognized by law; and mean that the designated number of dollars shall be paid in so many gold or silver dollars of the coinage of the United States.
3. The act of February 25th, 1862, in declaring that the notes of the United States shall be lawful money and a legal tender for all debts, only applies to debts which are payable in money generally, and not to obligations payable in commodities or obligations of any other kind.
4. When a contract for money is by its terms made payable in specie or in coin, judgment may be entered thereon for coined dollars. *Bronson* v. *Rhodes* (7 Wallace, 229) affirmed.

ERROR to the Supreme Court of the State of Iowa; the case being thus:

In June, 1861, Wilson gave to Trebilcock his promissory note for nine hundred dollars, due one year after date with ten per cent. interest, *payable in specie;* and, at the same time, to secure its payment, he and his wife executed and delivered to Trebilcock a mortgage, duly recorded, upon certain real property in Iowa.

In February, 1863, Wilson offered to pay the amount due on the note, principal and interest, and for that purpose tendered to Trebilcock such amount in United States notes, declared by the act of Congress of February 25th, 1862,* to be a legal tender for all debts, public and private, with certain exceptions; but Trebilcock refused to receive them, asserting that the note was payable in gold or silver coin of the United States.

* 12 Stat. at Large, 345.

Statement of the case.

In July, 1865, Wilson and wife presented to one of the District Courts of Iowa their petition, reciting the contract to pay "in specie," and setting forth that they had tendered to Trebilcock the full amount of money, principal and interest, due, "said money so offered and tendered being United States legal tender treasury notes, commonly called greenbacks;" setting forth, further, that Trebilcock had refused to accept the same, "because," among other reasons, "the said money was not in kind what the contract demanded or called for; . . . the said defendant claiming that the same was payable only in gold or silver coin." And praying finally that Trebilcock might be required, by decree, to release and discharge the mortgage upon the proper book of record, as required by law upon the payment of a mortgage-debt. The complainants averred that they had kept the money tendered, ready to pay the defendant, and that they brought the same into court for that purpose.

The defendant demurred to the petition, and for causes, among others of demurrer, set down the following:

"1st. The petition shows upon its face that by the contract the note could only be discharged by payment of the amount due thereon in gold.

"2d. The petition asks the aid of this court for the reason that the petitioners tendered the amount of the note described in the petition in United States treasury notes. Such tender is not good. There is no law of this State or of the United States making anything but gold and silver a legal tender in discharge of the contract set out in the petition. This contract was entered into on the 25th day of June, 1861. The law of Congress making United States treasury notes a legal tender in payment of debts does not apply to this contract, because it was not enacted until long after this contract was entered into, to wit, on the 25th day of February, 1862. To apply this law to this contract would be to make it a retrospective law, a law impairing the obligation of contracts, in violation of the Constitution of the United States."

The court overruled the demurrer, and in September, 1866, gave its decree, that the mortgage be cancelled, and

that the defendant enter satisfaction of it upon the record; thus holding that the tender in notes was legal and sufficient.

On appeal to the Supreme Court of Iowa, this decree was, in October, 1857, affirmed, and the defendant brought the case here on a writ of error, under the 25th section of the Judiciary Act of 1789.

That section was re-enacted, with some changes in its phraseology, by the 2d section of the act of 1867, amending the Judiciary Act of 1789. As the old section was the ground of argument at the bar and the new one is adverted to in the opinion of the court, both are here presented.

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*

Amendatory 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*

* 1 Stat. at Large, 86.

† 14 Id. 386.

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 judgment or decree complained of had been rendered or passed in a [circuit] court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court [instead of remanding the cause for a final decision, as before provided], may at their discretion [if the cause shall have been once remanded before], proceed to a final decision of the same, and award execution [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 before-mentioned questions of validity or construction of the said Constitution, treaties, statutes, commissions, or authorities in dispute]"

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 complained of had been rendered or passed in a court [of the United States]; and the proceeding upon the reversal shall also be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the same, and award execution [or remand the same to an inferior court]."

Mr. G. B. Corkhill, for the defendant in error, asked to have the case dismissed for want of jurisdiction, relying on *Roose-*

velt v. *Meyer*,* as in point. There Meyer, a mortgagor, tendered in United States notes, authorized by the act of February 25th, 1862 (the sort of notes tendered here), then at a discount of 4 per cent. for gold, to Roosevelt, his mortgagee, the amount due on a mortgage; one created in 1854, like this one, before the passage of the legal tender acts. Roosevelt refused the tender; demanding coin. The highest court of New York decided that the notes were a good tender; and though it appeared by the order of that court for judgment, that on the hearing of the case, Roosevelt relied on the provision of the Constitution, that "the Congress shall have power to coin money and regulate the value thereof," and of the 5th, 9th, and 10th amendments, which ordain that "no person shall be deprived of property without due process of law;" that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people;" and that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people"—*against* all which, as he contended the decision of the New York court sustaining the tender, had been,—this court dismissed the case for want of jurisdiction. They say that "as the validity of the act of February 25th, 1862, was drawn in question, and the decision was in *favor* of it, this court could not take cognizance of the case."

But if jurisdiction exists, the unsettled condition of the law of legal tender justifies asking a review of the whole subject; cases of coin contract (if this one falls within that class) as well as others.

Mr. G. W. McCrary, *contra*, relied for an answer to the point of jurisdiction, on *Furman* v. *Nichols*;† and as to the matter of merits, on *Bronson* v. *Rhodes*.‡

Mr. Justice FIELD delivered the opinion of the court.

The principal question presented in this case for our con-

* 1 Wallace, 512. † 8 Wallace, 44. ‡ 7 Id. 229.

sideration is, whether a promissory note of an individual, payable by its terms *in specie*, can be satisfied, against the will of the holder, by the tender of notes of the United States declared by the act of Congress of February 25th, 1862, to be a legal tender in payment of debts.

There is, however, a preliminary question of jurisdiction raised, which must be first disposed of. The State court, in holding the tender legal and sufficient, sustained the validity and constitutionality of the act of Congress declaring the notes a legal tender. Its decision was, therefore, in favor of, and not against, the right claimed by the plaintiffs under the act of Congress, and hence it is contended that the appellate jurisdiction of this court does not arise under the 25th section of the Judiciary Act of 1789. Some support is given to this view by the decision of this court in *Roosevelt* v. *Meyer*,* where it was held that, as the validity of the legal tender act was drawn in question in that case, and the decision of the State court was in favor of it, and of the right set up by the defendant, this court had no jurisdiction to review the judgment, and a dismissal of the case was accordingly ordered. The court in that case confined its attention to the first clause of the 25th section of the Judiciary Act, and, in its *decision*, appears to have overlooked the third clause. That section provides for the review of the final judgments and decrees of the highest court of a State in which decisions could be had, in three classes of cases:

First. 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;

Second. 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 their validity; and,

Third. Where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of,

* 1 Wallace, 512.

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 Constitution, treaty, statute, or commission.

Under this last clause the appellate jurisdiction of this court in the case of *Roosevelt* v. *Meyer* might have been sustained. The plaintiff in error in that case claimed the right to have the bond of the defendant paid in gold or silver coin under the Constitution, upon a proper construction of that clause which authorizes Congress to coin money and regulate the value thereof and of foreign coin; and of those articles of the amendments which protect a person from deprivation of his property without due process of law; and declare that the enumeration of certain rights in the Constitution shall not be construed as a denial or disparagement of others retained by the people; and reserve to the States or the people the powers not delegated to the United States or prohibited to the States.

The decision of the court below being against the right of the plaintiff in error claimed under the clauses of the Constitution, the construction of which was thus drawn in question, he was entitled to have the decision brought before this court for re-examination.

In the present case, as the defendant claimed a similar right upon a construction of the same and other clauses of the Constitution, and a like adverse decision of the court below was made, he is equally entitled to ask for a re-examination of the decision.

But the defendant also claimed a right to demand coin in payment of the note of the plaintiff by the acts of Congress regulating the gold and silver coins of the United States, and making them a legal tender in payment of all sums according to their nominal or declared values, contending that the act of 1862, making notes of the United States a legal tender for debts, did not apply to the contract in suit. He thus claimed in fact, although he did not state his position in this form, that, upon a proper construction of the several acts together, he was entitled to payment in coin. This

right having been denied by an adverse decision, he was clearly in a condition to invoke the appellate jurisdiction of this court for a review of the decision.

Nor is the appellate jurisdiction of this court, in this case, affected by the change in the language of the third clause of the 25th section of the Judiciary Act of 1789, by the 2d section of the amendatory judiciary act of February 5th, 1867. By this clause in the latter act the judgment or decree of the highest court of a State can be reviewed "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." The section came incidentally before the court at the last term, in *Stewart* v. *Kahn*,* but it was not deemed necessary to determine whether it had superseded the 25th section of the Judiciary Act of 1789. As there observed, it is to a great extent a transcript of that section; and several of the alterations of phraseology are not material. The principal addition is found in the second clause, and the principal omission is at the close of the section. But in this case, as in that, there is no occasion to express any opinion as to the effect of the new section upon the original. Under the new section, as under the old, if that be superseded, the plaintiff in error can seek a review of the decision made against the right claimed by him.

We proceed, then, to consider the merits of the case. The note of the plaintiff is made payable, as already stated, *in specie*. The use of these terms, *in specie*, does not assimilate the note to an instrument in which the amount stated is payable in chattels; as, for example, to a contract to pay a specified sum in lumber, or in fruit, or grain. Such contracts are generally made because it is more convenient for

* 11 Wallace, 502.

the maker to furnish the articles designated than to pay the money. He has his option of doing either at the maturity of the contract, but if he is then unable to furnish the articles or neglects to do so, the number of dollars specified is the measure of recovery. But here the terms, *in specie*, are merely descriptive of the kind of dollars in which the note is payable, there being different kinds in circulation, recognized by law. They mean that the designated number of dollars in the note shall be paid in so many gold or silver dollars of the coinage of the United States. They have acquired this meaning by general usage among traders, merchants, and bankers, and are the opposite of the terms, *in currency*, which are used when it is desired to make a note payable in paper money. These latter terms, *in currency*, mean that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars.*

This being the meaning of the terms *in specie*, the case is brought directly within the decision of *Bronson* v. *Rhodes*,† where it was held that express contracts, payable in gold or silver dollars, could only be satisfied by the payment of coined dollars, and could not be discharged by notes of the United States declared to be a legal tender in payment of debts.

The several coinage acts of Congress make the gold and silver coins of the United States a legal tender in all payments, according to their nominal or declared values. The provisions of the act of January 18th, 1837, and of March 3d, 1849, in this respect, were in force when the act of February 25th, 1862, was passed, and still remain in force. As the act of 1862 declares that the notes of the United States shall also be lawful money and a legal tender in payment of debts, and this act has been sustained, by the recent decision of this court, as valid and constitutional, we have, *according to that decision*, two kinds of money, essentially different in their nature, but equally lawful. It follows, from

* Taup *v.* Drew, 10 Howard, 218. † 7 Wallace, 229.

that decision, that contracts payable in either, or for the possession of either, must be equally lawful, and, if lawful, must be equally capable of enforcement. The act of 1862 itself distinguishes between the two kinds of dollars in providing for the payment in coin of duties on imports and the interest on the bonds and notes of the government. It is obvious that the requirement of coin for duties could not be complied with by the importer, nor could his necessities for the purchase of goods in a foreign market be answered, if his contracts for coin could not be specifically enforced, but could be satisfied by an offer to pay its nominal equivalent in note dollars.

The contemporaneous and subsequent legislation of Congress has distinguished between the two kinds of dollars. The act of March 17th, 1862,* passed within one month after the passage of the first legal tender act, authorized the Secretary of the Treasury to purchase coin with bonds or United States notes, at such rates and upon such terms as he might deem most advantageous to the public interest, thus recognizing that the notes and the coin were not exchangeable in the market according to their legal or nominal values.

The act of March 3d, 1863,† amending the internal revenue act, required contracts for the purchase or sale of gold or silver coin to be in writing, or printed, and signed by the parties, their agents or attorneys, and stamped; thus impliedly recognizing the validity of previous contracts of that character without this formality. The same act also contained various provisions respecting contracts for the loan of currency secured by a pledge or deposit of gold or silver coin, where the contracts were not to be performed within three days.

Legislation of a later date has required all persons making returns of income, to declare "whether the several rates and amounts therein contained are stated according to their values in legal tender currency, or according to their values

* 12 Stat. at Large, 370. † Ib. 719, § 4.

in coined money," and if stated "in coined money," it is made the duty of the assessor to reduce the rates and amounts "to their equivalent in legal tender currency, according to the value of such coined money in said currency for the time covered by said returns."*

The practice of the government has corresponded with the legislation we have mentioned. It has uniformly recognized in its fiscal affairs the distinction in value between paper currency and coin. Some of its loans are made payable specifically in coin, whilst others are payable generally in lawful money. It goes frequently into the money market, and at one time buys coin with currency, and at another time sells coin for currency. In its transactions it every day issues its checks, bills, and obligations, some of which are payable in gold, while others are payable simply in dollars. And it keeps its accounts of coin and currency distinct and separate.

If we look to the act of 1862, in the light of the contemporaneous and subsequent legislation of Congress, and of the practice of the government, we shall find little difficulty in holding that it was not intended to interfere in any respect with existing or subsequent contracts payable by their express terms in specie; and that when it declares that the notes of the United States shall be lawful money, and a legal tender for all debts, it means for all debts which are payable in money generally, and not obligations payable in commodities, or obligations of any other kind.

In the case of *Cheang-Kee* v. *United States*,† a judgment for unpaid duties, payable in gold and silver coin of the United States, rendered by the Circuit Court for the District of California, was affirmed by this court.

It is evident that a judgment in any other form would often fail to secure to the United States payment in coin, which the law requires, or its equivalent. If the judgment were rendered for the payment of dollars generally it might, according to the recent decision of this court, be paid in

* 14 Stat. at Large, 147.

† 3 Wallace, 320.

note dollars, and, if they were depreciated, the government would not recover what it was entitled to receive. If, on the other hand, the value of the coin was estimated in currency and judgment for the amount entered, the government, in case of any delay in the payment of the judgment, by appeal or otherwise, would run the risk of losing a portion of what it was entitled to receive by the intermediate fluctuations in the value of the currency. From considerations of this kind this court felt justified in sustaining the judgment of the Circuit Court for California, requiring its amount to be paid specifically in coin, as being the only mode by which the law could be fully enforced.* The same reasoning justified similar judgments upon contracts that stipulated specifically for the payment of coin. The twentieth section of the act of 1792,† establishing a mint and regulating the coins of the United States, in providing that the money of account of the United States shall be expressed in dollars, dimes, cents, and mills, and that all proceedings in the courts of the United States shall be kept in conformity with this regulation, impliedly, if not directly, sanctions the entry of judgments in this form. The section has reference to the coins prescribed by the act, and when, by the creation of a paper currency, another kind of money,

* The twelfth section of the act of Congress of March 3d, 1865, entitled, "An act amendatory of certain acts imposing duties upon foreign importations," enacts: "That in all proceedings brought by the United States in any court for due recovery, as well of duties upon imports alone as of penalties for the non-payment thereof, the judgment shall recite that the same is rendered for duties, and such judgment, interest, and costs shall be payable in coin by law receivable for duties, and the execution issued on such judgment shall set forth that the recovery is for duties, and shall require the marshal to satisfy the same in the coin by law receivable for duties; and, in case of levy upon and sale of the property of the judgment debtor, the marshal shall refuse payment from any purchaser at such sale in any other money than that specified in the execution."

It appears, from the examination of the record in Cheang-Kee v. The United States, that the judgment of the Circuit Court in that case, affirmed by the Supreme Court, was rendered before this act was passed, namely, on the 8th of August, 1864.

† 1 Stat at Large, 250, § 20.

expressed by similar designations, was sanctioned by law and made a tender in payment of debts, it was necessary, as stated in *Bronson* v. *Rhodes*, to avoid ambiguity and prevent a failure of justice, to allow judgments to be entered for the payment of coined dollars, when that kind of money was specifically designated in the contracts upon which suits were brought.

It follows from the views expressed, that the judgment of the Supreme Court of Iowa must be reversed, and that court directed to remand the cause to the proper inferior court of the State for further proceedings in conformity with this opinion;

AND IT IS SO ORDERED.

Mr. Justice BRADLEY, dissenting:

I dissent from the opinion of the court in this case for reasons stated in my opinion delivered in the cases of *Knox* v. *Lee* and *Parker* v. *Davis*.* In all cases where the contract is to pay a certain sum of money of the United States, in whatever phraseology that money may be described (except cases specially exempted by law), I hold that the legal tender acts make the treasury notes a legal tender. Only in those cases in which gold and silver are stipulated for as bullion can they be demanded in specie, like any other chattel. Contracts for specie made since the legal tender acts went into operation, when gold became a commodity subject to market prices, may be regarded as contracts for bullion. But all contracts for money made before the acts were passed must, in my judgment, be regarded as on the same platform. No difficulty can arise in this view of the case in sustaining all proper transactions for the purchase and sale of gold coin.

Mr. Justice MILLER, dissenting:

In the case of *Bronson* v. *Rhodes* I expressed my dissent on the ground that a contract for gold dollars, in terms, was in no respect different, in legal effect, from a contract for

* *Supra*, p. 554.

dollars without the qualifying words, specie or gold, and that the legal tender statutes had, therefore, the same effect in both cases.

I adhere to that opinion, and dissent from the one just delivered by the court.

THE PROTECTOR.

1. The beginning and termination of the late rebellion in reference to acts of limitation, is to be determined by some public act of the political department.
2. The war did not begin or close at the same time in all the States.
3. Its commencement in certain States will be referred to the first proclamation, of blockade embracing *them*, and made on the 19th April, 1861; and as to other States to the second proclamation of blockade embracing *them*, and made on the 27th April, 1861.
4. Its termination as to certain States will be referred to the proclamation of the 2d April, 1866, declaring that the war had closed in those States, and as to Texas to the proclamation of the 20th August, 1866, declaring it had closed in that State also.
5. Alabama was one of the States named in the first proclamation of blockade, and the first proclamation as to the termination of the war.
6. Accordingly an appeal from a decree by the Circuit Court of Alabama of the 5th April, 1861, which was filed in the clerk's office on the 17th May, 1871, was dismissed; it being held on the principles above stated, that more than five years had elapsed between the date of the decree and the filing of the appeal, allowing the suspension of the time produced by the war.

APPEAL from the Circuit Court of the United States for the District of Louisiana.

This was a motion by *Mr. P. Phillips* to dismiss an appeal from a decree of the Circuit Court of the United States in the Southern District of Alabama. A motion to dismiss an appeal from the same decree, for the reason that it was not brought within one year from the passage of the act of March 2d, 1867,* had been made and denied at the December Term, 1869.† The appeal was subsequently dismissed on another ground.‡ The ground of this present motion

* 14 Stat. at Large, 545. † 9 Wallace, 689. ‡ 11 Id. 82.

was that more than five years, excluding the time of the rebellion, elapsed after the rendering of the decree, before the appeal was brought.

By the act of 1789, it is provided that writs of error shall not be brought but within five years from the rendering or passing the judgment or decree complained of. By the act of 1803, appeals from decrees were allowed, subject to the same rules, regulations, and restrictions as writs of error.* As a writ of error is not brought† until it is filed in the court where the judgment was rendered, so an appeal, as this court considers, is not brought until it is rendered or filed in the same way.

The decree in this case was rendered on the 5th of April, 1861, and the present appeal was allowed on the 6th of May, 1871, and filed in the clerk's office of the proper court, or brought, on the 17th of May, 1871.

In *Hanger* v. *Abbott*‡ it was held that the statute of limitations did not run, during the rebellion, against citizens of States adhering to the national government having demands against citizens of the insurgent States. And the question of course was whether, making allowance for the suspension of time produced by the rebellion, the appeal was or was not in season.

Mr. Phillips contended that it was not; *Mr. F. S. Blount, contra*, urging that it was.

The CHIEF JUSTICE delivered the opinion of the court.

The question, in the present case is, when did the rebellion begin and end? In other words, what space of time must be considered as excepted from the operation of the statute of limitations by the war of the rebellion?

Acts of hostility by the insurgents occurred at periods so various, and of such different degrees of importance, and in parts of the country so remote from each other, both at the commencement and the close of the late civil war, that it

* 2 Stat. at Large, 244. † Brooks *v.* Norris, 11 Howard, 204.
‡ 6 Wallace, 532; The Protector, 9 Id. 659.

would be difficult, if not impossible, to say on what precise day it began or terminated. It is necessary, therefore, to refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken.

The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second. But the war did not begin or close at the same time in all the States. There were two proclamations of intended blockade: the first of the 19th of April, 1861,* embracing the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; the second, of the 27th of April, 1861,† embracing the States of Virginia and North Carolina; and there were two proclamations declaring that the war had closed; one issued on the 2d of April, 1866,‡ embracing the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas, and the other issued on the 20th of August, 1866,§ embracing the State of Texas.

In the absence of more certain criteria, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the States mentioned in them. Applying this rule to the case before us, we find that the war began in Alabama on the 19th of April, 1861, and ended on the 2d of April, 1866. More than five years, therefore, had elapsed from the close of the war till the 17th of May, 1871, when this appeal was brought. The motion to dismiss, therefore, must be

GRANTED.

* 12 Stat. at Large, 1258.
† Ib. 1259.
‡ 14 Stat. at Large, 811.
§ Ib. 814.

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CAPE OF GOOD HOPE. See *Customs of the United States.*

CAPTURED AND ABANDONED PROPERTY. See *Jurisdiction*, 9.

Claims of persons under, must, on suit brought for breach of official bonds, be pleaded (if meant to be invoked) by way of set-off to the suit. They cannot be profited of by way of motion to satisfy a judgment on the bond or by *auditâ querelâ*. *Avery* v. *United States*, 304.

CARRIER. See *Common Carrier.*

CAUSA PROXIMA, &c. See *Insurance*, 1–4.

CHARGE OF COURT.

A special one as to acceptance of a lease interpreted. *Wadsworth* v. *Warren*, 308.

CITATION. See *Practice*, 19.

COLLISION.

1. Even flagrant fault committed by one of two vessels approaching each other from opposite directions does not excuse the other from adopting every proper precaution required by the special circumstances of the case to prevent a collision. Damages equally divided in a case of collision on an application of this rule. *The Maria Martin*, 31.
2. A steamer having a very large tow, and approaching a place where, from the number of vessels in the water, and the force of counter currents, navigation with such a tow is apt to be dangerous, but with a small one is less so—bound to proceed with great care, and if within two or three miles of the place, though not nearer, she can divide her tow, she is bound to divide it. *The Steamer Syracuse*, 167.
3. A vessel racing in order to enter a harbor before another and preoccupy a loading-place condemned for a collision resulting. *The Spray*, 366.
4. When a vessel is sailing in close proximity to other vessels, the fact that her hands are engaged in reefing her mainsail is no sufficient excuse for failure to keep a lookout, or to take such precautions as are needful to avoid collisions. *Thorp* v. *Hammond*, 408.
5. One of several general owners, who sails a vessel on shares, under an arrangement between himself and the other owners, whereby he in

COLLISION (*continued*).

effect has become the charterer, is to be considered the owner "*pro hac vice*," and, as such, is liable personally for a tortious collision with another vessel. *Ib.*

COMMERCE BETWEEN STATES.

A discriminating tax tending to prevent, is void. What constitutes such tax shown. *Ward* v. *Maryland*, 418.

COMMON CARRIER. See *Baggage; Private Carriers; Railroad Corporation.*

1. His obligations are imposed by law. *Hannibal Railroad* v. *Swift*, 262.
2. If he have ground to object to carry persons or property, must object when they ask to be carried. *Ib.*
3. His liability attaches when the property passes into his hands. *Ib.*
4. Not discharged by fact that owner of the property accompanies and keeps watch of it; no interference being attempted with the carrier. *Ib.*
5. Liable as for merchandise for property not "baggage" carried on passenger trains. *Ib.*
6. Liable as for baggage of a military surgeon's surgical instruments travelling with troops. *Ib.*
7. When goods in the hands of are threatened to be destroyed or seized by a public enemy, he is bound to use due diligence to prevent such destruction or seizure. It is not necessary that he should be guilty of fraud or collusion with the enemy, or wilful negligence, to make him liable; ordinary negligence is sufficient. *Holliday* v. *Kennard*, 254.

CONFIDENTIAL RELATIONS.

An instrument on its face an absolute deed, held to be a mortgage, the relations between the parties being confidential, and the consideration a debt due. *Villa* v. *Rodriguez*, 323.

CONFLICT OF JURISDICTION,

BETWEEN STATE GOVERNMENTS.

A State statute imposing a discriminating tax on traders, citizens of other States, coming into the State imposing the tax, to trade, is unconstitutional. *Ward* v. *Maryland*, 418.

CONSIDERATION. See *Public Policy.*

CONSTITUTIONAL LAW.

1. Congress has power to make notes of the United States a legal tender in payment of all debts, public and private. *Legal Tender Cases*, 457.
2. A State statute imposing a discriminating tax on non-resident traders is void. What constitutes such tax shown. *Ward* v. *Maryland*, 418.
3. Taxes cannot be imposed by a State upon vessels owned by its citizens, "at so much per ton of the registered tonnage." *State Tonnage Tax Cases*, 204.
4. Nor is the case varied by the fact that the vessels were exclusively engaged in trade between places within the State. *Ib.*

CONTINUANCE. See *Practice*, 9.

CONTRACT. See *Insurance*, 6; *Public Policy*.

1. There were three points along a river course, the highest A., the next B., the last C. *Held*, that a party having by contract a right to transport with the United States government goods from B. to C., and to and from all points between them, when the transportation was to be by water, did not have a right to transport such goods from B. to C. when the government, transporting from A. to C. touched at B., but did not discharge there, although such transportation necessarily involved (as a greater includes a less) a transportation between B. and C. *Scott* v. *United States*, 443.
2. Army regulation No. 1002 does not apply to contracts on behalf of the United States, which require for their validity the approval of the Secretary of War. *United States* v. *Burns*, 246.

CORPORATION. See *Municipal Corporation*.

COURT AND JURY. See *Direct Tax Commissioners*, 3.

COURT OF CLAIMS. See *Practice*, 9.

1. A claim for property accidentally destroyed in the bombardment and burning of a town, by the naval forces of the United States, is not of itself within the jurisdiction of the. *Perrin* v. *United States*, 315.
2. Not bound by any special rules of pleading. *United States* v. *Burns*, 247.

CUSTOMS OF THE UNITED STATES.

Under the 6th section of the act of March 3d, 1865, relating to importation of goods, &c., the growth of countries east of the Cape of Good Hope, when imported from countries west, a duty of 10 per cent. is chargeable on them when imported from places west, though no duty was payable when imported from places east. *Sturges* v. *The Collector*, 19.

DIRECT TAX COMMISSIONERS.

1. Certificate signed by only two of those appointed under the act of June 7, 1862, is not void, and is admissible in evidence. *Cooley* v. *O'Connor*, 391.
2. The act contemplates a certificate of sale, though the United States becomes the purchaser. *Ib.*
3. Whether there has been a sufficient advertisement is a mixed question of law and fact. *Ib.*

DURESS.

1. A deed procured through fear of loss of life, produced by threats of the grantee, may be avoided for. *Baker* v. *Morton*, 150.
2. Acceptance from the government of a smaller sum than one claimed, in full of such one (the acceptance being without force or intimidation, and with a full knowledge of all the circumstances), does not leave the government open to further claim on the ground of duress

DURESS (*continued*).

because the sum was so large that the claimants were induced by their want of the money to accept the less sum in full. *United States* v. *Child*, 232.

EQUITY. See *Estoppel; Mortgage; Practice*, 20.

1. A judgment being but a general lien and the creditor under it obtaining no incumbrance but on such estate as his debtor really had, the equity of such creditor gives way before the superior right of an owner in the land who had conveyed it to the debtor only by duress and who never parted with possession. *Baker* v. *Morton*, 150.
2. A deed, absolute on its face, made by nephews and nieces, with their mother, to an uncle—a debt to the uncle from them being at the time of the deed secured by mortgage on part of the premises—held to be but a mortgage. *Villa* v. *Rodriguez*, 323.
3. A vendee cannot defend as a *bonâ fide* purchaser without notice, against an unrecorded mortgage, where his rights lie in an executory contract; nor where he has a right to call for no deed but that of a "quit-claim." *Ib.*

ESCAPE. See *Sheriff*.

ESTOPPEL.

1. Where a party having an inchoate title to land gave a power to "sell and convey" it, declaring, however, in the power, subsequently, that the attorney was authorized "to sell and convey such interest as I have and such title as I may have, and no other or better title," and that he would not hold himself "personally liable or responsible" for the acts of his attorney in conveying the land, "beyond quit-claiming whatever title I have," and the party afterwards acquired complete title, and the attorney conveyed by quit-claim for full consideration, which consideration passed to the principal, *Held*, that the grantor could not, six years afterwards, disavow the act of his attorney and convey the land to another person. *Smith* v. *Sheeley*, 358.
2. Although under the act of Congress of July 1st, 1863, a bank created by a Territorial legislature cannot legally exercise its powers until the charter creating it is approved by Congress, yet a conveyance of land to it, if the charter authorize it to hold land, cannot be treated as a nullity by the grantor who has received the consideration for the grant, there being no judgment of ouster against the corporation at the instance of the government. *Ib.*
3. Silence of a party works no estoppel, unless it have misled another to his hurt. *Railroad Company* v. *Dubois*, 47.

EVIDENCE.

I. In Cases Generally.

1. Where a court on the preliminary examination of a witness can see that he has that degree of knowledge of a party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject, though he have never

EVIDENCE (*continued*).

seen the party write nor corresponded with him. *Rogers* v. *Ritter*, 317.

2. Where it appeared by affidavits filed by the appellant, who was claimant below, in a collision case, that it was probable that two witnesses for the libellant received, before testifying, a promise from him for the payment of a sum of money in the event that the case should be decided in his favor, and that the appellant ascertained the fact after the appeal, the court ordered a commission, under the 12th rule, to take the testimony of such witnesses relative to said agreement. *The Western Metropolis*, 389.
3. The courts of the United States will take judicial notice of the public laws of the several States; and, in Indiana, by virtue of statute there, of the private as well as public laws of that State. *Railroad Co.* v. *Bank of Ashland*, 227.
4. In trespass to real property brought to try the title, a freehold or a mere possessory right in the defendant may be given in evidence under the general issue. *Cooley* v. *O'Connor*, 391.

II. In Patent Cases.

5. The novelty of a patented invention cannot be assailed by any other evidence than that of which the plaintiff has received notice. Hence the state of the art, at the time of the alleged invention, though proper to be considered by the court in construing the patent, in the absence of notice, has no legitimate bearing upon the question whether the patentee was the first inventor. *Railroad Company* v. *Dubois*, 48.

"FINAL DECREE."

What constitutes such decree stated. *French* v. *Shoemaker*, 86.

FORGERY.

The loss occurring by the acceptance of a forged bill falls on the acceptor The doctrine illustrated. *Hoffman & Co.* v. *Bank of Milwaukee*, 181.

GENERAL AVERAGE. See *Average*.

HANDLIN, W. W. See *Rebellion, The*, 3.

HANDWRITING. See *Evidence*, 1.

IMPLIED PROMISE.

By a collector of taxes, to repay taxes paid under protest, not inferable when statute makes it his unqualified duty to pay over to government at once what he collects. *The Collector* v. *Hubbard*, 1.

INSANITY.

1. A sufficient excuse for failure to make an affidavit required by a policy of insurance previous to payment for a loss. *Insurance Companies* v. *Boykin*, 433.
2. No defence to payment of loss, if affidavit of the party insane contains the information necessary. *Ib.*

INSURANCE. See *Pleading*, 5, 6; *Practice*, 18; *Principal and Agent*, 1.

1. When two causes of loss concur, one at the risk of the assured and

INSURANCE (*continued*).

the other insured against, or one insured against by A. and the other by B., if the damage caused by each peril can be discriminated, it must be borne proportionably. *Insurance Company* v. *Transportation Company*, 194.

2. But if the damage caused by each peril cannot be distinguished from that caused by the other, the party responsible for the predominating efficient cause, or that which set in operation the other incidentally to it, is liable for the loss. *Ib.*

3. An insurance upon a steamer against fire, "except fire happening by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power," is an insurance against fire caused by collisions. *Ib.*

4. Underwriters against fire are responsible for a loss occasioned by the sinking of a vessel insured when caused by fire (though the fire itself be the result of a collision not insured against), if the effect of the collision without the fire would have been only to cause the vessel to settle to her upper deck, and that be a case in which she might have been saved. *Ib.*

5. A condition in a policy making the policy void in case the assured kept gunpowder, phosphorus, saltpetre, and benzine on the premises: *Held*, under the punctuation of the policy, to mean "in quantities exceeding a barrel;" this being a more reasonable construction than one which made the policy void if there was *any* quantity, however small, of these articles, on the premises. *Insurance Company* v. *Slaughter*, 404.

6. When insurance companies restrict, by conditions subsequently stated, the liability which the policy in its body appears to create, they should set forth these restrictions in terms which cannot admit of controversy, and should print these restrictive clauses in type large enough to arrest the attention of the assured. Nonpareil criticized as not being so. *Ib.*

INTERNAL REVENUE. See *Direct Tax Commissioners; Implied Promise.*

1. The provision in the 19th section of the act of July 13th, 1866, relating to bringing of suits to recover taxes as illegally assessed, operates on all suits brought subsequently to the time fixed for the act to take effect, and on suits in State courts; and this though the transactions sued for occurred prior to its passage. *The Collector* v. *Hubbard*, 1.

2. The 117th section of the Internal Revenue Act of 1864 requiring stockholders, in companies mentioned in it, to return gains and profits to which they should be entitled, whether divided or *otherwise*, embraces profits not divided and invested partly in real estate, machinery, and raw material, and partly applied to payment of debts incurred in previous years. *Ib.*

JURISDICTION. See *Court of Claims*, 2; *Practice*, 11; *Rebellion*, 2.

I. Of the Supreme Court of the United States.

(*a*) It has jurisdiction—

1. Upon a decree in the Circuit Court for a sum less than $2000, "with

JURISDICTION (*continued*).

interest from a date named," provided that the sum for which the decree is given and the interest added to it together exceed $2000. *The Patapsco*, 451.

2. As of a "final decree," where the whole law of a case before a Circuit Court is settled by a decree, and nothing remains to be done, unless a new application shall be made at the foot of the decree. *French* v. *Shoemaker*, 86.
3. Under the twenty-fifth section, where a plaintiff in error set up, in the court below, that he was entitled to have a note held by him, made by the defendant in error, paid in gold or silver coin, under the Constitution, upon a proper construction of various clauses of that instrument, and the decision of the court below was against the right thus set up. *Roosevelt* v. *Meyer* (1 Wallace, 512), overruled. *Trebilcock* v. *Wilson et ux.*, 687.

(*b*) It has NOT jurisdiction—

4. As under the twenty-fifth section of the Judiciary Act, in the case of an agreement made between two States, in pursuance of an act of Congress, the decision of the highest State court to which the writ of error was issued having been not upon the act of Congress but upon the agreement. *People* v. *Central Railroad*, 455.
5. Nor under that section (where the objection is that the decision has been in favor of some State statute, objected as obnoxious to some of the grounds set forth in the twenty-fifth section), if the judgment of the State court would have been the same without the aid of the special statutory provisions assailed by the plaintiff in error; and where the judgment does not give effect to some State statute, or State constitution, which comes within the grounds. *Knox* v. *Exchange Bank*, 379.
6. Nor of a judgment of a Circuit Court in ejectment, where the record stated that the land for which the suit was brought was "of the value of $500 and over." *Parker* v. *Latey*, 390.
7. Nor of a proceeding in its essence an equitable one (as the foreclosure of a mortgage), brought here by writ of error instead of appeal; not even when the case comes from Louisiana. *Walker* v. *Dreville*, 440.
8. Nor of decisions of the Circuit Courts exercising but a supervisory jurisdiction, under the second section of the Bankrupt Law. *Hall* v. *Allen, Assignee*, 452.

II. OF THE CIRCUIT COURTS OF THE UNITED STATES.

9. The courts have no jurisdiction under the act of March 12th, 1863, commonly known as the Abandoned and Captured Property Act, where both parties are citizens of the same State. *Mail Company* v. *Flanders*, 130.

JURY AND COURT. See *Direct Tax Commissioners*, 3.

LEGAL TENDER.

1. The acts of Congress known as the Legal Tender are constitutional, when applied to contracts made before their passage. *Hepburn* v. *Griswold* (8 Wallace, 603), on this point overruled. *Legal Tender Cases*, 457.

LEGAL TENDER (*continued*).

2. They are also valid as applicable to contracts made since. *Ib.*
3. When a contract by its terms calls for the payment of "specie," it cannot be discharged by the notes of the United States now known as "greenbacks" or "legal tenders." *Trebilcock* v. *Wilson et ux.*, 687.

LIEN. See *Equity*, 1; *Mortgage*, 2.

LIMITATION.

1. The beginning and termination of the late rebellion in reference to acts of limitation, are to be determined by some public act of the political department. *The Protector*, 700.
2. The war did not begin or close at the same time in all the States. Dates of beginning and ending in different States how fixed. *Ib.*

LOUISIANA. See *Handlin, W. W; Practice*, 20.

The statute of July 28th, 1866, relative to the transfer of cases from, to the Circuit and District Courts of the United States, construed. *Edwards* v. *Tanneret*, 446.

MORTGAGE.

1. A deed on its face, absolute, held to be but a mortgage, under special circumstances, and where the parties stood in the relation of debtor and creditor. *Villa* v. *Rodriguez*, 323.
2. What interest those by railroad companies, whose terms embrace future acquired property, cover; and how far others are displaced. *United States* v. *New Orleans Railroad*, 362.

MOTION. See *Captured and Abandoned Property.*

MUNICIPAL CORPORATION.

Where the issue of bills as a currency (except by banking institutions) is prohibited, a municipal corporation has no power, without express authority, to issue such bills; and if it does issue them, the holders thereof cannot recover the amount, either in an action on the bills themselves, or for money had and received. Especially where the receiving, as well as issuing, of unlawful bills is prohibited by statute. *Thomas* v. *City of Richmond*, 349.

NEGOTIABLE PAPER. See *Municipal Corporation; Ohio; Usury.*

The loss from acceptance of a forged bill falls on the acceptor. *Hoffman & Co.* v. *Bank of Milwaukie*, 181.

NEW ORLEANS.

Provisional Court of. Statute relating to transfer of cases from to Circuit and District Courts, construed. *Edwards* v. *Tanneret*, 446.

NEW YORK. See *Usury*, 5.

NEW TRIAL. See *Practice*, 10.

OHIO.

Statutes of, by construction, authorize railroad companies of all the States to sell their bonds and notes at such prices as they please. *Railroad Company* v. *Bank of Ashland*, 226.

OPINIONS OF THE COURT,

Will not, as a general thing, go into grounds and reasons of the judgment on appeals involving questions of fact, where two courts below have both decided in the same way. *The Spray*, 366.

PARTICULAR AVERAGE. See *Average.*

PATENTS. See *Evidence*, 5.

I. General Principles Relating to.

1. It is not a bar to an action for an infringement of a patent, that before making his application to the Patent Office, the patentee had explained his invention orally to several persons, without making a drawing, model, or written specification thereof, and that subsequently, though prior to his application for a patent, the defendant had devised and perfected the same thing, and described it in the presence of the patentee, without his making claim to it. *Railroad Company* v. *Dubois*, 47.
2. Silence of a party works no estoppel, unless it has misled another party to his hurt. *Ib.*

II. Construction of Particular.

3. Dubois's, of September 23d, 1862, "for building piers for bridges, and setting the same." *Held*, to be for a device or instrument used in a process, and not for the process itself. *Railroad Company* v. *Dubois*, 47.

PENSIONS.

Under the act of Congress of 23d of February, 1853, granting to widows of Revolutionary soldiers, who were married subsequently to January, A. D. 1800, the widows take only from the date of the act. *United States* v. *Alexander*, 177.

PLEADING. See *Captured and Abandoned Property; Auditâ Querelâ.*

I. In Cases generally.

1. The principle of pleading that a demurrer, after several pleadings, reaches back to a defective declaration, has no application where the defect is one of form simply. *Railroad Company* v. *Harris*, 65.
2. A plea in bar waives all pleas in abatement. *Ib.*
3. A defective declaration may be cured by sufficient averments in a replication demurred to. *Ib.*
4. Where a plea is erroneously overruled on demurrer, and issue is joined on another plea, under which the same defence might be made, the judgment will not be disturbed after verdict. *Railroad Co.* v. *Bank of Ashland*, 226.
5. On a policy for $10,000 signed by four companies, each of whom agreed to become liable for one-fourth of the loss to that extent, one action can be brought against all by their consent; the declaration charging the separate promises and praying for separate judgment. *Insurance Companies* v. *Boykin*, 433.
6. A verdict finding that the defendants did assume in manner and form as in such declaration alleged, and assessing the whole damages at $10,000, is a good verdict in such action. *Ib.*

PLEADING (*continued*).

II. In Admiralty.

7. A decree on a libel for a tortious collision may be made against one of several general owners, who is owner *pro hac vice*, and so liable for such collision, although such one owner is sued jointly with other general owners and is not described as owner *pro hac vice*. *Thorp* v. *Hammond*, 408.

8. Though a libel alleging an admitted collision may not allege the specific sort of negligence by which the collision was brought about, but on the contrary allege facts not shown, yet where the true cause of the collision is disclosed by the respondent's witnesses, so that the respondent cannot allege surprise, the appellate court, if it can see that the omission to state the true cause was without any design, will not allow it to work injury to the libellant; and though the libellant ought in such a case to have amended his libel below, will extract the real case from the whole record, and decide accordingly. *The Steamer Syracuse*, 167.

III. In the Court of Claims.

9. No special rules of prevail in that court. *United States* v. *Burns*, 247.

PRACTICE. See *Evidence*, 2; *Captured and Abandoned Property; Pleading*, 4; *Rehearing*.

I. In the Supreme Court.

1. What constitutes a final decree stated. *French* v. *Shoemaker*, 86.

2. Indemnity on appeal bond presumed sufficient where record does not show the reverse. *Ib.*

3. Though several defendants may be affected by a judgment or decree, there may be such a separate judgment or decree against one of them that he can appeal or bring a writ of error without joining the other defendants. *Germain* v. *Mason*, 259.

4. A judgment *in personam* against one defendant for a sum of money, which at the same time establishes the debt as a paramount lien on real estate as to other defendants, may be brought to this court by the party against whom the personal judgment is rendered, without joining the others. *Ib.*

5. Under the 30th rule of court a motion to advance is discretionary with the court. *Ward* v. *State of Maryland*, 163.

6. An advance under that rule refused; it appearing that the party asking the advance was not in jail. *Ib.*

7. Such motion cannot, under the act of June 30th, 1870, be made, except in behalf of a State, or by a party claiming under its laws. *Ib.*

8. Although a suit be nominally by a State as the plaintiff, yet where the real plaintiffs are individuals—as *ex gr.* in a *quo warranto*, where the State is plaintiff *ex relatione*—the court will not advance, even by consent of counsel on both sides, a case under the act of June 30th, 1870 *Miller et al.* v. *The State*, 159.

9. A continuance granted on an appeal from the Court of Claims, there having been a motion made there by the appellant, and yet undis-

PRACTICE (*continued*).

posed of, for a new trial on the ground of after-acquired evidence. *United States* v. *Crusell*, 175.

10. The court below, not this court, must determine whether the application for a new trial is seasonably made. *Ib.*

11 When a case is within the jurisdiction of the court, and there has been no defect in removing it from the subordinate court to this, the court will not dismiss the case on motion made out of the regular call of the docket. *The Eutaw*, 136.

12. Where the record shows that the case of a plaintiff is inherently and fatally defective, a judgment against him will not be reversed for instructions however erroneous. *Barth* v. *Clise, Sheriff*, 401.

13. Judgment affirmed under Rule 23d, with 10 per cent. damages in addition to interest; the court believing that the writ of error had been brought for delay. *Insurance Company* v. *Huchbergers*, 164; *Hennesey* v. *Sheldon*, 440.

14. Although when a court has no jurisdiction it is in general irregular to make any order, except to dismiss the suit, that rule does not apply to the action of the court in setting aside such orders as had been made improperly before the want of jurisdiction was discovered, and restoring things to the state in which they were before the improper orders were made. *Mail Company* v. *Flanders*, 130.

15. The mode of finding the facts by the court (waiving a jury), under the act of March 3d, 1865 (relative to the trial of issues of fact in civil causes), and as to the effect to be given to such finding, and the manner in which the record is to be prepared for this and the extent of the inquiry to be made in this court, set forth in detail. *Kearney* v. *Case*, 275; *Miller* v. *Life Insurance Company*, 285.

16. In appeals involving mere question of fact, where the District and Circuit Courts have taken the same view, this court, affirming the decree, contents itself with an announcement of its conclusions, without extended comment on the testimony. *The Spray*, 366.

17. When a contract for money is, by its terms, made payable in specie or in coin, judgment may be entered thereon for coined dollars. *Bronson* v. *Rodes* (7 Wallace, 229) affirmed. *Trebilcock* v. *Wilson et ux.*, 687.

18. On a policy for $10,000 signed by four companies, each of whom agreed to become liable for one-fourth of the loss to that extent, one action may be brought against them all by their consent; the declaration charging the separate promises and praying for separate judgment: and a verdict finding that the defendants did assume in manner and form as in the declaration alleged, and assessing the whole damages at $10,000, is good. But the judgment should be against each defendant for one-fourth of the damages, and against them jointly for the costs, and a joint judgment against them all on the whole sum is erroneous and should be reversed. On such reversal this court, instead of awarding a *venire facias de novo*, must, under the 24th section of the Judiciary Act, as well as by the common law powers of a court of error, render the judgment which the Circuit Court ought to have rendered on that verdict. *Insurance Companies* v. *Boykin*, 433.

PRACTICE (*continued*).

19. On motion in this court to dismiss on the ground of irregularity in the citation and recitals in the appeal bond, the court, acknowledging the obvious irregularity of both bond and citation, yet *held*,

i. That the acceptance by the counsel, in particular language, was a waiver of the irregularity in the citation. *Bigler* v. *Waller*, 142.

ii. That the irregularity, as respected the bond, did not necessarily exact a dismissal, which was accordingly ordered, only unless the appellant filed a sufficient appeal bond, in the usual form, within ten days. *Ib.*

20. The distinctions between law and equity must be preserved in the Federal courts of Louisiana, and equity causes can only be brought to the Supreme Court for review by appeal, and cases at law by writ of error. As the pleadings in the Circuit Court for that district are by petition and answer, both at law and in equity, the court must look at the essential nature of the proceeding to determine whether it belongs to the one or to the other. A proceeding which is in its essential nature a foreclosure of a mortgage, as a mortgage is foreclosed in a court of chancery, is a suit in equity, by whatever name it may be called; and when brought here by writ of error, the writ must be dismissed. *Walker* v. *Dreville*, 440.

II. In the Circuit Court. See *Practice*, 15–18.

21. Even after an appeal, a Circuit Court may, in some cases, enjoin a party from proceeding in another court in what the Circuit Court deems has been in effect passed on by *it*. *French* v. *Shoemaker*, 86.

PRINCIPAL AND AGENT.

1. Where an insurance company instructed its agents not to deliver policies until the whole premiums are paid, "as the same will stand charged to their account until the premiums are received," and the agent did, nevertheless, deliver a policy giving a credit to the insurer and waiving a cash payment, *held* that the company, it being a stock company, was bound. *Miller* v. *Life Insurance Co.*, 285.

2. A majority of persons, the persons being commissioners appointed by the government, clothed with public authority to do a public act, may execute a power given to the whole; though this is not the rule generally in regard to private agencies. *Cooley* v. *O'Connor*, 391.

PRIVATE CARRIER.

Distinguished from common, and not bound to the same extent. To what extent bound. *Shoemaker* v. *Kingsbury*, 369.

PROVISIONAL COURT OF NEW ORLEANS.

Statute referring to transfer of cases from, to Circuit and District Courts, construed. *Edwards* v. *Tannaret*, 446.

PUBLIC AGENT.

Several, clothed with authority to perform a function of government, how far all must join in performing the function. Distinguished herein from private agents. *Cooley* v. *O'Connor*, 397.

PUBLIC POLICY. See *Evidence*, 2.

1. Action will not lie for the price of goods sold in aid of the rebellion or with knowledge that they were purchased for the Confederate States government. *Hanauer* v. *Doane*, 342.
2. A promissory note, the consideration of which is wholly or in part the price of such goods, is void, and an action cannot be sustained thereon by a holder who received it knowing for what it was given. *Ib.*
3. Due-bills given for the price of such goods and passed into the hands of a person knowing the fact, will not be a good consideration for a note. *Ib.*
4. It is contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members. *Ib*
5. A law passed by the legislature of one of the late rebel States requiring the redemption of bills issued by a city in aid of the rebellion, cannot be enforced. *Thomas* v. *City of Richmond*, 349.
6. The law as to the recovery of money paid on an illegal contract stated and defined. *Ib.*

RAILROAD CORPORATION. See *Mortgage*, 2.

1. Where a Maryland railroad corporation whose charter contemplated the extension of the road beyond the limits of Maryland, was allowed by act of the legislature of Virginia—re-enacting the Maryland charter in words—to continue its road through that State, and was also allowed by act of Congress to extend, into the District of Columbia, a lateral road in connection with the road through Maryland and Virginia; *Held:* (the unity of the road being unchanged in name, locality, election, and power of officers, mode of declaring dividends, and doing all its business),

   i. That no new corporations were created, either in the District or in Virginia, but only that the old one was exercising its faculties in them with their permission; and that, as related to responsibility for damages, there was a unity of ownership throughout. *Railroad Company* v. *Harris*, 65.

   ii. That in view of such unity the corporation was amenable to the courts of the District for injuries done in Virginia on its road. *Ib.*

   iii. That this responsibility was not changed by a traveller's receiving tickets in "coupons" or different parts, announcing that "responsibility for safety of person or loss of baggage on each portion of the route is confined to the proprietors of that portion alone." *Ib.*

REBELLION, THE. See *Direct Tax Commissioners; Public Policy.*

1. A purchase of the property of a loyal citizen of the United States under a confiscation and sale made pursuant to statutes of the late rebel confederacy, passed in aid of their rebellion, is void. *Texas* v. *White* (7 Wallace, 700), affirmed on this point. *Knox* v. *Lee*, 457.

REBELLION, THE (*continued*).

2. Dates of its beginning and end, different in different States. How they are to be determined in reference to acts of limitation. *The Protector*, 700.

3. The appointment by General Shepley of W. W. Handlin as judge in New Orleans, was a military appointment only; and was revocable by Governor Hahn. *Handlin* v. *Wickliffe*, 173

RECEIPT.

Of a smaller sum in payment of a larger. See *Action*, 1; *Duress*, 2.

REHEARING.

Refused after several terms had elapsed; though perhaps in form the judgment which it was sought to have reheard was not quite regularly given. *Noonan* v. *Bradley*, 121.

REVERSAL. See *Practice*, 12, 18.

REVOLUTIONARY SOLDIERS. See *Pensions*.

SHERIFF.

Not responsible for escape of prisoner brought before court in obedience to a writ of *habeas corpus*, while in custody of court, and before a remand or other order. *Barth* v. *Clise, Sheriff*, 400.

SHIPOWNERS. See *Collision*, 5.

SOVEREIGNTY.

Auditâ querelâ does not lie in any case against the United States. *Avery* v. *United States*, 304.

"SPECIE."

The word defined when used in contracts for tne payment of money *Trebilcock* v. *Wilson et ux.*, 687.

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, or construed.

September 24, 1789. See *Jurisdiction*, 1–7; *Practice*, 1–4; 18–20.
March 2, 1831. See *Railroad Corporation*.
February 28, 1853. See *Pensions*.
February 25, 1862. See *Legal Tender*.
March 3, 1851. See *Collision*, 5; *Pleading*, 8.
June 7, 1862. See *Direct Tax Commissioners; Public Agents*.
July 11, 1862. See *Legal Tender*.
March 3, 1863. See *Legal Tender*.
March 12, 1863. See *Jurisdiction*, 9.
July 1, 1863. See *Estoppel*, 2.
June 30, 1864. See *Internal Revenue*, 2.
March 3, 1865. See *Customs of the United States; Practice*, 15.
July 13, 1866. See *Internal Revenue*, 1.
July 28, 1866. See *Provisional Court of New Orleans*.
February 22, 1867. See *Railroad Corporation*.
March 2, 1867. See *Bankruptcy*.

STATUTES OF THE UNITED STATES (*continued*).
July 28, 1866. See *Provisional Court of New Orleans.*
June 30, 1870. See *Practice*, 7, 8.

TAX. See *Direct Tax Commissioners.*

By one State discriminating against traders of another, unconstitutional. What constitutes such tax. *Ward* v. *Maryland*, 418.

TENDER. See *Legal Tender.*

TONNAGE TAX. See *Constitutional Law*, 3, 4.

TRADERS.

Of one State have right to trade in all without injury from discriminating taxes against them. What constitutes such tax shown. *Ward* v. *Maryland*, 418.

UNITED STATES.

Auditâ querelâ does not lie against. *Avery* v. *United States*, 304.

USURY.

1. If a bond be not usurious by the law of the place where payable, a plea of usury cannot be sustained in an action thereon, unless it alleges that the place of payment was inserted as a shift or device to evade the law of the place where the bond was made. *Railroad Company* v. *Bank of Ashland*, 226.
2. A prohibition against lending money at a higher rate of interest than the law allows will not prevent the purchase of securities at any price which the parties may agree upon. *Ib.*
3. Whether a negotiation of securities is a purchase or a loan, is ordinarily a question of fact; and does not become a question of law until some fact be proven irreconcilable with one or the other conclusion. *Ib.*
4. Though the negotiation of one's own bond or note is ordinarily a loan in law, yet if a sale thereof be authorized by an act of the legislature, it becomes a question of fact, whether such negotiation was a loan or a sale. *Ib.*
5. Plea of in New York, by a corporation, forbidden by statute. *Ib.*
6. The requiring or giving of collateral security for the payment of a bond when negotiated, is not inconsistent with the transaction being a sale. *Ib.*

"VOLUNTARY STRANDING."

What constitutes, so as to entitle owners to general average. *Fowler* v. *Rathbones*, 102.

WAIVER. See *Practice*, 19.

Of irregularity in citation and recitals of the bond on appeal, held to have been made by counsel's accepting service of the citation in a particular form. *Bigler* v. *Waller*, 142.

WIDOWS.

Of Revolutionary soldiers. See *Pensions.*

WRIT OF ERROR. See *Practice*, 20.