CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1871.

REPORTED BY

JOHN WILLIAM WALLACE.

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JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE.

HON. SALMON PORTLAND CHASE.

ASSOCIATES.

HON. SAMUEL NELSON,
HON. 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. GEORGE H. WILLIAMS.

SOLICITOR-GENERAL.

HON. BENJAMIN H. BRISTOW.

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.

BENJAMIN CHEW HOWARD.

The Honorable Benjamin Chew Howard departed this life at his residence, 220 North Charles Street, Baltimore, March 6th, 1872, in the eighty-first year of his age. He was born at his paternal residence, Belvidere, at the head of Calvert Street, in the same city, November 5th, 1791, and was the third son of Colonel John Eager Howard, a well-known officer of the Revolutionary War, commander of the Maryland line, a friend of Washington, and one of his trusted lieutenants, whose "cool, determined bravery" was the subject of Alexander Hamilton's eulogy;* and has made his name as inseparable as those of Morgan and of Greene from the splendid achievement at Cowpens. Colonel Howard's reputation, as all residents of Baltimore know, is cherished in that city. He was at one time governor of Maryland and built the dignified residence known as Belvidere, already mentioned, which was inherited by the subject of our notice—always the seat, whether in possession of Colonel Howard or his son, of gracious and refined hospitalities. The grounds attached to it, including a park, embraced nearly all the upper portion of the city. Colonel John Eager Howard was a liberal benefactor of Baltimore. Among his donations to the city may be mentioned Washington Monument Square, the Richmond Market, and Liberty Engine houses. He also gave St. Paul's Church parsonage and burying-ground, where the family vault of the Howards now is. Maternally, the subject of our notice was connected with Pennsylvania; his mother having been a daughter of the Honorable Benjamin Chew, Attorney-General of the Province of Pennsylvania and the last of its chief justices under the Crown; as also in later life the

* Hamilton's Works, vol. ii, 490.

venerable President of the High Court of Errors and Appeals after the establishment of the State of Pennsylvania under a republican government. Mr. Howard, the subject of our notice, received his collegiate education at Princeton, where he graduated in 1809. In the class before him was James Moore Wayne, afterwards a justice of this court, between whom and Mr. Howard an affectionate intimacy long subsisted. Having studied law for the usual term, Mr. Howard was subsequently admitted to the bar. His circumstances not making the practice of any profession a matter of necessity to him, and his tastes inclining more to military and political distinctions, he devoted himself to public rather than to professional objects. In 1814, when Baltimore was threatened by a British army, young Howard led a company known as the First Mechanical Volunteers toward North Point, to oppose the invaders, under General Ross, who were landing there. This company, with Captain Leverings's, both from Colonel Sterets's regiment, and Asquitth's and a few other riflemen, all under Major Richard Heath, accompanied by a small piece of ordnance and a few artillerymen and riflemen, were sent forward to attack the British. A severe conflict ensued, in which Howard behaved with a gallantry worthy of his descent and name. In 1820 he was elected to the first branch of the City Council of Baltimore; and in 1824 sent to the lower house of the legislature, and afterwards to the Senate. On the 21st of February, 1827, at a meeting of a number of citizens to take into consideration the best means of restoring to the city that portion of the Western trade which was diverted by the introduction of steam navigation and other causes, he was appointed one of a committee whose report "for a direct railroad from Baltimore to some point on the Ohio River" was unanimously adopted. Of the committee whose report was so instrumental in bringing about the great and successful work which it recommended, Mr. Howard was the last survivor. In 1829 he was elected to Congress, and served till 1833; and again from 1835 till 1839. He was chairman of the Committee on Foreign Relations, and author of a creditable report on the Northeast boundary question. Leaving Congress, he was appointed, in 1842, Reporter of this Court; where, on entering upon his duties, he found upon the bench Mr. Justice Wayne, his former associate in collegiate life at Princeton. Mr. Howard reported the decisions of the court for eighteen years, but resigned upon accepting, in 1861, the

nomination of the political party with which he was associated for governor of Maryland. The last public office which he discharged was that of a member in what was known as the Peace Conference, a convention assembled just before the outbreak of the rebellion. For the ten years preceding his death, Mr. Howard lived quietly among his friends and books, his winters being spent at his town residence on North Charles Street, and his summers at his country retreat, "Roslyn," which handsome estate had been in his family for nearly two hundred years. He died with entire composure; leaving in the community with which his name and family were so creditably identified, the recollection of a well-bred and honorable gentleman, of genial nature and of social and agreeable dispositions.

Mr. Justice NELSON heard no cases in this volume, having been detained at home by indisposition.

GENERAL RULES,

PROMULGATED MAY 6TH, 1872.

AMENDMENT TO THE 6TH RULE.

All motions to dismiss appeals and writs of error, except motions to docket and dismiss under the ninth rule, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject it will be ordered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days.

Affidavit of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *primâ facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless for satisfactory reasons further time be given by the court to either party.

AMENDMENT TO THE 41ST EQUITY RULE.

If the complainant, in his bill, shall waive an answer under oath, or shall only require an answer under oath with regard to certain specified interrogatories, the answer of the defendant, though under oath, except such part thereof as shall be directly responsive to such interrogatories, shall not be evidence in his

favor, unless the cause be set down for hearing on bill and answer only; but may nevertheless be used as an affidavit, with the same effect as heretofore, on a motion to grant or dissolve an injunction, or on any other incidental motion in the cause; but this shall not prevent a defendant from becoming a witness in his own behalf under Section 3 of the act of Congress of July 2d, 1864.

SUPPLEMENTARY RULES OF PRACTICE IN ADMIRALTY, under the act of March 3d, 1851, entitled "An act to limit the liability of ship-owners, and for other purposes."*

54. When any ship or vessel shall be libelled, or the owner or owners thereof shall be sued, for any embezzlement, loss, or destruction by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture done, occasioned, or incurred without the privity or knowledge of such owner or owners, and he or they shall desire to claim the benefit of limitation of liability provided for in the third and fourth sections of the said act above recited, the said owner or owners shall and may file a libel or petition in the proper District Court of the United States, as hereinafter specified, setting forth the facts and circumstances on which such limitation of liability is claimed, and praying proper relief in that behalf; and thereupon said court, having caused due appraisement to be had of the amount or value of the interest of said owner or owners, respectively, in such ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sureties for payment thereof into court whenever the same shall be ordered; or, if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and upon compliance with such order, the said court shall issue a monition against all persons claiming damages for any such

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* See *infra*, p. 125.

embezzlement, loss, destruction, damage, or injury, citing them to appear before the said court and make due proof of their respective claims at or before a certain time to be named in said writ, not less than three months from the issuing of the same; and public notice of such monition shall be given as in other cases, and such further notice served through the post-office, or otherwise, as the court, in its discretion, may direct; and the said court shall, also, on the application of the said owner or owners, make an order to restrain the further prosecution of all and any suit or suits against said owner or owners in respect of any such claim or claims.

55. Proof of all claims which shall be presented in pursuance of said monition, shall be made before a commissioner to be designated by the court, subject to the right of any person interested, to question or controvert the same; and, upon the completion of said proofs, the commissioner shall make report of the claims so proven, and upon confirmation of said report, after hearing any exceptions thereto, the moneys paid or secured to be paid into court as aforesaid, or the proceeds of said ship or vessel and freight (after payment of costs and expenses), shall be divided *pro rata* amongst the several claimants in proportion to the amount of their respective claims, duly proved and confirmed as aforesaid, saving, however, to all parties any priority to which they may be legally entitled.

56. In the proceedings aforesaid, the said owner or owners shall be at liberty to contest his or their liability, or the liability of said ship or vessel for said embezzlement, loss, destruction, damage, or injury (independently of the limitation of liability claimed under said act), provided that in his or their libel or petition, he or they shall state the facts and circumstances by reason of which exemption from liability is claimed; and any person or persons claiming damages as aforesaid, and who shall have presented his or their claim to the commissioner under oath, shall and may answer such libel or petition, and contest the right of the owner or owners of said ship or vessel, either to an exemption from liability, or to a limitation of liability under the said act of Congress, or both.

57. The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libelled to answer for any such embezzlement, loss, destruction, damage, or injury; or, if the said ship or vessel be not libelled, then in the District Court for any

district in which the said owner or owners may be sued in that behalf. If the ship have already been libelled and sold, the proceeds shall represent the same for the purposes of these rules.

AMENDMENT TO THE 5TH RULE IN ADMIRALTY.

Ordered, That this rule be amended so as to read as follows, viz.:

Bonds, or stipulations in admiralty suits, may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court, or any commissioner of the United States authorized by law to take bail and affidavits in civil cases.

AMENDMENT TO THE 12TH RULE IN ADMIRALTY.

Ordered, That this rule be amended so as to read as follows:

In all suits by material-men for supplies or repairs, or other necessaries, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*.

AMENDMENT TO THE 45TH RULE IN ADMIRALTY.

Ordered, That this rule be amended so as to read as follows, viz.:

All appeals from the District to the Circuit Court must be made while the court is sitting, or within such other period as shall be designated by the District Court by its general rules, or by an order specially made in the particular suit, or in case no such rule or order be made, then within thirty days from the rendering of the decree.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

BETHELL *v.* MATHEWS.

1. A plaintiff in error cannot take advantage of exceptions in his own favor even if erroneous; a matter often decided before.
2. Under the act of March 3d, 1865, authorizing the trial of facts by Circuit Courts, the court must itself find the facts in order to authorize a writ of error to its judgment. A statement of facts signed by counsel and filed after the judgment is insufficient.
3. Where in a case tried under the above-mentioned act the record, owing to the manner in which things have been done below, presents a case as of a judgment rendered on a general verdict in favor of the defendant in error, and does not present any question arising on the pleadings, nor any ruling against the plaintiff in error, the judgment will be affirmed.

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

The act of Congress of March 3d, 1865,* authorizing the Circuit Courts of the United States, on written stipulation of the parties or their attorneys filed, to try issues of fact in civil cases without the intervention of a jury, enacts that—

"§ 4. The findings of *the court* upon the facts . . . shall have the same effect as the verdict of a jury."

With this statute in force, Bethell sued Mathews in the court below on certain promissory notes. A written stipu-

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* 13 Stat. at Large, 501.

lation signed by the parties was filed, waiving a jury and submitting the cause for trial by the court. It was so tried, accordingly. Six bills of exception, all by the defendant, were taken to testimony offered by the plaintiff, and all overruled. On the 2d of May, 1870, for reasons orally assigned, the court, *not having made any findings of fact*, ordered "that judgment be entered in favor of the defendant," and it was so signed accordingly four days afterwards. On the 10th of June, thirty-nine days after the judgment was rendered, the counsel filed a "statement of facts proved in the case," which statement was signed by *them*. The present writ of error was taken to review the judgment given in the case; the record disclosing the proceedings as above mentioned.

Messrs. Miles Taylor and C. N. Morse, for the plaintiff in error, submitted the case on merits.

Mr. T. J. Durant, contra:

The facts or case should have been found by the court. The statute is imperative. A case agreed on by counsel after the judgment cannot possibly be intended as found by the court. At any rate the finding should precede the judgment.

There is, then, only a general finding in favor of the defendant, which must have the same effect as a similar finding of a jury. The case is thus presented to this court, as if on a writ of error to a judgment of the court rendered on a general verdict in favor of the defendant in error, and where there is no question arising on the pleadings, and where there was no ruling on the trial of the cause against the plaintiff in error. In such a case the judgment of the lower court must be affirmed as of course.

The CHIEF JUSTICE:

It has been often decided that a plaintiff in error cannot take advantage of rulings upon exceptions in his own favor, even if erroneous. Nor can a statement of facts signed by

counsel be noticed upon error.* In this case, then, not only was the statement so signed, but it does not appear to have been made and filed until after the judgment.

There is, therefore, no error in the record, or none of which we can take notice. The judgment of the Circuit Court for the District of Louisiana must be

AFFIRMED.

NORWICH TRANSPORTATION COMPANY *v.* FLINT.

In a suit by a passenger against a steamboat company for injuries done to him on the deck of a steamboat by the discharge of a gun by some disorderly soldiers, whom the transportation company had taken on board and who had overpowered their sentinels, evidence was held to have been properly received as part of the *res gestæ* that during the disturbance a person, who appeared to be a sergeant, came into the cabin to a person who appeared to be his superior officer, and told him, first in a less excited manner, that there was a disturbance on deck which he could not suppress, and in which he feared that some one would be hurt; and on being told to "go back and mind his orders" retired, and came again, after some time, hurriedly, and very soon after the discharge of a gun had been heard, exclaiming to the officer, "For God sake, come up; a man has been shot!" The statements of the sergeant being not offered for the purpose of proving the facts stated by him, but the whole incident (including those statements) being adduced for the purpose of showing the manner in which the officers attended to their duty whilst the disturbance was going on; the fact that notice of its progress was communicated, the time that it continued, and the degree of alarm it was calculated to excite in such a person as the sergeant appeared to be.

ERROR to the Circuit Court for the District of Connecticut.

Flint brought an action on the case in the court below against the Norwich and New York Transportation Company, to recover damages for an injury received by him in June, 1864, while a passenger on their steamboat, running from New London to New York. The plaintiff, with other

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* Generes *v.* Bonnemer, 7 Wallace, 564; Avendano *v.* Gay 8 Id. 376; Kearney *v.* Case, 12 Id. 276.

passengers from Boston, went on board of the boat at New London about eleven o'clock in the evening. A detachment of United States soldiers—sixty, perhaps, in number—were on board, and were behaving in a disorderly and riotous manner, having overpowered their sentinels and rushed to the after-deck set apart for passengers. A portion of the detachment, which had been assigned as a guard over the rest, were armed, and in the melee a musket was thrown upon the deck and discharged, and the ball entered the plaintiff's foot, injuring him severely. His action was based on a charge of negligence on the part of the defendants in not providing against and quelling the disturbance. At the trial of the cause, after considerable evidence had been adduced tending to show the transactions which occurred on the boat at the time of the injury, the plaintiff offered in evidence the testimony of certain passengers, who testified that after they had gone down to the dining saloon, and were at the table, a man in military uniform, whom they supposed from the stripes on his arm to be a sergeant, came into the saloon and saluted an officer in uniform, whom they supposed to be a lieutenant, and who was sitting at the table with another officer, whom, from his uniform, they supposed to belong to the navy, and said to him, "There is a row on deck, and I cannot suppress it;" that the officer addressed replied, "Mind your orders;" that the sergeant said, "I am afraid some one will be hurt;" that the officer replied, "You have your orders—mind your orders;" that the sergeant then retired, and, after a few minutes, came down again into the saloon hurriedly, very soon after the report of a gun had been heard, and said to the officer, "For God's sake, come up; a man has been shot!" This testimony was offered for the purpose of proving the condition of affairs on the deck, the extent and character of the disturbance, the condition and situation of the officers and soldiers on board, and the manner in which they discharged their duty prior to and at the time when the plaintiff received his injury, the time the disturbance continued, and the failure of the officers of the soldiers to repress the disorder, it being admitted that no

other persons on board were directly charged with the care of preserving order among them.

The defendant objected to the testimony thus offered, but the court received it. As appeared from its opinion, which had been printed for the use of this court, the court below regarded the evidence admissible: "as indicating, first, the relation of the sergeant to his officer—not as a mere declaration, but as an act of subordination; second, as showing the alarm and fright of the sergeant and a state of mind indicating need of assistance; and, finally, because the whole transaction was a part of the *res gestæ*, in such sense that the jury might properly be permitted to hear it." The connection of the whole testimony with the circumstances of the case, gave it, in the opinion of that court, "credit and significance, not as the isolated act or statement of the sergeant, but as a narrative of occurrences in their connection with the principal events, receiving significance and inviting belief."

The jury having found $10,000 for the plaintiff, and judgment being given accordingly, the transportation company brought the case here; the admission of the evidence being the only error relied on.

Mr. J. Halsey, for the plaintiff in error:

The evidence was inadmissible for the purpose of proving the state of affairs on deck prior to and at the time the plaintiff received his injury; because,

1. As evidence of the truth of the words spoken, it was mere hearsay.

2. It was not spoken in the presence and hearing of any officer of the boat. It was *res inter alios acta.*

3. It was not addressed to any agent or officer of the defendants.

4. It was no part of the *res gestæ.*

5. The declarations were not admissible as part of the transaction. What is the transaction but a description of the person who said the words, and the person to whom they were addressed? The transaction in and of itself was

nothing. Declarations of this sort having been allowed to go to the jury, and counsel to comment upon them as evidence of the condition of affairs on deck, the jury regarded it in the same way that it would have done the sworn evidence of an eye-witness; which certainly it was not.

Mr. R. H. Dana, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

It is hardly necessary for us to enter into a lengthy discussion on the admissibility of the testimony in question. The opinion of the Circuit Court, which has been laid before us, is sufficiently full on the subject, and need not be repeated. We have no hesitation in regarding the incident testified to as part of the *res gestæ*, and as entirely competent for the purposes for which it was offered. The statements of the sergeant were not offered in evidence for the purpose of proving the facts stated by him, but the whole incident (including those statements) was adduced in evidence for the purpose of showing the manner in which the officers attended to their duty whilst the disturbance was going on, the fact that notice of its progress was communicated, the time that it continued, and the degree of alarm it was calculated to excite in such a person as the sergeant appeared to be. These were substantially the purposes for which the evidence was professedly offered, and for these purposes, as part of the *res gestæ*, it was clearly competent.

JUDGMENT AFFIRMED.

YEAGER *v.* FARWELL.

1. A., residing in St. Louis, and treating through B., of the same place, for a loan of money from C., in Boston, got a promise from C. of the money wanted, A.'s own note and a mortgage by him on real estate near St. Louis being contemplated and agreed on as the security to be given. C. relied wholly on B. to look after the sufficiency of the security (which he desired "first and foremost" should be ample) and after the preparation of the note and mortgage, all of which B. assumed to do. Having

Statement of the case.

had both note and mortgage executed by A., B. sent them to C. with a slight departure in the note from the agreement, and, in addition, a slight informality in the mortgage. No money being yet advanced by C. he returned both papers to B. in order to have the informality in the mortgage corrected, and, at the same time, requested B. to indorse the note, saying: "This will do you no harm, and will be an accommodation to me." B. did indorse the note. The mortgaged property having proved insufficient to pay the debt, B., on suit brought by C., was held liable as indorser.

2. On the last day of grace, B., in St. Louis, wrote to C., in Boston (which letter, of course, C. did not get until some days after the said last day of grace), saying that A. could not take up the note, expressing regret therefor, and adding that he, B., held himself "responsible for the payment of the note," and should see that "it was done at an early day." *Held*, that he was liable as indorser, although no demand of payment had been made of A., or notice given to him, B., and though, thus in point of fact, B. (except in so far as it may have been prevented by his letter) had been, as indorser, discharged.

3. When an indorser of a matured note, not knowing whether demand has or has not been made of the maker, writes to the holder, stating that the maker is unable to pay, expressing regret that this is so, and promising, himself, to pay the note, such indorser will be held to have waived proof of demand and notice, and will be held liable as indorser, although quite without reference to his letter, and before any receipt of it, no demand of payment was made or notice of dishonor given.

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

Yeager & Co., shippers of flour, in St. Louis, and intimately associated with one Kerckhoff, a miller of that place, who was then building a mill, and needing $15,000 to complete it, wrote to Farwell & Co., flour commission merchants and capitalists, of Boston, intimate correspondents of their own, telling them what Kerckhoff was doing; that he wanted $15,000; that he would give security by trust deed on a valuable farm near St. Louis; that the security was good, and urging them to lend him the amount, "for, say one or two years, or even one year, after which," says the letter, "we would make the advances ourselves." As an inducement for "coming to a favorable conclusion on their proposition," they request Farwell & Co. to bear in mind that they, Farwell & Co., will get, as flour commission merchants in Boston, a large share of the business of the new mill.

Farwell & Co. did not (so far as their real wishes were expressed in their letters) seem much disposed to lend the money; at least they wanted 13 per cent. interest. However, on some remonstrance at such a rate from Yeager & Co., who proposed 10 per cent., they conclude "to come as near the wishes of Yeager & Co. as they can," and to lend the money at 12 per cent., provided, "first and foremost," they can feel that the farm is good and ample security beyond a question, for which certainty they say that they rely on Yeager & Co. "The rate of interest," they add, "in itself is no object, for we can use our money to better advantage in Boston; but, desiring very much," they continue, "to accommodate you, and for the further consideration of getting a large share of the business of the new mill, we are willing to lend you the money on the above terms, but shall be very glad if you can obtain it more cheaply."

Yeager & Co. now directed a note for the $15,000 and a trust deed of the farm to be prepared, and both were executed and the deed put on record. For some reason the rate of interest on both was put at 10 per cent, instead of 12, the rate agreed on. There were also certain clerical errors in the deed of trust, showing some carelessness in the preparation of it. Farwell & Co., on receiving the papers, and not having themselves as yet advanced any part of the money (though Yeager & Co. had advanced about $4000 to Kerckhoff as on account of the $15,000), noted the departure from the rate of interest proposed, as also the clerical errors in the deed. They accordingly returned both papers to Yeager & Co., saying, in regard to the interest, that unless a new note should be made, the drafts on them by Kerckhoff must be for 2 per cent. less, and requesting, unconditionally, that one of the clerical errors, deemed by them more important, in the deed, should be rectified, remarking that they think it better to have it put right "in the beginning." In the letter inclosing the papers they add:

"And, too, we will thank your Mr. Yeager to indorse the notes in the name of your firm, or his individual name, as may

be preferred. This will do him no harm, and will be an accommodation to us."

Yeager did accordingly indorse the note with his firm's name, and the clerical error in the deed and in the record of it was corrected. After this, the balance of the $15,000 was advanced by Farwell & Co. to Kerckhoff as drawn for by him.

The note, which by its terms was payable at one of the banks in Boston, fell due October 15th to 18th, 1867, but it was not paid, *neither was demand of payment made, or any notice of dishonor given to the indorsers, Yeager & Co.*

On the 18th of October, 1867, the last day of grace, Yeager & Co., not knowing, of course, what had or had not been, or would or would not be then done in or about the note in Boston, wrote this letter from St. Louis to Farwell & Co.:

ST. LOUIS, October 18th, 1867.

GENTLEMEN:

Mr. Kerckhoff fully expected to be able to place funds in our hands in time for us to have them with you to-day to meet his note of $15,000, but owing to the stringency of the money market, he has been unable thus far to complete arrangements to raise the money so as to have it in your hands to-day; but in a week or ten days it will be forthcoming, and he assures us it will be done without fail, and feels very sorry that circumstances were such as to prevent his meeting the note at maturity. We also feel very much annoyed about it, but we *hold ourselves responsible for the payment of this note, and shall see that it is done at an early day.* Thanking you for your many acts of kindness to us, we are

Yours, very truly,
YEAGER & Co.

Of course this letter did not reach Boston until some days after the last day of grace.

The note not being paid, the farm was sold under the trust deed, but did not bring enough to pay the sum due on the note. Thereupon Farwell & Co. sued Yeager & Co., in assumpsit, as *indorsers of the note.* The defences were:

1. That the indorsement was made at the instance and

special request of the plaintiffs, after the note had passed into their possession, solely as an accommodation to them, and without any value or consideration whatever.

2. That if this was not so, and if Yeager & Co. had ever been liable as indorsers, they had been discharged by want of demand on the maker, and notice of non-payment to them.

The plaintiffs disclaimed all demand on the defendants *as guarantors.*

The court charged "that if Yeager & Co. placed their names on the back of the note before the negotiations for the loan by the plaintiffs was closed, or before the plaintiffs advanced any money on the said loan, they were liable as indorsers."

Verdict and judgment accordingly, and writ of error here.

Messrs. G. P. Strong, Slayback, and Haeussler, for the plaintiffs in error:

The suit is against Yeager & Co., as indorsers simply. No claim is made on them as guarantors. Now,

1st. The indorsement was made after the execution of the papers, and after the record of the trust deed, by which the lien on the farm attached. It was purely at the instance of Farwell & Co. as "an accommodation" to them, and on their assurance that it should do "no harm" to Yeager. On such an indorsement the original indorsers cannot recover.*

2d. If this is not so, still the whole case of the other side rests on Yeager & Co.'s letter of the 18th October, 1867. But, when this letter reached Boston and was accepted, Yeager & Co. had been discharged from all liability for several days. The idea of the court below was, of course, that the letter was a waiver of demand of payment, and notice of non-payment. But there is not a word in the letter about either. To give such a letter value, for the purpose for which it is used, the other side should show that, in consequence of it, the holder of the note had omitted

* Moore *v.* Maddock, 33 Missouri, 575; Dowe *v.* Schutt, 2 Denio, 624; Corlies *v.* Howe, 11 Gray, 127; Slade *v.* Hood, 13 Id. 99; Parish *v.* Stone, 14 Pickering, 201; Schoonmaker *v.* Roosa, 17 Johnson, 304.

to make demand and to give notice (which assumes that the letter had been written before the time for demand); or show (if the letter was written after the demand) that it was written with full notice of the fact that no demand was made. Neither can be here pretended. The letter is used as a mere godsend in the case, and to reimpose, without consideration, a liability confessedly once clear gone. That it cannot do.*

Mr. T. T. Gantt, contra.

Mr. Justice DAVIS delivered the opinion of the court.

This case resolves itself into two points:

First. Were Yeager & Co. indorsers of the note in controversy.

Secondly. If so, were Farwell & Co. relieved from the necessity of proving on the trial that they demanded payment of the maker, and gave notice to the indorsers of the dishonor of the note.

It is very clear that Yeager & Co. were liable as indorsers, if they placed their names on the back of the note in question before Farwell & Co. closed the negotiations for the loan to Kerckhoff, or made any advances on it to him. And the condition of the parties is not altered by the fact that Yeager & Co., without consideration, indorsed the note at the request of Farwell & Co. after negotiations concerning the loan had been some time in progress, and when they had a right to suppose Farwell & Co. were satisfied with the landed security which Kerckhoff offered. It may be true that Farwell & Co. originally intended to let the money go on the security of the trust deed, but they were not legally bound to do so, and could alter their minds on the subject, and forbear to loan the money unless Yeager & Co. (who were the middlemen in the negotiation) should also indorse the note. If they chose to do this before the transaction

* Freeman *v.* Boynton, 7 Massachusetts, 488; Garland *v.* Salem Bank, 9 Id. 408; Low *v.* Howard, 11 Cushing 268 Kelley *v.* Brown, 5 Gray, 108; Cayuga Bank *v.* Dill, 5 Hill, 404.

was completed or any portion of the money loaned was actually advanced to Kerckhoff, then their liability as indorsers is fixed, and so the learned court told the jury. Whether the indorsement was before or after the conclusion of the negotiations for the loan, or before or after the advancements to Kerckhoff, were questions of fact for the determination of the jury. As there was evidence tending strongly to support the finding of the jury on this point, and as they were correctly instructed in relation to it, the plaintiff in error cannot justly complain of the action of the jury.

The undertaking, however, of the indorser of a negotiable note is only to pay it in case the maker does not, and he is immediately notified of this default. The remaining defence set up in this action is, that this was not done, and, therefore, the indorsers were not chargeable. But the indorser can, by his own conduct, place himself in such a position that he is estopped from alleging want of demand and notice of non-payment. Although, accurately speaking, there can only be a waiver of demand and notice by the indorser before the note is due, yet, after it is due, he can waive proof of them; or, what is more to the purpose, he can so act towards the holder of the note as to render the fact that demand was not made or notice given wholly immaterial.* The inquiry is, whether Yeager & Co. have, by their course of action, put themselves in this category. The court below held that they had, and, as the evidence on the subject was undisputed, took it from the jury and decided it as a question of law.

The letter of Yeager & Co., which constituted this evidence, substantially informed the Farwells that Kerckhoff was unable to pay his note, but would be able to do so in a week or ten days at farthest. After expressing the annoyance felt by the writers, on account of the dishonor of the paper, it concludes in these words: "But we hold ourselves responsible for the payment of the note, and shall see it is done at an early day."

* 1 Parsons on Bills and Notes, chapter 13, p. 594.

Necessarily, this letter could not have reached its destination in due course of mail until after the note was due; but, for the purpose of holding the indorser, this is immaterial, for, as we have seen, he can dispense with the conditions for his benefit as well after as before the paper matures. It has been held by this court, in *Sigerson* v. *Mathews*,* that if the indorser, with full knowledge of the fact that no demand has been made or notice given, makes a subsequent promise, he is liable, and cannot, when sued, set up as a defence the want of such demand and notice; and to the same effect are the decisions of the courts in this country generally.† Applying the principle of these decisions to the admitted facts of this case there is no difficulty in charging the indorsers. Their promise to pay was expressly made after they knew of the laches of the maker of the note, and they cannot now be allowed to repudiate it.

The most formal demand and notice could have been of no service to them, for they knew the demand would be useless, and the notice could only tell them what they were advised of without it. Acting under the weight of the knowledge of Kerckhoff's default, they did not choose to wait in order to see whether Farwell & Co. had taken the requisite steps to charge them, but preferred at once to acknowledge their liability, and, accordingly, made the direct promise to pay the note. Under these circumstances this promise is binding, and does not require for its enforcement the proof of demand and notice.

JUDGMENT AFFIRMED.

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* 20 Howard, 496.

† See 1 Parsons on Bills and Notes, p. 595, note m.

WEBB, TRUSTEE, *v.* SHARP, MARSHAL.

In the District of Columbia a landlord has a tacit lien for his rent on the chattels of his tenant on the demised premises, from the time the chattels are placed therein until the expiration of three months after the rent becomes due; which lien has priority over a mortgage on the chattels given after they are placed on the premises. But it seems that a *bonâ fide* sale or removal of the goods would discharge them from the lien.

ERROR to the Supreme Court of the District of Columbia; the case being this:

By the act of Congress, passed February 22d, 1867,* the right of distress for rent in the District of Columbia was abolished, and instead thereof, it was enacted, "that the landlord shall have a tacit lien upon *such* of the tenant's personal chattels upon the premises *as are subject to execution for debt*, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said three months." And under the act this lien may be enforced:

(1.) By attachment, to be issued upon affidavit that the rent is due and unpaid; or, if not due, that the defendant is about to remove or sell all, or some, of said chattels; or,

(2.) By judgment against the tenant and execution, to be levied on said chattels, or any of them, in whosesoever hands they may be found; or,

(3.) By action against any purchaser of any of said chattels, with notice of the lien.

This act of Congress being in force, one Polkinhorn, owner of a house in Washington City, leased it to Snow et al. for a printing-office, and they afterwards bought and placed a printing-press therein. Subsequently, on the 11th of December, 1867, they borrowed money, and executed to one Webb a deed of trust to secure the repayment of the loan, the press, however, still remaining on the premises leased.

* 14 Stat. at Large, 404, § 12.

The loan, though it became due, was never paid. And the tenants falling behind in payment of their rent also, Polkinhorn, their landlord, attached the printing-press; the rent for which the attachment was made having accrued in 1869, within three months prior to the issuing of the attachment. Judgment being perfected on the attachment a writ of *fieri facias* was issued to the marshal of the District, who levied on the press, then still remaining upon the premises. Hereupon Webb, the trustee, under the deed of trust, issued a replevin against the marshal in the court below. That court adjudged that the plaintiff should take nothing by his suit, and that the marshal have a return of the printing-press. From this judgment Webb brought the case here.

Mr. S. S. Hencle, for the plaintiff in error:

The deed of trust conveyed the printing-press completely out of Snow et al., and vested it completely in Webb, as trustee. It was no longer "the tenant's personal chattels on the premises, subject to execution for debt." Yet it is only on *such* chattels that the lien is given by the statute.

Mr. W. F. Mattingly, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The question is, whether the lien of the landlord is, or is not, superior to that of the trustee. The Supreme Court of the District decided that it is, and in that opinion we concur.

It will be seen by reference to the act of Congress passed February 22d, 1867, and which governs the subject, that it is clear and explicit that the landlord shall have a lien upon the tenant's chattels on the premises (liable to execution), "to commence with the tenancy and continue for three months after the rent is due." It also points out how, within the three months, the lien is to be enforced, namely, by attachment, &c. In this case the chattel was on the premises, it was attached within three months after the rent accrued, the suit on the attachment was regularly prosecuted to judgment, and the marshal took the chattel in execution.

The case is strictly within the language of the act, unless the press was not "such a chattel of the tenant as is subject to execution."

The plaintiff in error contends that the deed of trust, being a valid instrument, the property became vested in the trustee, and the press was not liable to be taken in execution for the debts of the tenant, and, therefore, that the act does not give the landlord a lien, because the lien given by the act is only upon such chattels of the tenant as are subject to execution.

The deed of trust was, in effect and purpose, nothing but a mortgage. It was given to secure the payment of a loan. It was an express lien created by deed to secure the performance of a contract. The landlord's lien is an implied or tacit lien, created by law to secure the performance of another contract, and, of the two, the landlord's is the prior lien, and cannot be displaced by the other. The landlord's lien attached to the printing-press the moment it was placed upon the demised premises, before the mortgage was given, and as long as it remained on the premises the lien continued until each instalment of rent became due and for three months afterwards, and then ceased as to that instalment. Had the tenant made an absolute and *bonâ fide* sale of the press, the case would have been a different one. The law protects *bonâ fide* purchasers without notice of the landlord's lien. Goods sold in the ordinary course of trade undoubtedly become discharged from the lien; otherwise business could not be safely carried on. This was so decided by the Supreme Court of Iowa in giving construction to a similar law of that State.* But neither the words nor the reason of the law call for a postponement of the landlord's lien to that of a subsequent mortgage or execution creditor, so long as the goods remain on the demised premises and continue to be the property of the tenant.

As to the suggestion that this press was not subject to execution, we apprehend that a deed of trust does not pro-

* Grant *v.* Whitwell, 9 Iowa, 156.

tect goods from sale by execution. The owner has still an interest, or equity of redemption in them, which is subject to sale; and a purchaser at an execution sale would be entitled to redeem the goods from the deed of trust by paying the debt secured thereby. When the law imposes the lien only upon such goods of the tenant upon the premises *as are subject to execution*, it means to exclude goods which are exempt from execution by some general or special law, such as those which a man is entitled to retain, against all execu tions, for the use of his family or the practice of his trade.

JUDGMENT AFFIRMED.

BOYDEN ET AL. *v.* UNITED STATES.

1. A receiver of public moneys of the United States does not stand in the position of an ordinary bailee; he is bound to higher responsibility. Upon a suit, therefore, on a bond "for the faithful discharge of his trust," such a receiver cannot discharge himself by showing that he was suddenly beset in his office, thrown down, bound, gagged, and that against all the defence he could make the money was violently and without his fault taken from him.
2. Though statutes oblige receivers to pay over when required by the Secretary of the Treasury, a declaration, stating that the receiver had been often requested to pay is enough after verdict, there having been general regulations in force at the time the bond here sued on was given, requiring receivers to pay at stated times.

IN error to the Circuit Court for the District of Wisconsin.

The United States sued Boyden and his sureties on his official bond as receiver of public moneys for the district of lands subject to sale at Eau Claire, in the State of Wisconsin. The bond was given pursuant to the 6th section of the act of May 10th, 1800.* The section enacts:

"The receiver of public moneys shall, before he enters upon the duties of his office, give bond with approved security *for the faithful discharge of his trust.*"

* 2 Stat. at Large, 75.

This bond was conditioned, that if the said Boyden truly and faithfully executed and discharged all the duties of his said office according to law, then the obligation should be void. The breach alleged was, that Boyden had received as receiver $5088, of the moneys of the United States, which he had not paid over to the United States, "although often requested so to do."

The defendants pleaded as one plea, that Boyden had been violently robbed of the said sum of money; and under a notice that they would give in such evidence offered upon the trial to prove that, on the 23d of December, 1859, at Eau Claire, in the State of Wisconsin, while in the land office of the United States for that land district, he the said Boyden, then and there being the receiver of public moneys for said district, and then and there being in the discharge of the duties of his office as such receiver, was suddenly beset by some person or persons to him unknown, and thrown down, and against all defence that he could make, was gagged and bound, and the moneys described in the complaint *violently, and without his fault*, taken from him and carried away.

To the introduction of this evidence the United States objected, upon the ground that the facts as offered to be proved constituted no defence. The court sustained the objection, and the defendants excepted.

Judgment having been given for the United States, the defendant brought the case here.

The assignments of error were:

1. That the evidence offered was improperly rejected.

2. That the declaration did not state a cause of action. This second assignment being founded on the fact that an act of August 6th, 1846,* requires all receivers of public moneys to keep in their possession all of the moneys by them received, until the same is *ordered by the proper department or officer of the government* to be transferred or paid out; and that the amendatory act of March 3d, 1857,† requires

* 9 Stat. at Large, 59, § 6.

† 11 Id. 249, § 3.

persons having moneys of the United States in their hands, to pay them to the Treasurer, the Assistant Treasurer, or public depositary of the United States, *when required by the Secretary of the Treasury, or any other department.*

The case was twice argued.

Messrs. M. H. Carpenter and M. M. Cothren, for the plaintiff in error:

I. The sureties contract for such capacity and fidelity as man may possess, and as may be suitable for the employment of their principal. The duty of the principal is measured by physical possibility. *Their* liability is no greater. They do not undertake that an earthquake shall not swallow up the property of the government; nor that the public enemy, or a robber shall not, despite all resistance that can be made by the custodian, seize, and carry away the funds of the government. At the common law, an officer was not responsible for loss of public or private funds, except upon the ground of negligence or default. This is old law, settled in *Lane* v. *Cotton*, reported by Lord Raymond,* and in *Whitfield* v. *Le De Spencer*, reported in Cowper.† The principle is adopted in our own country, as is seen by the case of the *Supervisors of Albany* v. *Dorr et al.*,‡ where it was held by the Supreme Court of New York, that a "public officer intrusted with the receipt and disbursement of public funds, is not responsible for money *stolen* from his office, where there is no imputation of negligence or other default on his part." Nelson, C. J., in giving the opinion, places emphasis upon the condition of the bond being for the faithful execution of the duties of his office, and says that this condition recognizes the common law rule. The case was affirmed by the Court of Errors.§ The later case of *Muzzy, Supervisor*, v. *Shattuck*,‖ in the same State, which might *appear* to conflict with this decision, was placed upon the construction of a statute, which was peculiar in its provisions, and, in the

* Page 646.
† Page 754.
‡ 25 Wendell, 440.
§ 7 Hill, 583.
‖ 1 Denio, 233.

opinion of the court, rendered the collector a *debtor* for the amount by him collected, and his sureties *guarantors for the payment of the debt.* It therefore does not conflict with *Supervisors of Albany* v. *Dorr*, nor with the common law rule as to official liability; but only interprets and gives effect to a particular statute.

The very terms of the statute of 1800, under which this bond was given, make the receiver an agent, trustee, or bailee. Persons occupying such relations are only responsible for the same kind of negligence that bailees are liable for; and certainly the settled rule is, that bailees in general are not responsible for losses resulting from inevitable accident or irresistible force. It is the government that is to protect the citizen against the public enemy, and the private robber; and not the citizen who is to protect the government against losses by either.

The United States v. *Prescott et al.*,* which might be cited against us, does not apply. In that case the sureties had undertaken in addition to the common law obligation of sureties upon an official bond, that the principal

"Has well, truly, and faithfully, and shall well, truly, and faithfully keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same has been or shall be ordered, by the proper department or officer of the government, to be transferred or paid out. And when such order for transfer or payment has been, or shall be received, has faithfully and promptly made, and will faithfully and promptly make the same as directed."

The conditions of that bond enlarged the obligations of the contractors beyond the contract in this case. And the contract may well have been considered a contract of insurance with the government, that all moneys which might come into the hands of the principal should be paid in the manner stipulated.

Moreover, the rule was only applied to a case of theft

* 3 Howard, 587.

The defence in this case is quite different. It is robbery. Public policy may require such vigilance upon the part of public officers as that theft can never occur. This, upon principle, would render theft no defence. Not so with robbery. That is a crime against which the utmost vigilance cannot guard. If the guardian be strong, the robber may be stronger. If government cannot so administer law as that its own property will be safe from the bandit, it ought to sustain its own losses, unless the citizen has contracted to make them good.

So too, *United States* v. *Dashiel*,* was a case of stealing, while in *United States* v. *Keehler*,† a postmaster in North Carolina, who during the rebellion had paid money of the United States to the rebel authorities, in obedience to a statute of the rebel States, and to "a regular official order under it," was held not discharged, because the case did "not show the application of any physical force to *compel* the defendant to pay." The intimation is, that had force been shown, he would have been held discharged.

II. The declaration does not state any cause of action. From the act of 1846, and the amendatory one of 1857,‡ it is obvious, that until some order is made by the head of the proper department, no cause of action accrues against a receiver. The declaration here does not state that any order or requisition was ever made upon Boyden to transfer or pay over. This being so, there is a judgment without anything to base it upon.

Messrs. B. H. Bristow, Solicitor-General, and W. A. Field and C. H. Hill, Assistant Attorneys-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would

* 4 Wallace, 182. † 9 Id. 84. ‡ *Supra*, pp. 18 19.

then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more except in the case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and not within his control, he will not be excused.* The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part. It is true that in the case of the *Supervisors of Albany* v. *Dorr et al.*,† in the Supreme Court of New York, it was decided in a suit on a bond of a county treasurer, conditioned for the payment of all money that should come into his hands as treasurer, that he was not responsible for the public money feloniously stolen from his office without any negligence, want of due care, or other blame or fault whatever on his part; and this decision was affirmed in the Court of Appeals of that State, only, however, by an equal division.‡ It was rested upon the supposed liability of the officer, *virtute officii*, which it was thought his bond did not increase, and it was supposed to be sustained by *Lane* v. *Cotton*,§ and *Whitfield* v.

* Metcalf on Contracts, 213; The Harriman, 9 Wallace, 161.

† 25 Wendell, 440. ‡ 7 Hill, 583. § 1 Lord Raymond, 646.

*Le De Spencer.** It is quite plain, however, that those cases do not sustain it. They were actions upon the case against the Postmaster-General, brought not by the government, but by private individuals to recover damages for the negligent failure to deliver letters, and the defendants were held not liable for money stolen, even by their subordinates in office. At most the Postmaster-General was a mere bailee, and no question was raised respecting the effect of a bond to secure the performance of his duties. But, whatever may have been the ruling in the case of the *Supervisors of Albany* v. *Dorr*, it is no longer authority, even in the State of New York. *Muzzy, Supervisor*, v. *Shattuck et al.*,† subsequently decided, and affirmed unanimously in the Court of Appeals, is utterly irreconcilable with it, and it has settled the law otherwise in that State. So in Pennsylvania, in *Commonwealth* v. *Comly*,‡ it was ruled that the responsibility of a public receiver depends on his contract, when there is one, and not on the law of bailments. There the condition of the bond was to account and pay over, and it was held no defence by the surety of the receiver that the money was stolen, though it was kept as a prudent man would keep his own funds. It was said by Chief Justice Gibson, in delivering the judgment of the court, after referring to the fact, that a lessee is not relieved from payment of rent by destruction of the demised premises by fire, "A loss by a visitation of Providence, which no vigilance could prevent, would present a more meritorious claim for relief, one would think, than a loss by robbery, which is always preceded by a greater or less degree of negligence. A receiver, or his surety, would come before a chancellor with an ill grace on that ground, even if there was a power to relieve him. The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretences, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case;

* Cowper, 754. † 1 Denio, 233. ‡ 3 Pennsylvania State, 372.

and his discretion, were he at liberty to use it, would be influenced by considerations of general policy." *State* v. *Harper** is to the same effect. This is precisely the ground which this court has taken. In *The United States* v. *Prescott*† it was decided that the felonious taking, stealing, and carrying away the public money in the hands of a receiver of public money, without any fault or negligence on his part, does not discharge him or his sureties, and that it cannot be set up as a defence to an action on his official bond. The condition of the receiver's bond in that case, it is true, was that the receiver should pay promptly when orders for payment should be received, while the bond in the case before us is conditioned that Boyden, the receiver, had truly executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of said office according to law. But the acts of Congress respecting receivers made it their duty to pay the public money received by them when ordered by the Treasury Department, and that department, by its general orders of 1854, required payment to be made before this suit was brought. No exception was made, no contingency was contemplated. The bond, therefore, was an absolute obligation to pay the money, and differing not at all, in legal effect, from the bond in Prescott's case. A similar ruling was made in *United States* v. *Dashiel*.‡ What the condition of the bond on which suit was brought in that case was, does not appear in the report, but it was for the discharge of the paymaster's official duty. The doctrine of Prescott's case was also recognized in *United States* v. *Keehler*,§ and it must be considered as settled law. Applying it to the case now in hand, it makes it clear that the evidence offered by the defendants, tending to prove that the receiver had been robbed of the public money received by him, was rightly rejected as constituting no defence to the suit on the receiver's bond. It is true that in Prescott's case the defence set up was that the money had been

* 6 Ohio State, 607.
† 3 Howard, 578.
‡ 4 Wallace, 182.
§ 9 Id. 83

stolen, while the defence set up here is robbery. But that can make no difference, unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it.

There is nothing in the second error assigned. Though under the acts of Congress of August 6th, 1846,* and the amendatory act of March 3d, 1857,† receivers are required to pay when required by the Secretary of the Treasury, there were general orders made for all receivers, requiring payments to be made at stated times, which were in existence when this receiver's bond was given. The declaration avers a request, and this is enough after verdict.

JUDGMENT AFFIRMED.

[See *infra*, p. 56, Bevans, Receiver, *v.* United States.]

UNITED STATES *v.* WORMER.

The United States contracted, during the war to suppress the Rebellion, with a dealer in horses for a large number of cavalry horses; he to be paid on the completion of the contract, should Congress make an appropriation for that purpose. *After* the contract had been made, the government issued instructions which were better calculated to protect it against frauds than previous ones had been; and among the regulations was one that the horses should be placed in the inspection yard twenty-four hours before inspecting them, and another that the person appointed as inspector should brand with the letter R, on the shoulder, all horses "manifestly intended as a fraud on the government, because of incurable disease or any purposely concealed defect." The contractor threw up his contract and claimed damages, which the Court of Claims allowed him, to the extent which it deemed would make him whole.

This court reversed the judgment and ordered a dismissal of the contractor's claim; it holding that the new regulations were not unreasonable.

APPEAL from the Court of Claims.

The claimant demanded $15,000 from the government by way of damages for breach of contract. The principal facts

* 9 Stat. at Large, 59, § 6. † 11 Id. 249.

were that on the 26th day of February, 1864, he entered into a written agreement with the chief quartermaster of the Cavalry Bureau to deliver at the government stables in St. Charles, Illinois, by or before the 26th of March, 1200 cavalry horses, sound, and of certain specified ages, height, and quality, and on delivery to be examined and inspected *without unnecessary delay* by a person or persons to be appointed by the government. Rejected horses were to be removed by the contractor within one day after receiving notice of their rejection. Payment was to be made on completion of the contract, should Congress have made an appropriation for that purpose, or as soon thereafter as funds might be received. Instructions for inspectors of cavalry horses were issued a few days *after* the date of the contract, which required, amongst other things, that horses proposed for sale to the government should be placed in the inspection yard *at least twenty-four hours before inspecting them;* and none but the inspector and his assistants were to be allowed to enter the yard or to handle the horses until the inspection was completed. It was also provided that all horses which were *manifestly intended* as a fraud upon the government, because of incurable disease, or any purposely concealed defect, *should be branded on the left shoulder with the letter* **R.** Horses rejected for being under age, in poor condition, or injured by transportation, &c., were to be lightly branded on the front part of the fore hoof with the letter **R.** A large number of other directions were given to inspectors, but these were the principal ones complained of. The claimant applied to have these rules modified or suspended in his case, as not having been promulgated when he made his contract; but his application was refused. He therefore threw up his contract, and did not purchase any horses; but alleged that he sustained damages by not being allowed to perform his contract untrammelled by the new regulations.

The Court of Claims found that the regulations materially changed and modified the contract, by throwing upon the claimant, in its performance, increased delay, greater expense, and largely augmented risk; and, therefore, they

gave judgment in his favor for such damages as would make him whole, which they estimated at $9000. The United States appealed.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States:

Covenants which might be implied in a contract between individuals will not be in a contract made by the government, where the only express agreement is dependent on the fact of an appropriation.*

But, independently of this, no particular rules of inspection were referred to or adopted in this contract, and the only question is were the rules actually prescribed unreasonably severe, reference being had to the fact that we were carrying on a mighty war, that the number of horses to be bought by the government was immense, and that the claimant was a public contractor; one of a class continually practicing frauds on the government. We think that they were not.

Messrs. M. H. Carpenter, H. E. Totten, and I. Harris, contra:

Governments are bound to perfect faith in their dealings, as much as are individuals; and, if possible, more so; for remedies against them are less complete than against individuals.

Now, we say, when the rules in force at the time that the contract was made did *not* require the horses to be impounded for twenty-four hours before any inspection began, and did *not* stipulate that horses which, *in the opinion of any person appointed as inspector by the chief of the Cavalry Bureau*, were offered with manifest intention to defraud, should be branded,—that the government had not a right to require that they *should be* impounded twenty-four hours before the inspection began, and *should* be branded and so rendered utterly unsalable whenever such deputy inspector pleased

* Churchward *v.* The Queen, Law Reports, 1 Q. B. 173, 195, *et seq.*

to fancy a fraudulent purpose; or to say that he fancied it, or even without saying anything, to act as if he knew the fact. The government had the right to keep the horses any length of time for the act of inspection; they had a right to make the inspection the most rigid possible, and to reject if dissatisfied. But they had no right, after the contract made without such a provision, to instruct their subordinates to punish even the fraudulent presentation of a horse by permanently mutilating and disfiguring him; or to debase the value of the claimant's property by branding it when it was rejected for common defects involving no fraud.

Mr. Justice BRADLEY delivered the opinion of the court.

We think that the Court of Claims erred in its finding and judgment in this case. The government clearly had the right to prescribe regulations for the inspection of horses, and there was great need of strictness in this regard, for frauds were constantly perpetrated. We see nothing unreasonable in the regulations complained of. It is well known that horses may be prepared and fixed up to appear bright and smart for a few hours, and it was altogether reasonable that they should be placed in the government yard for the period required, and that no person interested in them should be permitted to manipulate them whilst under inspection. The branding was also a proper and necessary precaution to prevent the same horses being presented a second time after condemnation. The branding on the foot was of slight importance, and the brand on the shoulder was not to be applied except in cases of absolute fraud. A person guilty of fraud would have no right to complain of the regulation being carried into effect.

As the government had the right to prescribe all proper and reasonable regulations on the subject, and as the regulations prescribed do not seem to have been unreasonable, the claimant cannot complain. If he chose, under these circumstances, to fling up his contract, he must be content to suffer any incidental damage which he may have incurred

in making preparations for its performance. It was a damage voluntarily sustained, and the maxim, *volenti non fit injuria*, applies to the case.

DECREE REVERSED, and the court below directed to DISMISS THE PETITION.

LOW ET AL. *v.* AUSTIN.

1. Goods imported from a foreign country, upon which the duties and charges at the custom-house have been paid, are not subject to State taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the State, which is subjected to an ad valorem tax.
2. Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State until they have passed from the control of the importer, or been broken up by him from their original cases.

ERROR to the Supreme Court of the State of California.

The statutes of California, in force in 1868, provided that "all property of every kind, name, and nature whatsoever within the State" (with certain exceptions), should be subject to taxation according to its value. In 1868, and for several years before, and at the time of commencing this action, Low and others were importing, shipping, and commission merchants in the city of San Francisco, California. In 1868 they received on consignment from parties in France, certain champagne wines upon which they paid the duties and charges of the custom-house. They then stored the wines in their warehouse in San Francisco, in the original cases in which the wines were imported, where they remained for sale. Whilst in this condition they were assessed as the property of the said Low and others, for State, city, and county taxes, under the general revenue law of California above mentioned. Low and the others refused to

pay the tax, asserting that it was levied in contravention of that provision* of the Constitution, which ordained that

"No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports," &c.

Upon the refusal, one Austin, at the time collector of taxes for the city and county of San Francisco, levied upon the cases of wine thus stored for the amount of the tax assessed, and was about to sell them, when Low and the others paid the amount, and the charges incurred, under protest. They then brought the present action in one of the District Courts of the State to recover back the money paid; there arguing that the illegality of the tax was settled by the case of *Brown* v. *The State of Maryland*,† in which this court declared an act of the State of Maryland, requiring all persons who should sell imported goods by wholesale, bale, or package, to take out a license from the State, for which they were required to pay $50, to be in conflict with the provision of the Constitution of the United States above quoted;—this court there holding that the license was a tax upon the articles imported; that it intercepted the goods before they had become mingled with the mass of the property of the State, and, therefore, that it was a tax upon the goods as imports, and consequently within the constitutional inhibition.

The District Court gave judgment for the plaintiffs, holding that the law under which the tax was levied was void.

The collector, Austin, now took the case to the Supreme Court of California. The view of that court did not coincide with the view of the District Court. Referring to the case of *Brown* v. *The State of Maryland*, above quoted and relied on by the importers to show the illegality of the tax, the Supreme Court of California said:

"It is contended that the property taxed in this case had not become incorporated with the mass of the general wealth of the

* Art. I, § 10.

† 12 Wheaton, 419.

State, simply because it was still the property of the importer, in the original packages in which it was imported.

"We see nothing in this which even tends to show that the property had not become incorporated with the general wealth of the State. We see no reason why imported goods exposed in the store of a merchant for sale do not constitute a portion of the wealth of the State, as much as domestic goods similarly situated. Nor do we see the slightest difference whether the importer is also the merchant who sells, or whether the goods are in the original packages or not. In either case the goods are exposed for sale in the markets for the profit which may be realized from selling. They may be equally the basis of credit, and alike they require and receive the benefit of the police laws of the State, and upon every principle of equality should contribute to pay for their protection. Possibly the plaintiff, who is a commission merchant, has in his store champagne wines manufactured in Sonoma or Los Angeles, which he is offering to sell in the same market, in precisely similar packages. In what possible sense can one be said to constitute a portion of the wealth of the State in which the other does not? The object of the constitutional restriction is said to be to prevent the State from imposing a tax upon commerce, to discriminate against foreign goods. It certainly cannot be intended to discriminate against domestic productions by exempting foreign goods from its share of the cost of protecting it.

"A tax which is imposed alike upon all the property of the State cannot in any sense be considered a tax upon commerce. It has no tendency to discourage importations. Exemption from the tax might encourage importations, but certainly it was not the purpose of the restriction to compel the State to offer a bounty to foreign produce over domestic. The tax prohibited must be a tax upon the character of the goods as importations, rather than upon the goods themselves as property."

The Supreme Court of California accordingly reversed the decree of the District Court, and to that decree of reversal the present writ was taken.

Messrs. W. A. Fisher, C. Marshall, and H. McAllister, for the plaintiffs in error.

Mr. J. Hamilton, Attorney-General of California, contra.

Mr. Justice FIELD delivered the opinion of the court.

The simple question presented in this case for our consideration is, whether imported merchandise, upon which the duties and charges at the custom-house have been paid, is subject to State taxation, whilst remaining in the original cases, unbroken and unsold, in the hands of the importer.

The decision of this court in the case of *Brown* v. *The State of Maryland** furnishes the answer to the question. The distinction between that case and the present case does not affect the principle affirmed, which equally governs both.

In that case the question arose whether an act of the legislature of Maryland requiring importers of foreign goods by the bale or package, to pay the State a license tax before selling them in the form and condition in which they were imported, was valid and constitutional. The court held the act in conflict with the provision of the Constitution which declares that no State shall, without the consent of Congress, lay any impost or duty on imports or exports, except what may be absolutely necessary for executing its inspection laws.

In the elaborate opinion of Mr. Chief Justice Marshall the whole subject of the power of Congress over imports is considered, and the line marked where the power of Congress over the goods imported ends, and that of the State begins, with as much precision as the subject admits. After observing that the prohibition of the Constitution upon the States to lay a duty on imports, and their acknowledged power to tax persons and property may come in conflict, he says, speaking for the court: "The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, gen-

* 12 Wheaton, 419.

erally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."*

In that case it was also held that the authority given to import necessarily carried with it a right to sell the goods in the form and condition, that is, in the bale or package, in which they were imported; and that the exaction of a license tax for permission to sell in such case was not only invalid as being in conflict with the constitutional prohibition upon the States, but also as an interference with the power of Congress to regulate commerce with foreign nations.

The reasons advanced by the Chief Justice not only commend themselves, by their intrinsic force, to all minds, but they have received recognition and approval by this court in repeated instances. Mr. Chief Justice Taney, who was at the time eminent at the bar, as he was afterwards eminent on the bench, argued the case on behalf of the State of Maryland; and in the *License Cases*,† he referred to his position and observed that, at that time, he persuaded himself that he was right, and thought that the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. "But farther and more mature reflection," the great judge added, "has convinced me that the rule laid down by the Supreme Court is a just and safe one, and perhaps the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them. The question, I have already said, was a very difficult one for the

* 12 Wheaton, 441.

† 5 Howard, 575.

judicial mind. In the nature of things the line of division is, in some degree, vague and indefinite, and I do not see how it could be drawn more accurately and correctly, or more in harmony with the obvious intention and object of this provision in the Constitution. Indeed, goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State government."*

The Supreme Court of California appears, from its opinion, to have considered the present case as excepted from the rule laid down in *Brown* v. *The State of Maryland*, because the tax levied is not directly upon imports as such, and consequently the goods imported are not subjected to any burden as a class, but only are included as part of the whole property of its citizens which is subjected equally to an *ad valorem* tax. But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as imports, a tax upon them, in any shape, is within the constitutional prohibition. The question is not as to the extent of the tax, or its equality with respect to taxes on other property, but as to the power of the State to levy any tax. If, at any point of time between the arrival of the goods in port and their breakage from the original cases, or sale by the importer, they become subject to State taxation, the extent and the character of the tax are mere matters of legislative discretion.

There are provisions in the Constitution which prevent

* See also Almy *v.* The State of California, 24 Howard, 169; Woodruff *v.* Parham, 8 Wallace, 123; Hinson *v.* Lott, Ib. 148.

one State from discriminating injuriously against the products of other States, or the rights of their citizens, in the imposition of taxes, but where a State, except in such cases, has the power to tax, there is no authority in this court, nor in the United States, to control its action, however unreasonable or oppressive. The power of the State, except in such cases, is absolute and supreme.*

The argument for the tax on the wines in the present case, that it is not greater than the tax upon other property of the same value held by citizens of the State, would justify a like tax upon securities of the United States, in which form probably a large amount of the property of some of her citizens consists; yet it has been repeatedly held that such securities are exempted from State taxation, whether the tax be imposed directly upon them by name or upon them as forming a part in the aggregate of the property of the taxpayer.† The rule is general that whenever taxation by a State is forbidden, or would interfere with the full exercise of a power vested in the government of the United States over the same subject, it cannot be imposed. Imports, therefore, whilst retaining their distinctive character as such, must be treated as being without the jurisdiction of the taxing power of the State.

It follows that the judgment of the Supreme Court of California must be

REVERSED.

UNITED STATES v. CLYDE.

Receiving payment of a sum of money for a disputed claim against the government and giving a receipt in full therefor, will, in the absence of proof of any mistake, be deemed a satisfaction of the claim.

APPEAL from the Court of Claims.

Clyde presented his petition in that court, claiming, by

* Woodruff v. Parham, 8 Wallace, 123; Hinson v. Lott, Ib. 148.
† Bank of Commerce v. New York City, 2 Black, 620.

one count of it (the first), compensation for the use of his ferry-boat Tallacca.

The facts found by the court were, that on the 16th of November, 1862, the Tallacca, owned by the claimant and at the time lying at Alexandria, was chartered by Captain Ferguson, an assistant quartermaster of the United States army, at the rate of $115 per day, for every day she might be employed in the service of the United States, and until returned to the port whence taken; and that the said boat continued in the service of the government from the date of the charter-party until the 31st of July, 1863, and was paid at the agreed rate up to the last of February, 1863, without objection; but that, on the 13th of May, 1863, the Quartermaster-General disapproved of the charter party by the following order:

"The charter of the Tallacca is disapproved by the Quartermaster-General. She will be paid for only at the rate of $75 per day from the date of her charter, so long as she may be retained in the service. The excess of $40 per day already paid will be deducted on the present settlement for her services from March 1st, 1863, &c."

The claimant received notice of the contents of this order during the month of May. He refused to consent to the reduction, but did not show to the Court of Claims whether, on receiving notice of this order, he determined to allow his boat to remain in the service at the reduced rate, or sought to take her out of it. The boat in fact remained in the service until July 31st, 1863. No further payment was made until December, 1863, when the quartermaster stated the account at the reduced rate, deducted the excess of $40 per day paid on the former settlements, and paid the claimant the balance. The claimant receipted for this balance as "*in full of the above account.*"

Upon these facts the Court of Claims decided that the claimant was entitled to be paid at the rate named in the charter-party until he received notice of the reduction made by the Quartermaster-General, and after that, at the reduced rate.

From this decision both parties appealed; the United States on the ground that the payment received and receipt given by Clyde was a bar to any further claim upon the government—a position for which they relied on the *United States* v. *Child et al.*, decided at the last term*—the claimant on the ground that he was entitled to have the full amount stipulated for in the charter-party.

Messrs. B. H. Bristow and C. H. Hill, for the United States; Messrs. C. F. Peck and T. J. Durant, contra, for the claimant.

Mr. Justice BRADLEY delivered the opinion of the court.

On the principles determined by this court in the late case of the *United States* v. *Child et al.*, we think that the Court of Claims erred in the decision made. From the time that the order of the Quartermaster-General was made, disapproving of the charter-party and razeeing the rate for the whole period of service, the case was clearly one of dispute, at least, if not one of acquiescence on the part of the claimant. Notwithstanding this order he permitted his boat to remain in the service until the 31st of July, knowing the change of terms which the Quartermaster-General had made. It cannot be pretended that there were two lettings, or two charter-parties, of the vessel. There was only one; and as to this one the government determined to allow one rate, and the claimant insisted on another. The government stood on the order of the superior officer and insisted that this should govern the contract; the claimant insisted the contrary. Under these circumstances the final determination of the latter to take the balance of the account as made out on the basis contended for by the government, and his giving a receipt in full, is clear evidence that he agreed to take that balance in satisfaction of the claim; and this fact, under the circumstances of the case, concludes him from making any further demand.

Judgment reversed, and the record remitted with direc-

* 12 Wallace, 232.

tions to enter a decree of dismissal as to this first count in the petition.

Mr. Justice FIELD dissented from this judgment.

[See the next case.]

CLYDE *v.* UNITED STATES.

A rule of the Court of Claims, requiring parties to present their claims to an executive department before suing in that court, is unauthorized and void.

APPEAL from the Court of Claims; the case being argued and disposed of at the same time with the preceding one.

Clyde, the claimant in the preceding case, presented his petition in that court, the same petition mentioned in that case, claiming by the second count of it compensation for the use of his barge William Hunt, as he had in the former appeal, claimed by the first count, compensation for the use of the Tallacca.

The Court of Claims dismissed the claim on the ground that it was not presented in conformity with a rule of practice which the court then had, but which has since been abrogated. This rule required that where the case was such as is ordinarily settled in any executive department, the petition should show that application for its allowance had been made to that department, and without success, and its decision thereon.

From the action of the court, Clyde, the claimant, appealed to this court.

Messrs. C. F. Peck and T. J. Durant, for the appellant, argued that the rule in question was one both arbitrary and without authority.

Messrs. B. H. Bristow and C. H. Hill, contra, contended that it was both useful and proper; and that not having

been complied with, the court below properly refused to hear the case.

Mr. Justice BRADLEY delivered the opinion of the court.

However useful and proper such a rule as that complained of by the appellant may have been prior to the enactment of the law passed June 25th, 1868,* which requires the Attorney-General to obtain from the proper department, and the department to furnish, such facts, circumstances, and evidence as it might be in possession of in relation to any claim prosecuted in the Court of Claims, we are of opinion that it was not competent for the Court of Claims to impose it as a condition of presenting a claim in that court. Instead of being a rule of practice, it was really an additional restriction to the exercise of jurisdiction by that court. It required the claimant to do what the acts giving the court jurisdiction did not require him to do before it would assume jurisdiction of his case.

The act of 1855, which created the court, declares that it shall "hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein." The rule adopted by the court required that the claimant should not only have such a claim as stated in the act, but should have first gone through the department which might have entertained it, before he would be permitted to prosecute in that court. This was establishing a jurisdictional requirement which Congress alone had the power to establish.

This judgment of dismissal is therefore reversed, and the record remitted with directions to proceed to a hearing on the second count.

* 15 Stat. at Large, 76.

TOOF ET AL. *v.* MARTIN, ASSIGNEE, ETC.

1. By insolvency, as used in the bankrupt act when applied to traders and merchants, is meant inability of a party to pay his debts, as they become due, in the ordinary course of business.
2. The transfer, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such a case, and not upon the assignee or contestant in bankruptcy.
3. A creditor has reasonable cause to believe a debtor, who is a trader, to be insolvent when such a state of facts is brought to the creditor's notice respecting the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that he is unable to meet his obligations as they mature in the ordinary course of business.
4. A transfer by an insolvent debtor with a view to secure his property, or any part of it, to one creditor, and thus prevent an equal distribution among all his creditors, is a transfer in fraud of the bankrupt act.

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

The 35th section of the bankrupt act of 1867, thus enacts:

"That if any person, being insolvent, or in contemplation of insolvency, with a view to give a preference to any creditor or person having a claim against him . . . . makes any assignment, transfer, or conveyance of any part of his property . . . . (the person receiving such assignment, transfer, or conveyance, having reasonable cause to believe such person is insolvent, and that such assignment or conveyance is made in fraud of the provisions of this act), the same shall be void, and the assignee may recover the property, or the value of it, from the person so receiving it or so to be benefited."

With this enactment in force, Martin, assignee in bankruptcy of Haines and Chetlain, filled a bill in the District Court for the Eastern District of Arkansas, against J. S. Toof, C. J. Phillips, and F. M. Mahan, trading as Toof, Phillips & Co. (Haines and Chetlain being also made parties), to

set aside and cancel certain conveyances alleged to have been made by these last in fraud of the above-quoted act.

Haines and Chetlain were, in February, 1868, and had been for some years before, merchants, doing business under the firm name of W. P. Haines & Co., at Augusta, Arkansas. On the 29th of that month they filed a petition for the benefit of the bankrupt act, and on the 28th of May following were adjudged bankrupts, and the complainant was appointed assignee of their estates. On the 18th of the previous January, which was about six weeks before the filing of their petition, they conveyed an undivided half-interest in certain parcels of land owned by them at Augusta, to Toof, Phillips & Co., who were doing business at Memphis, in Tennessee, for the consideration of $1876, which sum was to be credited on a debt due from them to that firm. At the same time they assigned to one Mahan, a member of that firm, a title-bond which they held for certain other real property at Augusta, upon which they had made valuable improvements. The consideration of this assignment was two drafts of Mahan on Toof, Phillips & Co., each for $3034, one drawn to the order of Haines, and the other to the order of Chetlain. The amount of both drafts was credited on the debt of Haines & Co. to Toof, Phillips & Co., pursuant to an understanding to that effect made at the time. There was then due of the purchase-money of the property, for which the title-bond was given, about $700. This sum Mahan paid, and took a conveyance to himself from the obligor who held the fee.

The bill charged specifically that at the time these conveyances were made the bankrupts were insolvent or in contemplation of insolvency; that the conveyances were made with a view to give a preference to Toof, Phillips & Co., who were the creditors of the bankrupts; that Toof, Phillips & Co. knew, or had reasonable cause to believe, that the bankrupts were then insolvent, and that the conveyances were made in fraud of the provisions of the bankrupt act.

It also charged that the assignment of the title-bond to Mahan was in fact for the use and benefit of Toof, Phillips

& Co., for the purpose of securing the property or its value to them in fraud of the rights of the creditors, and that this purpose was known and participated in by Mahan.

The answer, admitting a large amount of debts at the time of the conveyances in question, denied that the bankrupts were then "insolvent," asserting, on the contrary, "that at the time aforesaid said Haines & Co. had available assets in excess of their indebtedness to the extent of $16,000." It also denied that there was a purpose to give a preference; asserting that the conveyances of the land were made because Haines & Co., not having cash to pay the debt due Toof, Phillips & Co., were willing to settle in property; and it denied that the title-bond was assigned to Mahan for the benefit of Toof, Phillips & Co., or that they paid for the same; but on the contrary averred that Mahan bought the property and paid for it himself, and for his own use and benefit, out of his own funds.

Appended to the bill were several interrogatories, the first of which inquired whether at the time of making the transfers to Toof, Phillips & Co. the indebtedness of W. P. Haines & Co. was not known to be greater than their immediate ability to pay; and to this Toof, Phillips & Co. answered that at the time of making these transfers they did not believe Haines & Co. were able to pay their debts *in money*, but that they were able to do so on a fair market valuation of the property they owned, and of their assets generally.

Chetlain, one of the bankrupts, testified that on the 18th of January, 1868, Haines & Co. could not pay their notes as they came due; that previous to this time they had contemplated bankruptcy, and that he had had several conversations with Mr. F. M. Mahan, relative to their finances, and had told him the amount, or near the amount, of their debts. His advice was to get extensions, and he would help them get through; that after his promises to advance them more goods, they concluded not to go into bankruptcy, but to go on in business; that he told Mahan that Haines & Co. could not pay out; and in a conversation with him previous to the transfer of the real estate, he, Chetlain, told Mahan that

such was the state of the finances of Haines & Co. that if he would assume their liabilities, and give them a receipt, Haines & Co. would turn over all their assets to him. He did not accept.

He also testified that about the 1st of January, 1868, the sheriff levied on the goods belonging to Haines & Co., in their storehouse in Augusta, on an execution in favor of one Weghe, which caused them to suspend business for a few days, until the levy was dissolved by order of the sheriff, at or about the 15th day of January, 1868. Mahan was in Augusta at the time of this levy, and Haines & Co. had an interview with him in regard to it.

During the entire autumn and winter preceding these transfers, Haines & Co. did not pay, except to Toof, Phillips & Co., more than $500 on all their debts; and in the latter part of December, 1867, and the first part of January, 1868, some of the creditors sent agents to collect money from them, but got none, because Haines & Co. had no funds to pay them.

A witness, Frisbee, testified that he had assisted Mr. Haines in making up his balance-sheet "about the 1st of January, 1868, and that the result was that their available assets were not sufficient to pay their debts."

Another witness, an agent for an express company, testified that he received, about the last of December, 1867, or January, 1868, notes from Toof, Phillips & Co. and another firm against Haines & Co. for collection; that he presented them for payment to Haines & Co., and that they said they could not pay them at that time. They did not pay them to him. He knew something of the financial condition of Haines & Co., and of their debt to Toof, Phillips & Co., and of complaints of other parties, and something of their business through the country, and from all these facts he thought it doubtful about their being able to pay their debts. This was during the months of December, 1867, and January, 1868; and he wrote to Toof, Phillips & Co. that he thought they had better look to their interests, as his conviction was that it was doubtful about their being able to collect their

debt from Haines & Co. Shortly after writing this letter Mahan came round to look after the matter.

The property described in the title-bond assigned to Mahan, which he stated that he purchased as an investment on private account for $7000, was shown by the testimony of Chetlain to have been worth only $4000, and by the testimony of a witness, Hamblet, to have been worth only $3500, and it was valued by the bankrupts in their schedules at $4000. Both of the bankrupts testified that it was understood at the time the title-bond was assigned to Mahan, that the amount of the two drafts given by him on Toof, Phillips & Co. for it, should be credited to Haines & Co. on their indebtedness to that firm.

The schedules of the bankrupts annexed to their petition showed that their debts at the time of their transfers to Toof, Phillips & Co. exceeded $59,000, while their assets were less than $32,000.

On the other hand there was some testimony to show that some persons thought that they could get through, &c., &c.

The District Court decreed the conveyances void, and that the title of the property be vested in the assignee, the latter to refund the amount of the purchase-money advanced by Mahan to obtain the deed of the land described in the title-bond, less any rents and profits received by him or Toof, Phillips & Co. from the property. This decree the Circuit Court affirmed.

In commenting upon the answer of Toof, Phillips & Co., already mentioned, which, in reply to the interrogatory, "whether at the time of the transfer to them the indebtedness of Haines & Co. was not greater than their ability," admitted that they did not believe Haines & Co. "able to pay their debts *in money*," the Circuit Court said:

"Here is a direct confession of a fact that in law constitutes insolvency, and it is idle for the defendants to profess ignorance of the insolvency of the bankrupts in face of such a confession. If the bankrupts could not pay their debts in the ordinary course of business, that is, *in money*, as they fell due, they were insolvent, and if the defendants did not know that this constituted

insolvency within the meaning of the bankrupt act, it was because they were ignorant of the law."

But that court examined all the testimony, and in affirming the decree of the District Court rested the case upon it, as well as upon this answer. From the decree of the Circuit Court, Toof, Phillips & Co. brought the case here.

Mr. A. H. Garland, for the plaintiffs in error:

1. Did the inability of Haines & Co. to pay their debts *in money*, as they fell due, constitute "insolvency" within the meaning of the bankrupt act, on their part? Now "insolvency" does not mean inability to pay *in money*. An insolvent is one who cannot pay, or who does not pay, his debts, or whose debts cannot be collected out of his means by legal process.* By the universal acceptation of the word in this country and in England, if a party's available means, which he can use in paying his debts, exceed those debts, he has never been deemed insolvent.† If even there are debts due which the party is unable to meet, yet if by arrangements made with his creditors, their promises to aid him, his assets overbalancing his debts, his credit good, and his prospects in business for the future encouraging, he still goes on in his business, he is not insolvent.‡

2. How does the case in this view stand on the evidence? When the witness, Frisbee, says that in December, 1867, he aided in making up a balance-sheet, and he found Haines & Co. were not able to pay, he states a fact, which, if limited to paying in money, we do not deny; but if he states that their debts exceeded their property in value, he is not sustained by the other witnesses. Other persons had confidence that with extension the firm would get through. The answer of defendants states, in response to an inquiry on this

* 2 Burrill's Law Dictionary, title (Insolvent).

† James on Bankruptcy (notes to § 35), p. 153–183; Avery & Hobbs, Bankruptcy, 261, 289, 290; Burrill on Assignments, 38–41; Buckingham *v.* McLean, 13 Howard, 151–167; Jones *v.* Howland, 8 Metcalf, 377.

‡ Potter *v.* Coggeshall, 4 Bankrupt Register, 19.

point, that the assets of Haines & Co. were in excess of their liabilities by $16,000.

3. Were these conveyances made with a view to give a preference to appellants over the other creditors of Haines & Co.? To constitute a preference here, not only must Haines & Co. have been insolvent, but Toof, Phillips & Co. must have known them to be so, and must have intended to have received, and actually have received a preference. Toof, Phillips & Co. swear that Haines & Co. were not insolvent, but on the contrary had a surplus. As for Haines & Co., it is impossible to suppose that they supposed themselves insolvent.

Messrs. Watkins and Rose, contra.

Mr. Justice FIELD delivered the opinion of the court.

The bill presents a case within the provisions of the first clause of the thirty-fifth section of the bankrupt act. That clause was intended to defeat preferences to a creditor, made by a debtor when insolvent or in contemplation of insolvency. It declares that any payment or transfer of his property made by him whilst in that condition, within four months previous to the filing of his petition, with a view to give a preference to a creditor, shall be void if the creditor has at the time reasonable cause to believe him to be insolvent, and that the payment or transfer was made in fraud of the provisions of the bankrupt act. And it authorizes in such case the assignee to recover the property or its value from the party who receives it.

Under this act it is incumbent on the complainant, in order to maintain the decree in his favor, to show four things:

1st. That at the time the conveyances to Toof, Phillips & Co. and Mahan were made the bankrupts were insolvent or contemplated insolvency;

2d. That the conveyances were made with a view to give a preference to these creditors;

3d. That the creditors had reasonable cause to believe the bankrupts were insolvent at the time; and,

4th. That the conveyances were made in fraud of the provisions of the bankrupt act.

1st. The counsel of the appellants have presented an elaborate argument to show that inability to pay one's debts at the time they fall due, *in money*, does not constitute insolvency, within the provisions of the bankrupt act. The argument is especially addressed to language used by the district judge when speaking of the statement of the appellants in answer to one of the interrogatories of the bill, to the effect that at the time the transfers were made they did not believe the bankrupts were able to pay their debts *in money*, but were able to do so on a fair market valuation of their property and assets. The district judge held that this was a direct confession of a fact which in law constitutes insolvency, and observed that "if the bankrupts could not pay their debts in the ordinary course of business, that is, in money, as they fell due, they were insolvent."

The rule thus laid down may not be strictly correct as applied to all bankrupts. The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to express the inability of a party to pay his debts, as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress. It was of the bankrupts as traders that the district judge was speaking when he used the language which is the subject of criticism by counsel.

With reference to other persons not engaged in trade or commerce the term may perhaps have a less restricted meaning. The bankrupt act does not define what shall constitute insolvency, or the evidence of insolvency, in every case.

In the present case the bankrupts were insolvent in both senses of the term at the time the conveyances in controversy were made. They did not then possess sufficient prop-

erty, even upon their own estimation of its value as given in their schedules, to pay their debts. These exceeded the estimated value of the property by over twenty thousand dollars. And for months previous the bankrupts had failed to meet their obligations as they matured. Creditors had pressed for payment without success; their stock of goods had been levied on, and their store closed by the sheriff under an execution on a judgment against one of them. It would serve no useful purpose to state in detail the evidence contained in the record which relates to their condition. It is enough to say that it abundantly establishes their hopeless insolvency.

2d. That the conveyances to Toof, Phillips & Co. were made with a view to give them a preference over other creditors hardly admits of a doubt. The bankrupts knew at the time their insolvent condition. A month previous they had made up a balance sheet of their affairs which showed that their assets were insufficient to pay their debts. They had contemplated going into bankruptcy in December previous, and were then pressed by numerous creditors for payment. Their indebtedness at the time exceeded $50,000, and except to Toof, Phillips & Co. they did not pay upon the whole of it over $500 during the previous fall and winter. Making a transfer of property to these creditors, under these circumstances, was in fact giving them a preference, and it must be presumed that the bankrupts intended this result at the time. It is a general principle that every one must be presumed to intend the necessary consequences of his acts. The transfer, in any case, by a debtor, of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him in such case, and not upon the assignee or contestant in bankruptcy.

No such proof was made or attempted in this case. But, on the contrary, the evidence shows that the conveyances were executed upon the expectation of the bankrupts, and upon the assurance of Toof, Phillips & Co., that in consequence of them they would continue to sell the bankrupts goods on credit, as they had previously done; and that no arrangement was made by the bankrupts with any other of their creditors, either for payment or security, or for an extension of credit.

The fact that the title-bond was assigned, and the property for which it was given was conveyed to Mahan alone, and not to Toof, Phillips & Co., does not change the character of the transaction. Mahan was a member of that firm, and the conveyance was made to him with the understanding that the sum mentioned as its consideration should be credited on the indebtedness of the bankrupts to them. Both of the bankrupts testified that such was the understanding at the time. The pretence that Mahan bought the lots as an investment on private account will not bear the slightest examination. It is in proof that the lots at the time were only worth $4000 at the outside, yet the consideration given was nearly $7000. Toof, Phillips & Co. might well have been willing to credit this amount on their claim against insolvent traders in consideration of obtaining from them the possession of property of much less value, but it is incredible that an individual, seeking an investment of his money, would be careless as to the difference between the actual value of the property and the amount paid as a consideration for its transfer to him.

3d. From what has already been said it is manifest not only that the bankrupts were insolvent when they made the conveyances in controversy, but that the creditors, Toof, Phillips & Co., had reasonable cause to believe that they were insolvent. The statute, to defeat the conveyances, does not require that the creditors should have had absolute knowledge on the point, nor even that they should, in fact, have had any belief on the subject. It only requires that they should have had reasonable cause to believe that such was

the fact. And reasonable cause they must be considered to have had when such a state of facts was brought to their notice in respect to the affairs and pecuniary condition of the bankrupts as would have led prudent business men to the conclusion that they could not meet their obligations as they matured in the ordinary course of business. That such a state of facts was brought to the notice of the creditors is plainly shown. Chetlain, one of the bankrupts, testifies that previous to the execution of the conveyances he had several conversations with Mahan respecting their finances, and told him the amount or near the amount of their indebtedness, and that they could not pay it. Mahan advised them to get extensions, and said that he would help them to get through. Chetlain also testifies that such was the state of the finances of the bankrupts that on one occasion, in conversation with Mahan, they offered to turn over to him their entire assets if he would assume their liabilities and give them a receipt, and that he declined the offer.

It also appears in evidence that the levy by the sheriff upon the stock of goods of the bankrupts, already mentioned, which was made in January, 1868, caused a temporary suspension of their business, and that Mahan was in Augusta at the time and had an interview with the bankrupts on the subject of the levy.

It also appears that about the last of December, 1867, or the first of January, 1868, Toof, Phillips & Co. sent notes of the bankrupts which they held to an agent in Augusta for collection. The agent presented the notes for payment to the bankrupts and was told by them that they could not pay the notes at that time. The agent then wrote to Toof, Phillips & Co. that they had better look to their interests, as his conviction was that it was doubtful whether they would be able to collect their debts. Shortly after this Mahan went to Augusta to look after the matter, and whilst there the conveyances in controversy were made.

It is impossible to doubt that Mahan ascertained, while thus in Augusta, the actual condition of the affairs of the bankrupts. The facts recited were sufficient to justify the

conclusion that they were insolvent, or at least furnished reasonable cause for a belief that such was the fact.

4th. It only remains to add that the creditors, Toof, Phillips & Co., had also reasonable ground to believe that the conveyances were made in fraud of the provisions of the bankrupt act. This, indeed, follows necessarily from the facts already stated. The act of Congress was designed to secure an equal distribution of the property of an insolvent debtor among his creditors, and any transfer made with a view to secure the property, or any part of it, to one, and thus prevent such equal distribution, is a transfer in fraud of the act. That such was the effect of the conveyances in this case, and that this effect was intended by both creditors and bankrupts, does not admit, upon the evidence, of any rational doubt. A clearer case of intended fraud upon the act is not often presented.

DECREE AFFIRMED.

Mr. Justice BRADLEY was absent from the court when this case was submitted, and consequently took no part in its decision.

WHEELER *v.* HARRIS.

1. On appeal to the Circuit Court from a decree in the District Court for the payment of money, the Circuit Court affirmed the judgment of the District Court with costs to be taxed, from which affirmance the respondent took an appeal here. After the appeal here, another decree was rendered by the Circuit Court, in which, after reciting the former decree and taxation of costs, it was decreed in form that the appellee have judgment against the appellant for the amount decreed, together with costs, amounting to the sum of $5444.
2. On motion to dismiss this last appeal, on the ground of a former one pending in the same case: *Held*, that under the circumstances, the first decree was not a final decree; and that it was the first appeal and not the second which should be dismissed.
3. The court approves the practice of entering decrees in form before taking appeals to this court.

THIS was a motion by *Mr. Donohue* to dismiss an appeal from the Circuit Court for the Southern District of New

York, on the ground that a prior appeal had been taken and was pending in the same suit.

The case was thus:

The Judiciary Act, by its 22d section,* gives a writ of error to this court, from final decrees in the Circuit Courts, and enacts that:

"Every judge signing a citation on any writ of error, shall take good and sufficient security that the plaintiff in error shall prosecute his writ to effect, and answer all damages and *costs*, if he fail to make his plea good."

The 23d section of the same act, enacts that the writ of error

"Shall be a supersedeas, and stay execution in cases only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office, where the record remains, *within ten days*, Sundays exclusive, after . . . passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a supersedeas."

The act of March 3d, 1803,† amendatory of the said act, gives by its 2d section an appeal in all "*final* judgments and decrees in the Circuit Courts, in any cases of admiralty and maritime jurisdiction, declaring that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law, in cases of writs of error."

With these statutory provisions in force, Harris, on libel filed in the District Court at New York, obtained a decree for advances made to a vessel of the respondent. From that decree the respondent appealed to the Circuit Court. The cause was there tried, and on the 19th of March, 1870, a decree made in these words:

"This cause coming on to be heard on the appeal herein taken by S. G. Wheeler, after hearing, and due deliberation had; it is now ordered, adjudged, and decreed that the judgment herein be affirmed, with the costs *to be* taxed."

* 1 Stat. at Large, 85. † 2 Id. 244.

Statement of the case.

After more than ten days—there having as yet been no taxation of costs nor decree in more form than as above given—the respondent appealed to the Supreme Court of the United States, giving a bond duly approved and sufficient in form and in amount to operate as a stay of execution. The libellants, notwithstanding such appeal, having caused their costs in the Circuit Court to be taxed, issued execution. Thereupon, the respondent moved to set aside the execution, insisting:

1st. That no execution could regularly issue upon a mere order of affirmance.

2d. That the respondent had ten days after a judgment *in form* awarding to the libellants a recovery of some amount ascertained and settled by the terms of a final decree.

On the other hand, it was argued by the libellants, that *the order of affirmance* was the final decree, within the meaning of the acts of Congress, and that the appeal was, therefore, too late; that such order of affirmance was frequently the only order made in the Circuit Court for New York, and that appeals had in many cases been heard in the Supreme Court of the United States, when no other order or judgment of the Circuit Court appeared in the record; that *Silsby* v. *Foote** was a signal instance of this; that there an appeal in equity had been taken to the Supreme Court within ten days after the decision of the Circuit Court was announced and entered in the minutes, and before a decree was settled and entered; and that after such formal decree was made, another appeal was taken. But that on a motion to dismiss, the court declared that either appeal was regular, in view of the differing practice prevailing in different circuits; but, as it was not proper that there should be two appeals in the same case, they dismissed the latter and allowed the former to stand. The counsel for the libellants, therefore, insisted in the Circuit Court below that the execution was regular.

* 20 Howard, 290.

Statement of the case.

The circuit judge, in passing upon the motion to set aside the execution, said as follows:

"The 22d section of the act of 1789, and the 2d section of the act of 1803, are held to require the judge, on signing the citation, on appeal, to require security in a sum sufficient to cover the whole judgment, damages, and costs, as well as the costs in error.* The inference is at least plausible, that until some actual award of damages and costs to a definite amount, the party appealing does not know, and the judge taking the security does not know what should be the amount of the bond, nor in what amount the sureties should justify; and that no judgment can be said to be rendered, and more especially no decree in admiralty can be said to be passed, until some actual award of recovery by the libellant is made.

"If the case was not ripe for an appeal, then such appeal would be dismissed, and it necessarily follows that it can have no influence on the present motion; that is to say, if it was premature and would be dismissed by the Supreme Court, then it cannot stay the libellant's proceedings. If it was not premature, but will operate to give the Supreme Court jurisdiction, still, not having been taken within ten days after the entry of the order appealed from, it cannot stay execution, unless I should hold that an appeal may be taken before the ten days begin to run, within which it must be taken. In view of the decision in *Silsby* v. *Foote*, I prefer to leave it to the Supreme Court to say whether the ten days begin to run so soon as the time arrives when an appeal may be taken; and whether, if the respondent waits until the actual entry of a decree which settles definitely all the details, his appeal, if taken within ten days thereafter, will stay execution.

"Here, an execution has been issued when there is no judgment or decree awarding to the libellants a recovery, or awarding to them any execution or other means of giving effect to the decision of the court. I am informed that it has not been unusual in this circuit, to issue execution in cases in admiralty, when no other judgment than an order of affirmance has been made or entered, the proctor, for that purpose, taking the amount

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

Argument in favor of dismissing the last appeal.

of damages to be collected from the decree in the District Court, and the costs of appeal from the taxation by the clerk. I think such a practice both loose and irregular, and I am not aware of any like practice anywhere."

The circuit judge accordingly set the execution aside, thus implying, of course, that the first appeal was premature, and in consequence of this opinion and the action of the court a decree was thus entered on the 27th day of May, 1871:

"A decree of affirmance having been entered herein on the 19th day of March, 1870, by which the decree of the District Court was in all things affirmed with costs to be taxed, which costs were taxed on the 21st day of April, 1870, at $640.61; now, on motion of the proctors for the appellees, it is ordered, adjudged, and decreed, that the appellee have judgment against said S. G. Wheeler, appellant, for the amount so decreed then, together with the costs so taxed, amounting, with interest, to the sum of $5444.69, for which judgment is hereby entered against him, the said appellant, and that the appellees have execution therefor."

From this judgment a petition of appeal to this court was filed on the 7th day of June, 1871, and on the same day a citation issued.

The present motion was made to dismiss this last appeal.

Mr. Donohue, in support of his motion:

Silsby v. *Foote* has passed on this very question. Under that decision the first appeal is good, and the question whether it stays proceedings or not does not change this matter. In the present matter, therefore, the case is before the court, on the first appeal; and two appeals are not allowable in the same case on the same question.

The statute giving the party an appeal gives the defeated party the right to appeal from the rendering or passing of the judgment or decree complained of. He has his choice, and when he takes it, and his appeal is good, his further right of appeal in that case is gone.

Both contingencies on which an appeal rest had occurred. When the first appeal was taken the judgment had passed and the decree had been rendered; all that remained to be done was to make up the amount,—a merely clerical operation.

Messrs. Goodrich and Wheeler, contra, argued that in view of the whole case, if either appeal was to be dismissed it should be the first.

The CHIEF JUSTICE:

It is quite true that two appeals are not allowed in the same case on the same question. We must determine which one of the two should be dismissed. It may be that the first appeal was from a decree which might be taken as final, if the second decree had not been rendered.* But it is obvious that the circuit judge did not regard it as final, and it was certainly defective. The second decree was rendered, not by inadvertence, but in view of the rendition of the first decree; and, in order to settle the practice in the Circuit Court for the Southern District of New York, that a decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is not to be regarded as a final decree.

We think this the better practice, and therefore hold that the first appeal must be

DISMISSED AS IRREGULAR.

BEVANS, RECEIVER, *v.* UNITED STATES.

1. Where a receiver of public moneys has such moneys in his hands, which would not have been in his hands at all, if he had paid them over with the promptness that the acts of Congress and the Treasury Regulations made in pursuance of them, prescribing the duties of receivers, in this respect made it his duty to do, and which therefore—inasmuch as

* Ribber Company *v.* Goodyear, 6 Wallace, 153; Silsby *v.* Foote, 20 Howard, 290.

Statement of the case.

the duties of receivers under their official bonds are defined by those acts and Treasury Regulations—it was also his duty under his official bond to do,—evidence that the moneys were forcibly taken from him by the agents of the so-called "Confederate States," usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout the State in which the receiver was, *held* to have been rightly refused in a suit by the government on the official bond of such receiver, as short of meeting the necessity of the case; it having been owing to the default of the receiver in not paying over promptly and at the right times, that the moneys were exposed to seizure, at all, by the rebel usurping government.

2. Where there are no disputed facts in the case, the court may properly tell the jury in an absolute form how they should find.

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

Prior to February, 1860, Bevans had been appointed a receiver of public money for the district of lands, subject to sale at Balesville, Arkansas, and gave bond conditioned that he "should have truly and faithfully executed and discharged, and should continue truly and faithfully to execute and discharge all the duties of the said office."

These duties are defined by acts of Congress and by Treasury Regulations enacted in pursuance of them.

The 6th section of the act of May 10th, 1800, made it the duty of all such receivers to transmit to the Secretary of the Treasury accounts of all public moneys by them received, within thirty days in case of public sale, and quarterly in case of private sales, and to transmit the money received by them within three months after its receipt. The act of August 6th, 1846,* however, and subsequent acts made it the duty of such receivers† "to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by the act, all the public money collected by them, or otherwise at any time placed in their possession and custody, till the same is ordered, by the proper department or officer of the government, to be transferred, or paid out, and when such orders for transfer, or payment, are received, faithfully and promptly to make the same as

* 9 Stat. at Large, 59. † Section 6.

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directed." Following these acts were the Treasury Regulations of July 18th, 1854 (in force when this receiver was in office), which required all receivers to deposit in the treasury all public money in their hands, as follows:

1. When their weekly receipts exceed $10,000, they were required to deposit at the termination of each week.

2. When the weekly receipts were less than $10,000, but exceeded $5000, they were required to deposit at the close of each period of two weeks.

3. When the monthly receipts were more than $2000, and less than $20,000, they were required to deposit at the end of each month.

4. When the monthly receipts were less than $2000, they were required to deposit at the end of each quarter.

In this state of things the United States, on the 27th September, 1867, brought suit against Bevans, and his sureties on his official bond, as above mentioned, conditioned for the faithful performance of all the duties of the office of receiver according to law. The breaches assigned were that the principal obligor had failed to account for the money he had received, in his official capacity, on behalf of the United States, from the time of his appointment, January 17th, 1860, to the 30th of April, 1861, and that he had failed to pay over such money, although required by law to account for the same and to pay it over. At the trial the plaintiffs gave in evidence duly certified transcripts of official settlements of the receiver's accounts, from which it appeared that he had in hand of public money, received by him between the 17th of January, 1860, and the 31st of March, 1861, the sum of $19,737.26; that on the 31st day of March, 1860, he held an unpaid balance of $4116.05; that on the 30th of June, 1860, the balance against him was $6535.26; on the 30th of September, 1860, $8346.34; on the 31st of December, 1860, $19,662.66; and on the 30th of April, 1861, $19,737.26, the unpaid balances at the end of each quarter being carried forward into the account of the next succeeding quarter. No attempt was made to impeach the correctness of these official settlements; but the defendants offered to prove that

on the 6th day of May, 1861, Bevans, the receiver, was residing at Independence, in the State of Arkansas; that on that day the people of the State, legally assembled in convention, passed "a secession ordinance," whereby the State of Arkansas was withdrawn from the Union; that such ordinance became of force and effect, and was binding on all the citizens of the State; that the convention then passed an ordinance prohibiting all officers of the United States from paying out any money of the United States in their hands, and requiring them to hold such money subject to the further order of the convention, and that immediately after the passage of this second ordinance he was notified thereof before he had time to account to the United States, or to remit the money in his hands as receiver. In connection with this the defendants further offered to prove that subsequently the State of Arkansas was attached to what was called the "Southern Confederacy," and that in order to insure performance of her duties as a member of said confederacy, the convention aforesaid, and the legislature of the State made provision for seizing, and did actually seize the money in the hands of the said Bevans, as receiver; that under the said acts and ordinances he paid to the agents of the State all the money he had in his possession belonging to the United States, as he was forced and compelled to do, the State being organized as a member of the confederacy, she and the confederacy having armed troops in her territory to compel him to pay, the acts and ordinances being compulsory, and the agents and officers of the State threatening that if he declined to pay they would punish him by imprisonment, or otherwise, and that in consequence of such menaces he did, on the 1st day of January, 1862, pay over to such agents and officers all the money he had in his hands as a receiver, which was placed in the treasury of the State in aid of the war against the United States, at a time when he could not remit the same to the Treasury Department at Washington. These facts had been pleaded in bar.

The evidence thus offered by the defendants the Circuit Court refused to receive, being of opinion that if all the

facts which it tended to prove were proved, they would not amount to a defence, and the court accordingly directed the jury to find for the plaintiffs the amount claimed, in and by the papers read in evidence by the plaintiffs, viz.: $19,737, with interest from October 4th, 1861.

Verdict and judgment having gone accordingly for the United States, Bevans and the sureties brought the case here; the decision of the court upon the evidence offered, and which it refused to receive, being the principal error assigned; the absolute form of the direction to the jury as to their finding being also a matter excepted to.

The case was twice argued.

Mr. A. H. Garland, for the plaintiff in error, on the first point went into an able and learned argument, citing various adjudged cases, to show that where the condition of a bond became impossible to be performed by great overpowering force and fear, then the obligation was saved.

On the second point he submitted that the direction of the court to the jury, unqualified as it was, took out of their hands all that there was for them to do, and was thus erroneous; that the instruction should have been, "if the jury believe," &c.

Mr. B. H. Bristow, Solicitor-General, and Mr. W. A. Field and Mr. C. H. Hill, Assistant Attorneys-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is to be observed that the defence attempted in this case, was not a denial of the receiver's obligation to pay all the public money in his hands to the United States, according to the condition of his bond and the requirements of the acts of Congress, nor was it an assertion of performance of his obligation, but it was setting up an excuse for non-performance. Was the receiver then in a condition to avail himself of the excuse which he presented? It may be a grave question whether the forcible taking of money belonging to the United States from the possession of one of her

officers, or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a State, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to the United States. This question has been thoroughly argued, but we do not propose now to consider it, for its decision is not necessary to the case. The bond of a receiver of public money is given to insure the performance of all his duties, and those duties are defined by the acts of Congress and by Treasury Regulations made under the acts. [The learned justice here quoted the acts of Congress and the Treasury Regulations, in the language already given on page 58, setting out the duties of receivers of public moneys, to the performance of which they are bound by their official bonds, and continued:] In view of the fact that the duties of this receiver, to the performance of which he was bound by his bond, were thus prescribed, it is plain that it was not in consequence of the Arkansas ordinances and acts of assembly, or in consequence of any action of the usurping government alone, that the money in the receiver's hands was not paid to the United States. Hence the evidence offered by the defendants came short of meeting the case, for it was the default of the receiver that exposed the money to seizure by the usurping power which for a time excluded the authority of the government. The condition of the bond was broken long before the ordinance of secession was passed. It was the duty of Bevans to pay over the money in his hands, in large part, more than a year before any obstacle came in the way of his payment. Had he performed his duty, all of it would have been paid into the treasury by the 1st of April, 1861. He was, therefore, a defaulter when the alleged seizure was made, and it was his default which concurred with the acts of the public enemy, and contributed to, or facilitated, the wrong which was perpetrated, or, at least, rendered it possible. Since then his bond had become absolute by his failure to perform its conditions,

and since the evidence offered tended to show at most an excuse for non-performance after May 6th, 1861, it is manifest that it presented an insufficient defence to the action. Seeking relief, which in its nature was equitable, as the receiver did, it was incumbent upon him to come with clean hands, and to place the obligees in the bond in as good a situation as they would have held had he made no default.

It is not to be overlooked that Bevans was not an ordinary bailee of the government. Bailee he was undoubtedly, but by his bond he had insured the safe-keeping and prompt payment of the public money which came to his hands. His obligation was, therefore, not less stringent than that of a common carrier, and in some respects it was greater. In *United States* v. *Prescott*,* it was said by this court: "Public policy requires that every depositary of public money should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open the door for frauds which might be practiced with impunity." These observations apply in full force to the present case. It cannot be allowed that a depositary of public money, who has not only assumed the common obligations of a bailee, but has given bond to keep safely the money in his hands, and to pay it over promptly, as required by law, may, by making a default, throw upon the government the risk of loss of the money by the intervention of a public enemy. We are, therefore, of opinion that the evidence offered by the defendants in the court below tended to show no sufficient defence to the claim of the plaintiffs, and that it was properly rejected.

The objection that the jury was instructed to find for the plaintiffs the amount claimed by the papers given in evidence (viz., the official settlements), with interest thereon, is entirely without merit. There was no evidence to impeach the accounts stated, or to show set-off, release, or payment.

* 3 Howard, 588

The instruction was, therefore, in accordance with the legal effect of the evidence, and there were no disputed facts upon which the jury could pass.

JUDGMENT AFFIRMED.

The CHIEF JUSTICE and Mr. Justice CLIFFORD dissented from the judgment, because they thought that the plea in bar set up a valid defence.

NOTE.

At the same time, with the preceding case, was heard another, in its chief point identical with it, but embracing also a minor point of evidence. It was the case of

HALLIBURTON, MARSHAL, *v.* UNITED STATES.

1. The doctrine of the preceding case as to the accountability of the receivers of public moneys affirmed.
2. Evidence of alleged payments made or of set-off, on a suit on a marshal's official bond, *held* rightly excluded under the 4th section of the act of March 3d, 1797, there having been no evidence that what was excluded was a claim presented to the accounting officers of the Treasury, and by them disallowed; nor it being pretended that the defendants were at the trial in possession of vouchers not before in their power to procure.

THIS case, like the former, came here on error to the Circuit Court for the Eastern District of Arkansas.

The action was debt upon a marshal's bond, conditioned for faithful performance of all the duties of the office of marshal. The breaches assigned were that on the 1st day of April, 1861, Halliburton, the marshal, was indebted to the United States in the sum of $3946.65 for money had and received by him for the use of the plaintiffs, and upon an account then stated, and for money which had previously come into his hands as marshal, which it was his duty to pay over, but which he had converted to his use. Among other defences set up, the defendants pleaded the ordinance of secession passed by the convention of Arkansas on the 6th of May, 1861; the ordinance of the same convention

passed May 7th, 1861, requiring all persons having money of the United States in their hands to hold the same subject to future action of the convention, and a subsequent ordinance of June 1st, 1861, requiring all persons having money, as aforesaid, to pay the same over to the treasurer of Arkansas, under severe penalties of fine and long imprisonment. The plea further averred that the convention, and the government organized thereunder, had the physical power to enforce its laws and decrees, and did enforce them, as fully as any organized government might do for a long period of time, to wit, one year, and that the defendant, Halliburton, yielding to the force and compulsion of the said government, so organized, and having at that time no protection from the government of the United States, and not being able in anywise to resist the execution of the ordinance of the convention, did pay the money mentioned in the declaration mentioned to the treasurer of Arkansas on the 21st day of June, 1861. The plea still further averred that after the 7th of May, 1861, Halliburton had no opportunity to pay the money to the United States, and that he was prevented from paying the same by public hostilities. To this plea there was a demurrer, and judgment was given against the defendants, which was one error—the principal one—insisted on.

There was, however, another error assigned, to wit, that the Circuit Court refused to admit evidence of payments made and of an alleged set-off. This refusal of the court was apparently founded on the fourth section of the act of Congress of March 3d, 1797,* which enacts that in suits between the United States and individuals, no claim for a credit shall be admitted upon trial, but such as shall appear to have been presented to the accounting officers of the Treasury for their examination, and by them disallowed, in whole or in part, unless it shall be proved to the satisfaction of the court that the defendant is, at the time of trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or some unavoidable accident. It did not appear that the evidence offered and rejected came within the provision of this statute.

* 1 Stat. at Large, 515.

Judgment having been given for the United States, the marshal, Halliburton, and his sureties, brought the case here.

It was twice argued and by the same counsel and on the same briefs as the preceding one.

Mr. Justice STRONG delivered the opinion of the court.

What we have said in the case just decided leads to the conclusion that the judgment in this case must be affirmed.

Looking to the declaration and the plea it appears that the bond had become absolute more than a month before the ordinance of secession was passed, and that all that time Halliburton was in default. The plea does not aver that there was any obstacle in the way of payment at the time when by law the payment was required to be made, or for a considerable period thereafter. If, then, it were sufficiently averred that after the 1st of June, 1861, payment was prevented by public enemies, there would still appear a default of the obligors, for which no excuse is offered, a fault which led directly to the loss of the public money. All the reasons, therefore, which have been mentioned in the case of *Bevans* v. *United States*, why the evidence there offered was insufficient to establish a defence, concur in justifying the judgment given upon this demurrer.

This disposes of the principal error insisted on. To the other error assigned—namely, the refusal of the court to admit evidence of payments made and of an alleged set-off—the fourth section of the act of Congress of March 3d, 1797, is a sufficient answer. What was offered and rejected was not any claims presented to the accounting officers of the Treasury, and by them disallowed. And it was not pretended that the defendants were at the trial in possession of vouchers not before in their power to procure. The evidence was, therefore, properly rejected.

JUDGMENT AFFIRMED.

The CHIEF JUSTICE and Mr. Justice CLIFFORD dissented in this case, as in the former one, and for the same reason, to wit, that they thought the plea in bar set up a valid defence.

[See *supra*, p. 17, Boyden et al. *v.* United States]

RICE *v.* HOUSTON, ADMINISTRATOR.

A citizen of one State getting letters of administration on the estate of a decedent there, its citizen also, and afterwards removing to another State, and becoming a citizen of it, may sue in the Circuit Court of the first State, there being nothing in the laws of that State forbidding an administrator to remove from the State.

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

A. W. Vanleer, a citizen of Tennessee, having died at Nashville, letters of administration were granted by the proper authority there to one Houston, on his estate. It seemed to be admitted by counsel that, at this time, Houston was a citizen of Tennessee. But he afterwards, it was equally admitted, was in Kentucky and domiciled there. Thus domiciled he brought two suits in the court below, the Circuit Court for the Middle District of Tennessee, to recover from Rice on certain notes given to his decedent, Vanleer. In these suits he described himself in his *narr.* as "a citizen of the State of Kentucky and administrator of the estate of A. W. Vanleer, deceased." The defendant craved oyer of the letters. This disclosing that the letters were granted in Tennessee, the defendant pleaded that "by the said letters of administration it appears that the administrator of the estate of the said A. W. Vanleer is the creature of the law of Tennessee, and has no existence *as such* outside of the State of Tennessee." To this plea the plaintiff demurred, and the demurrer being held good and judgment given for the plaintiff, the defendant brought the case here. The point involved was of course the jurisdiction of the Circuit Court.

Mr. R. A. Crawford, for the plaintiff in error:

Of course the Circuit Court has no jurisdiction between citizens of the same State. But here Houston was the domestic administrator, and in point of fact, it will be con-

ceded, though not so asserted in the record, a citizen of Tennessee, when he got his letters; he having *afterwards* removed to Kentucky. Independently of this, since, personally, he is a stranger to the suit, his personal domicil in Kentucky cannot be looked to. By his letters, he represented the sovereignty of Tennessee, regardless of personal alienship.

Messrs. F. B. Fogg and H. Maynard, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The question of jurisdiction is the only point in the case.

Although in controversies between citizens of different States, it is the character of the real and not that of the nominal parties to the record which determines the question of jurisdiction, yet it has been repeatedly held by this court that suits can be maintained in the Circuit Court by executors or administrators if they are citizens of a different State from the party sued, on the ground that they are the real parties in interest, and succeed to all the rights of the testator or intestate by operation of law. And it makes no difference that the testator or intestate was a citizen of the same State with the defendants, and could not, if alive, have sued in the Federal courts; nor is the status of the parties affected by the fact that the creditors and legatees of the decedent are citizens of the same State with the defendants.*

In this state of the law on this subject, it is not perceived on what ground the right of Houston to maintain these suits can be questioned. He was a citizen of Kentucky, had the legal interest in the notes sued on, by virtue of the authority conferred on him by the court in Tennessee, and, therefore, had a right to bring his action in the Federal or State courts at his option.

It is to be presumed, in the absence of an averment in

* Chappedelaine *v.* Dechenaux, 4 Cranch, 306, 307; Browne et al. *v.* Strode, 5 Id. 303; Childress's Ex. *v.* Emory et al., 8 Wheaton, 669; Osborn *v.* Bank of the United States, 9 Id. 856; McNutt *v.* Bland et al., 2 Howard, 15; Irvine *v.* Lowry, 14 Peters, 298; Huff *v.* Hutchinson, 14 Howard, 586; Coal Company *v.* Blatchford, 11 Wallace, 172.

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the pleadings to the contrary, that Houston, when appointed administrator, was a citizen of Kentucky, and if so the appointment was legal, for the laws of Tennessee do not forbid the probate courts of that State to intrust a citizen of another State with the duties of administering on the estate of a person domiciled at the time of his death in Tennessee.

But if the fact be otherwise, as seems to be admitted in argument, and Houston were a citizen of Tennessee at the time he got his letters of administration, the liability of the defendants to be sued in the Federal courts remains the same, because there is no statute of Tennessee requiring an administrator not to remove from the State, and the general law of the land allows any one to change his citizenship at his pleasure. After he has in good faith changed it, he has the privilege of going into the United States courts for the collection of debts due him by citizens of other States, whether he holds the debts in his own right or as administrator.

JUDGMENT AFFIRMED.

CURTIS *v.* WHITNEY.

1. A statute does not necessarily impair the obligation of a contract because it may affect it retrospectively, or because it enhances the difficulty of performance to one party or diminishes the value of the performance to the other, provided that it leaves the obligation of performance in full force.
2. A statute which requires the holder of a tax certificate made before its passage to give notice to an occupant of the land, if there be one, before he takes his tax-deed, does not impair the obligation of the contract evidenced by the certificate.

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

Mary Curtis brought suit under a statute of Wisconsin to have her title to a certain piece of land, which she claimed under a deed made on a sale for taxes, established and quieted as against the defendants.

The sale for taxes took place on the 11th day of May, 1865, and she received a certificate stating the sale, and that she would "be entitled to a deed of conveyance of said land in three years from that date unless sooner redeemed according to law," by payment of the amount bid, with interest and penalties; and accordingly, on the 12th day of May, A.D. 1868, she received the deed which she now sought to establish as the title to the land.

But the legislature of Wisconsin, on the 10th of April, 1867,* enacted that in all such cases where land *had been* or should thereafter be sold for taxes, and any person should have been in the actual occupancy or possession of such land for thirty days or more within six months preceding the time when the deed should be applied for, the deed should not be issued unless a written notice should have been served on the owner or occupant by the holder of the tax certificate, at least three months prior thereto. The act required that this notice should set forth a copy of the certificate, and state who was the holder and the time when the deed would be applied for.

In the present case there was such occupancy and no notice was served, and the court held the tax-deed void for want of it; overruling the objection of plaintiff, that the statute requiring notice was void as applied to her case, because it impaired the obligation of her contract evidenced by the certificate of sale.

The case having thus gone against the plaintiff, she brought the case here, setting up the same point that she set up below.

Mr. E. H. Ellis, for the plaintiff in error:

A tax sale of which the tax certificate is the evidence has been decided, by the courts of Wisconsin,† to be a contract between the State of Wisconsin and the county making the sale on the one part and the purchaser on the other. By the

* Laws of Wisconsin of 1857, ch. 113, p. 111.

† Robinson *v.* Howe, 13 Wisconsin, 341; Lain *v.* Shepardson, 18 Id. 59.

provisions of this contract Mrs. Curtis was entitled to a deed in three years from the date of the sale (May 11th, 1865), subject only to *one condition*, viz.: "unless sooner redeemed." Nearly two years thereafter, viz., April 10th, 1867, an act of the legislature was passed by which the party of the second part was required to perform an additional service, involving both time, labor, and expense, in order to obtain the fulfilment of her contract. This requirement did, in our opinion, impair the obligation of the contract made at the time of the tax-sale.

Mr. T. O. Howe argued that no contract was violated.

Mr. Justice MILLER delivered the opinion of the court.

Did the requirement of the statute of the 10th of April, 1867, that the holder of a certificate of tax-sale should give notice to whoever might be found in possession of the land before taking a deed impair the obligation of the contract made at the sale?

It must be conceded by all who are familiar with the vast disproportion between the value of the land and the sum for which it is usually bid off at such sales, and the frequency with which the whole proceeding is conducted to the making of the conveyance intended to pass the title without any knowledge on the part of the real owner, that the requirement is an eminently just and proper one. Nor is it one difficult to comply with, as it is only made necessary where some one is found on the land, on whom the notice can be served, and the cost of serving the notice must be paid by any party offering to redeem.

That a statute is not void because it is retrospective has been repeatedly held by this court, and the feature of the act of 1867, which makes it applicable to certificates already issued for tax-sales, does not of itself conflict with the Constitution of the United States. Nor does every statute which affects the value of a contract impair its obligation. It is one of the contingencies to which parties look now in making a large class of contracts, that they may be affected in

many ways by State and National legislation. For such legislation demanded by the public good however it may retroact on contracts previously made, and enhance the cost and difficulty of performance, or diminish the value of such performance to the other party, there is no restraint in the Federal Constitution, so long as the obligation of performance remains in full force.

In the case before us the right of plaintiff to receive her deed is not taken away, nor the time when she would be entitled to it postponed.

While she had a right to receive either her money or her deed at the end of three years, the owner of the land had a right to pay the money and thus prevent a conveyance. These were the coincident rights of the parties growing out of the contract by which the land was sold for taxes.

The legislature, by way of giving efficacy to the right of redemption, passed a law which was just, easy to be complied with, and necessary to secure in many cases the exercise of this right. Can this be said to impair the obligation of plaintiff's contract, because it required her to give such notice as would enable the other party to exercise his rights under the contract?

How does such a requirement lessen the binding efficacy of plaintiff's contract? The right to the money or the land remains, and can be enforced whenever the party gives the requisite legal notice. The authority of the legislature to frame rules by which the right of redemption may be rendered effectual cannot be questioned, and among the most appropriate and least burdensome of these is the notice required by statute.

In the case of *Jackson* v. *Lamphire*,* this court said: "It is within the undisputed province of State legislatures to pass recording acts by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time, and the power is the same, whether the deed is dated *before* or after the recording act. Though the

* 3 Peters, 290.

effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts. Such, too, is the power to pass acts of limitations, and their effect. Reason and sound policy have led to the general adoption of laws of both descriptions and their validity cannot be questioned." . . . "Cases may occur," says the court, "where the provisions of a law on those subjects may be so unreasonable as to amount to a denial of a right, and call for the intervention of the court; but the present is not one of them."

So we think of the case now under consideration, and we therefore

AFFIRM THE JUDGMENT OF THE STATE COURT.

JOHNSON v. TOWSLEY.

1. The question of the conclusiveness of the action of the land officers in issuing a patent on the rights of other persons reconsidered and former decisions affirmed.
2. The tenth section of the act of June 12th, 1858 (11 Stat. at Large, 326), which declares that the decision of the commissioner shall be final, means final as to the action of the Executive Department.
3. The general proposition is recognized that when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive.
4. Under this principle the action of the Land Department in issuing a patent is conclusive in all courts and in all proceedings, where by the rules of law the legal title must prevail.
5. But courts of equity, both in England and in this country, have always had the power in certain classes of cases to inquire into and correct injustice and wrong, in both judicial and executive action, founded in fraud, mistake, or other special ground of equity, when private rights are invaded.
6. In this manner the most solemn judgment of courts of law have been annulled, and patents and other important instruments issuing from the crown or other executive branch of the government have been reformed, corrected, declared void, or other appropriate relief granted.
7. The Land Office, dealing as it does with private rights of great value in a manner particularly liable to be imposed upon by fraud, false swearing, and mistakes, exemplifies the value and necessity of this jurisdiction.

Statement of the case.

8. The decisions of this court on this subject establish:

i. That the judiciary will not interfere by mandamus, injunction, or otherwise with the officers of the land department in the exercise of their duties, while the matter remains in their hands for decision.

ii. That their decision on the facts which must be the foundation of their action, unaffected by fraud or mistake, is conclusive in the courts.

iii. But that after the title has passed from the government to individuals, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

9. In deciding this question, if it appears that the party claiming the equity has established his right to the land to the satisfaction of the land department in the true construction of the acts of Congress, but that, by an erroneous construction, the patent has been issued to another, the court will correct the mistake. *Minnesota* v. *Bachelder* (1 Wallace, 109), *Silver* v. *Ladd* (7 Id. 219).

10. The fourth section of the act of March 3d, 1843, concerning two declaratory statements of the same pre-emptor, is confined to pre-emptions of land subject to private entry.

11. The fifth section of that act relating to lands not proclaimed for sale, does not forfeit the pre-emptor's right absolutely, when he has failed to make his declaratory statement within three months, but it gives the better right to any one else who has made a settlement, or declaratory statement on the same land before the first settler has made the requisite declaration.

12. Therefore, a declaratory statement on such land is valid if made at any time before another party commences a settlement or files a declaration.

ERROR to the Supreme Court of Nebraska; the case being this:

By an act of Congress, approved September 4th, 1841,* and entitled "An act to appropriate the proceeds of the public lands, and to grant pre-emption rights," it was enacted:

"SECTION 10. That from and after the passage of this act, every person, &c., who since the 1st day of June, A.D. 1840, has made or shall hereafter make a settlement in person on the public land . . . which has been, or shall have been, surveyed prior thereto, and who shall inhabit and improve the same, and who has or shall erect a dwelling thereon, shall be, and is hereby, authorized to enter with the register of the land office for the district in which such land may lie, by legal subdivisions,

* 5 Stat. at Large, 455.

any number of acres not exceeding 160, or a quarter-section of land, to include the residence of such claimant, upon paying to the United States the minimum price of such land, subject, however to the following limitations and exceptions: No person shall be entitled to more than one pre-emptive right by virtue of this act," &c., &c.

"SECTION 11. That when two or more persons shall have settled on the same quarter-section of land, the right of pre-emption shall be in him or her who made the first settlement, &c.; and all questions as to the right of pre-emption arising between different settlers *shall be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and a revision by the Secretary of the Treasury of the United States.*"

"SECTION 14. That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.

"SECTION 15. That whenever any person has settled or shall settle and improve a tract of land, *subject at the time of settlement to private entry*, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof, and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser."

A subsequent act, that of March 3d, 1843,* entitled "An

* 5 Stat. at Large, 620.

act to authorize the investigation of alleged frauds under the pre-emption laws, and for other purposes," thus enacts:

"SECTION 4. That where an individual has filed, under the late pre-emption law, his declaration of intention to claim the benefits of said law for one tract of land, it shall not be lawful for the same individual at any future time, to file a second declaration for another tract.

"SECTION 5. That claimants under the late pre-emption law, for land *not yet proclaimed for sale*, are *required* to make known their claims, in writing, to the register of the proper land office, . . . *within three months from the time of the settlement*, . . . giving the designation of the tract, and the time of settlement; *otherwise his claim to be forfeited*, and the tract awarded to the next settler, in the order of time, on the same tract of land, who *shall have* given such notice and otherwise complied with the conditions of the law."

Finally came an act, of June 12th, 1858:*

"SECTION 10. That the 11th section of the act of Congress, approved 4th September, 1841, entitled 'An act to appropriate the proceeds of the public lands, and to grant pre-emption rights,' be so amended that appeals from the decisions of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be *final*, unless appeal therefrom be taken to the Secretary of the Interior."

With these provisions of law in force, one Towsley, on the 15th of June, 1858, settled, as he alleged, on the W. ½ S.W. quarter-section 3, township 15 N., range 13 east, lying near the city of Omaha, and made improvements upon the same; and *on the 4th of February*, 1859, filed with the register of the land office his declaratory statement of an intention to claim the land under the provisions of the act of September 4th, 1841; claiming his settlement from June 15th, 1858. On the 5th of October, 1860, one Johnson, also setting up a settlement, improvement, &c., filed a declara-

* 11 Stat. at Large, 326.

tory statement of his intention to pre-empt the same land under the act of 1841.

The same Towsley had previously, to wit, on the 2d of April, 1858, filed a declaratory statement giving notice that he had settled, March 25th, 1858, upon other land, described in the usual manner, and claimed a pre-emption right therein; which land had not yet *been offered at public sale and thus rendered subject to private entry.* From this land he withdrew claim early in the following June, and waived all claim to it in favor of an opposing settler.

An investigation as to the respective rights of the two parties was had before the local office, which resulted in a decision in favor of Towsley. This decision was affirmed by the Commissioner of the General Land Office; and on the 20th of September, 1862, Towsley received a patent. The dispute between the parties being taken by appeal before the Secretary of the Interior, that officer on the 11th of July, 1863, as appeared from a statement of the Assistant Secretary, decided in favor of Johnson, on the ground that Towsley, previously to filing his declaratory statement claiming the land in question, had filed a declaratory statement claiming the other lands.

After this, Johnson entered on the lands, and a patent was issued to him.

In this state of things Towsley, relying on his patent and on different acts of Congress regulating the public lands, filed his bill in one of the inferior courts of Nebraska, against Johnson and others, his grantees, to compel them to surrender their title to him, the existing evidence of which cast a cloud on his own. The court in which the bill was filed decreed such a surrender, and the Supreme Court of the State on appeal affirmed that decree. Johnson now brought the case here under the 25th section of the Judiciary Act of 1789; or, if the reader prefer so to consider, under the 2d section of the act of February 5th, 1867, re-enacting with some change that so well-known section.*

* The reader may see the two acts arranged in parallel columns in Trebilcock *v.* Wilson, 12 Wallace, 687.

Argument for the plaintiff in error.

Three questions arose here:

1. Whether, conceding that the courts of Nebraska had jurisdiction in the case, this court had any under the Judiciary Act of 1789 or 1867.

2. Admitting, upon the concession stated, that it had, whether in view of the language of the 10th section of the act of June 12th, 1858 (quoted, *supra*, p. 75), as to the effect of decisions by the Commissioner of the General Land Office, in cases of contest between different settlers for the right of pre-emption, either of the courts below had any jurisdiction. Since if they had not, this court would have none now.

3. Whether, admitting that all three courts had jurisdiction, and that the matter was now properly here for review, the decision of the Supreme Court of Nebraska, affirming the validity of Towsley's patent, was correct.

Mr. Lyman Trumbull, for the plaintiff in error:

I. A question of jurisdiction under the 25th section has been suggested in a case similar to this. But we rely more on other points, one of which includes merits. We assert, therefore, that

II. The act of 1858, in plain terms makes the decision of the Commissioner of the General Land Office "final," unless appeal therefrom be taken to the Secretary of the Interior; when, of course, the decision of this officer must be equally so.

But independently of this, though courts of equity may interpose in cases of fraud, or to correct mistakes made in the disposition of the public lands by the officers charged with that duty, they cannot supervise the decisions of those officers when no fraud or mistake is alleged,* other than in arriving at a wrong conclusion, after a full hearing of all the parties in interest.

The cases of *Lytle* v. *State of Arkansas*,† and *Garland* v. *Wynn*,‡ arose under pre-emption acts prior to 1841, and be-

* Wilcox *v.* Jackson, 13 Peters, 511; Lytle *v.* Arkansas, 9 Howard, 333.

† 22 Howard, 193.

‡ 20 Id. 8.

fore the law vested the land officers with authority to settle questions arising between different pre-emptors, or made their decisions final. In these cases, as well as in the subsequent ones of *Minnesota* v. *Bachelder*,* and *Lindsey* v. *Hawes*,† fraud and misrepresentation were alleged, and in most of them the proceedings before the land officers had been *ex parte*. In none of them had there been a decision between conflicting claimants after a full hearing on notice and final appeal to the Secretary of the Interior, as in this case.

III. But if this is not so, and if the ordinary courts can re-examine such cases as this, Towsley has no case.

1. He filed April 2d, 1858, his declaratory statement, giving notice that he had, on the 25th day of March preceding, settled upon certain lands—different from those he now claims—and would claim a pre-emption right therein. It was not until after this, to wit, the 15th of August, 1858, that he tendered his declaratory statement for the land in controversy. This alone is fatal to his case.

The prohibition of the 4th section of the act of March 3d, 1843, against filing a second declaration, is not limited to filings on lands which were subject to private entry, but extends as well to lands of the class in question which have not been proclaimed for sale, the only difference being that in the one case the law requires the declaratory statement to be filed within thirty days, and in the other within three months from the date of settlement. But the law prohibits the same individual who has filed a declaration claiming one tract of land, from afterwards filing a second declaration for another tract, as much in the one case as the other.

The section is not limited to declarations which had been filed at the date of its passage, but applies to every case where an individual "at any future time" shall offer to file a second declaration. If he "*has filed under the late pre-emption law*" for one tract of land, at the "future time," when he seeks to file a second declaration for other land, the second

* 1 Wallace, 109.

† 2 Black, 554.

filing is invalid. The same reason applies for confining a pre-emption to one filing on lands not proclaimed for sale as on those which had been.

To allow a pre-emptor to file as many declaratory statements on as many different tracts of land as he pleases, would put it in his power to keep the public lands from being taken and settled by others, which would be contrary to public policy as well as the statute. The policy of the government has always been to sell its lands to actual settlers, and not let them fall into the hands of speculators. Hence, it has often delayed proclaiming lands for sale that actual settlers might take them; but this policy would be thwarted if a single pre-emptor could file declaratory statements for as many tracts as he pleased.

2. But a stronger, and, we think, a plainly unanswerable argument against his case remains. By the 5th section of the act of June 3d, 1843, a claimant is required to file his declaratory statement "within three months from the time of the settlement, otherwise his claim to be forfeited, and the tract awarded to the next settler in the order of time, on the same tract of land, who shall have given such notice, and otherwise complied with the conditions of the law." This is statute law, and imperative. Towsley neither filed nor offered to file his declaratory statement within the three months from the time of his settlement upon the land, and his claim as a pre-emptor thereby became forfeited. If, after having occupied the land nearly a year, he was at liberty to file a declaratory statement, asserting his settlement to have been within three months, then he could occupy the land indefinitely, and need never file his declaratory statement, and the law requiring him to do so within the three months becomes nugatory. No other individual could settle upon the land and pre-empt it, because Towsley, as soon as such an attempt should be made, would have it in his power to defeat him by filing a declaratory statement, dating his settlement, not at the time it was actually made, but at any time within three months which should be anterior to that of the other claimant. Towsley's declaratory

statement, filed February 4th, 1859, claiming a settlement June 15th, 1858, was a nullity.

By the act of 1841, individuals settling on lands not proclaimed for sale were not required to file declaratory statements, and in case of dispute between pre-emptors, the right of pre-emption was declared to be in him who made the first settlement; but the act of 1843 declared the claim of the first settler forfeited unless he filed a declaratory statement within three months from the time of settlement. Towsley having failed to file his declaratory statement as required by law, the land was properly awarded to Johnson, who was the next settler, and complied with the pre-emption laws.

[There were some other questions presented in the brief of the learned counsel, such as supposed defects in the bill, and whether on the evidence Towsley made the necessary settlement and owned the improvements, which this court declared were not within its cognizance. It was also argued that Towsley forfeited his right by entering into contracts, by which his title should enure to the benefit of others than himself, in violation of the 13th section of the act of 1841; but as the court considered that no such matter was put in issue in the pleadings, and that it could not be considered here, the reporter makes no further mention either of the questions or the matter referred to.]

Mr. J. M. Woolworth, contra.

Mr. Justice MILLER delivered the opinion of the court.

The jurisdiction of this court rests on two grounds found in the 25th section of the Judiciary Act, or, perhaps we should rather say, in the 2d section of the act of February 5th, 1867, which seems to be a substitute for the 25th section of the act of 1789, so far as it covers the same ground. The defendant in error relied on his patent, as conclusive of his right to the land, as an authority emanating from the United States, which was decided against him by the State court.

and he relied upon certain acts of Congress as making good his title, and the decision of the State courts was against the right and title set up by him under those statutes. Undoubtedly the case is fairly within one or both of these clauses of the act of 1867, and the conclusiveness of the patent and the right of the plaintiffs in error claimed under the statutes must be considered.

The contest arises out of rival claims to the right of preemption of the land in controversy. The register and receiver, after hearing these claims, decided in favor of Towsley, the complainant, and allowed him to enter the land, received his money, and gave him a patent certificate. On appeal to the Commissioner of the Land Office their action was affirmed, but on a further appeal to the Secretary of the Interior, the action of these officers was reversed on a construction of an act of Congress, in which the secretary differed from them, and under that decision the patent was issued to Johnson.

It will be seen by this short statement of the case that the rights asserted by complainant, and recognized and established by the Nebraska courts, were the same which were passed upon by the register and receiver, by the commissioner, and by the Secretary of the Interior, and we are met at the threshold of this investigation with the proposition that the action of the latter officer, terminating in the delivery to the defendant of a patent for the land, is conclusive of the rights of the parties not only in the land department, but in the courts and everywhere else.

This proposition is not a new one in this court in this class of cases, but it is maintained that none of the cases heretofore decided extend, in principle, to the one before us; and the question being pressed upon our attention with an earnestness and fulness of argument which it has not perhaps before received, and with reference to statutes not heretofore considered by the court, we deem the occasion an appropriate one to re-examine the whole subject.

The statutory provision referred to is the 10th section of

the act of June 12th, 1858,* which declares that the 11th section of the general pre-emption law of 1841 shall "be so amended that appeals from the decision of the district officers, in cases of contest between different settlers for the right of pre-emption, shall hereafter be decided by the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

The finality here spoken of applies in terms to the decision of the commissioner, and can only be supposed to attach to that made by the secretary by some process of reasoning, which implies the absurdity of making the decision, on appeal to the secretary, less conclusive than that made by the inferior officer. But the section under consideration is only one of several enactments concerning the relative duties, power, and authority of the executive departments over the subject of the disposition of the public lands, and a brief reference to some of them will, we think, show what was intended by this amendment. By the 1st section of the act to reorganize the General Land Office, approved July 4th, 1836,† it was enacted that the executive duties now prescribed, or which may hereafter be prescribed, by law, appertaining to the surveying and sale of the public lands, . . . and the issuing of patents for all grants of land, under the authority of the United States, shall be subject to the supervision and control of the Commissioner of the General Land Office, under the direction of the President of the United States. In the case of *Barnard's Heirs* v. *Ashley's Heirs*,‡ it was held that this authorized the commissioner to entertain appeals from the decisions of the register and receiver in regard to pre-emption claims, and it is obvious that the direct control of the President was contemplated whenever it might be invoked. Afterward, when the act of September 4th, 1841, was passed, which so enlarged the right of pre-emption as to have been ever since considered the main source of pre-emption rights, the 11th section provided that all questions as to the right of pre-emption arising be-

* 11 Stat at Large, 326. † 5 Id. 107. ‡ 18 Howard, 45.

tween different settlers should be settled by the register and receiver of the district within which the land is situated, subject to an appeal to and revision by the Secretary of the Treasury of the United States. This provision, in the class of cases to which it referred, superseded the functions of the Commissioner of the Land Office, as revising officer to the register and receiver, and, so far as the act of 1836 associated the President with the commissioner, superseded his supervisory functions also. It left the right of appeal from the register and receiver to the Secretary of the Treasury direct as the head of the department. The 10th section of the act of 1858, so much relied upon by the plaintiffs in error, the operative language of which we have quoted, was clearly intended to remedy this defect or oversight, and to restore to the commissioner his rightful control over the matters which belonged to his bureau. In the use of the word *final* we think nothing more was intended than to say that, with the single exception of an appeal to his superior, the Secretary of the Interior, his decision should exclude further inquiry in that department. But we do not see, in the language used in this connection, any intention to give to the final decision of the Department of the Interior, to which the control of the land system of the government had been transferred, any more conclusive effect than what belonged to it without its aid.

But while we find no support to the proposition of the counsel for plaintiffs in error in the special provisions of the statute relied on, it is not to be denied that the argument is much stronger when founded on the general doctrine that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others. That the action of the land office in issuing a patent for any of the public land, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated, and in all courts, and in all forms of judicial proceedings, where this title must control, either by

reason of the limited powers of the court, or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained. On the other hand there has always existed in the courts of equity the power in certain classes of cases to inquire into and correct mistakes, injustice, and wrong in both judicial and executive action, however solemn the form which the result of that action may assume, when it invades private rights; and by virtue of this power the final judgments of courts of law have been annulled or modified, and patents and other important instruments issuing from the crown, or other executive branch of the government, have been corrected or declared void, or other relief granted. No reason is perceived why the action of the land office should constitute an exception to this principle. In dealing with the public domain under the system of laws enacted by Congress for their management and sale, that tribunal decides upon private rights of great value, and very often, from the nature of its functions, this is by a proceeding essentially *ex parte*, and peculiarly liable to the influence of frauds, false swearing, and mistakes. These are among the most ancient and well-established grounds of the special jurisdiction of courts of equity just referred to, and the necessity and value of that jurisdiction are nowhere better exemplified than in its application to cases arising in the land office. It is very well known that these officers do not confine themselves to determining, before a patent issues, who is entitled to receive it, but they frequently assume the right, long after a patent has issued and the legal title passed out of the United States, to recall or set aside the patent, and issue one to some other party, and if the holder of the first patent refuses to surrender it they issue a second. In such a case as this have the courts no jurisdiction? If they have not, who shall decide the conflicting claims to the land? If the land officers can do this a few weeks or a few months after the first patent has issued, what limit is there to their power over private rights? Such is the case of *Stark* v. *Starrs*,* in which the

* 6 Wallace, 402.

patent was issued to one party one day and to the other the day after for the same land. They are also in the habit of issuing patents to different parties for the same land, containing in each instrument thus issued a reservation of the rights of the other party. How are those rights to be determined except by a court of equity? Which patent shall prevail, and what conclusiveness, or inflexible finality, can be attached to a tribunal whose acts are in their nature so inconclusive? So also the register and receiver, to whom the law primarily confides these duties, often hear the application of a party to enter land as a pre-emptor or otherwise, decide in favor of his right, receive his money, and give him a certificate that he is entitled to a patent. Undoubtedly this constitutes a vested right, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been done in violation of law, and, if it has, to give appropriate remedy. And so, if for any other reason recognized by courts of equity, as a ground of interference in such cases, the legal title has passed from the United States to one party, when, in equity and good conscience, and by the laws which Congress has made on the subject, it ought to go to another, "a court of equity will," in the language of this court in the case of *Stark* v. *Starrs*, just cited, "convert him into a trustee of the true owner, and compel him to convey the legal title." In numerous cases this has been announced to be the settled doctrine of this court in reference to the action of the land officers.*

Not only has it been found necessary in the interest of justice to hold this doctrine in regard to the decisions of the land officers of the United States, but it has been found equally necessary in the States which have had a system of land sales. Numerous cases are found in the courts of Kentucky and Virginia, where they have, by proceedings in equity, established the junior patent to be the title instead

* Lytle *v.* Arkansas, 22 Howard, 192; Garland *v.* Wynn, 20 Id. 8; Lindsey *v.* Hawes, 2 Black, 559.

of the elder patent, by an inquiry into the priority of location or some other equitable matter, or have compelled the holder of the title under the patent to convey, in whole or in part, to some persons whose claim rested on matters wholly anterior to the issuing of the patent. There is also a similar course of adjudication in the State of Pennsylvania, and we doubt not cases may be found in other States. Several of the Kentucky cases have come to this court, where the principle has been uniformly upheld.*

It is said, however, that the present case does not come within any of the adjudicated cases on this subject; that in all of them there has been some element of fraud or mistake on which the cases rested.

Undoubtedly there has been in all of them some special ground for the exercise of the equitable jurisdiction, for this court does not and never has asserted that all the matters passed upon by the land office are open to review in the courts. On the contrary, it is fully conceded that when those officers decide controverted questions of fact, in the absence of fraud, or impositions, or mistake, their decision on those questions is final, except as they may be reversed on appeal in that department. But we are not prepared to concede that when, in the application of the facts as found by them they, by misconstruction of the law, take from a party that to which he has acquired a legal right under the sanction of those laws, the courts are without power to give any relief. And this is precisely what this court decided in the case of *Minnesota* v. *Batchelder*,† and in the case of *Silver* v. *Ladd*.‡ In this latter case a certificate under the Oregon donation law, given by the register and receiver, was set aside by the commissioner, and his action approved by the secretary, and the action of each of these officers was based on a different construction of the act of Congress. This court held that the register and receiver were right; that

* Finly *v.* Williams, 9 Cranch, 164; McArthur *v.* Browder, 4 Wheaton, 488; Hunt *v.* Wickliffe, 2 Peters, 201; Green *v.* Liter, 8 Cranch, 229.

† 1 Wallace, 109.

‡ 7 Id. 219.

the certificate conferred a valid claim to the land, and that the patent issued to another party by reason of this mistake must enure to the benefit of the party who had the prior and better right. This court has at all times been careful to guard itself against an invasion of the functions confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satisfied that the relations thus established between the courts and the land department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law.

In the case now under consideration the complainant made his declaratory statement and proved his settlement to the satisfaction of the register and receiver, and they gave him a patent certificate. The defendant, Johnson, contested the complainant's right before these officers and asserted that he was entitled to the pre-emption right for the same land, and when they decided in favor of Towsley he appealed to the commissioner. This officer approved the decision of the register and receiver, and an appeal was taken by Johnson to the Secretary of the Interior. The secretary, or rather the assistant secretary, as appears by the record, rejected Towsley's claim on the sole ground that he had previously filed a declaratory statement of his intention to claim a pre-emption for another tract of land, which he had voluntarily abandoned, and it is clear that but for his construction

of the statute on that subject Towsley would have received the patent which was awarded to Johnson.

We must therefore inquire whether the statute, rightly construed, defeated Towsley's otherwise perfect right to the patent, and this inquiry requires consideration of some of the features of our system of land sales.

One of these is that after the surveys are made in any given locality, so that the different tracts can be identified by the descriptions used in these surveys, they are not subject to sale by private entry at the land office until there has been a public auction, at which the lands so surveyed are offered to the highest bidder. The time and place of this sale and the lands offered for sale are made known by a proclamation of the President. The object of this public sale and of withholding the lands from private entry is undoubtedly to secure to the government the benefit of competition in bidding for these parcels of land supposed to be worth more than the price fixed by Congress, at which they may afterward be sold at private entry. But as the tide of emigration was greatly in advance of these public sales, and indeed of the surveys, it was found that settlers who had made meritorious improvements were unable to secure the land on which they had settled without bidding at public auction against parties who took into consideration the value of the improvements so made and who would get them by the purchase. To remedy this evil several of the earlier pre-emption laws were passed, and they only included settlements made prior to the passage of those laws. The act of 1841, however, provided a general system of pre-emption, and authorized pre-emption of lands surveyed, but not open to private entry, as well as land which could be bought at private sale. It protected settlements already made, and allowed future settlements to be made with a right to pre-emption, which was a new feature in the pre-emption system. As, however, these settlements might now be made on lands subject to private sale, and the settler was allowed a year in which to make his entry and pay the money, the 15th section of the act required the settler on such lands to make a

declaratory statement if he intended to claim a right of pre-emption, in which he should declare such intention and describe the land. This statement was filed with the register and receiver, and was obviously intended to enable them to reserve the tract from sale for the time allowed the settler to perfect his entry and pay for the land. But an experience of two years seems to have shown that this privilege of withdrawing particular tracts from private sale was subject to abuse by persons who filed declarations for several tracts when they could only receive one as a pre-emptor, thus delaying the sales and preventing others from settling on or buying, with a view to a purchase by themselves or friends when it became convenient to do so. To remedy this evil Congress, when it came to legislate again about the right of pre-emption, by the act of 1843, enacted by the 4th section "that where an individual had filed, under the late pre-emption law, his declaration of intention to claim the benefit of said law for one tract of land, it shall not be lawful for the same individual, at any future time, to file a second declaration for another tract." As the only declaration of intention required by the act of 1841 (which is undoubtedly the one referred to as "the late pre-emption law") was, both by its express terms and by the policy which dictated it, confined to pre-emptions of land subject to private entry, we entertain no doubt that this section was limited, in like manner, to that class of lands. As to lands not subject to private sale no declaration of intention was required by the act of 1841, and the reference to such a declaration in the act of 1843 would be without anything on which to base it. This view is made still clearer by the fact that the next succeeding section of the act of 1843 does introduce distinctly, as a new and separate provision, the requirement that settlers on the land *not yet proclaimed for sale* are required to make a similar declaration, *within three months from the time of settlement*, on pain of forfeiting their pre-emption right in favor of the next actual settler, but making no provision whatever for the case of two declarations by the same party on different tracts of land. We are, therefore, of opinion

that the effect of a double declaration in defeating the right of the pre-emptor to the tract which he finally claims to purchase is limited to lands subject, at the time, to private sale. The land in controversy in this suit was never subject to private entry, and the application of the principle by the secretary to Towsley's case was, as we think, a misconstruction of the law, through which his right was denied him.

But it is argued that if the pre-emption claim of Towsley was not governed by the 4th section of the act of 1843, it certainly was by the 5th section of that act, and as he did not file his declaration of intention within three months from the time of settlement, his claim was forfeited and gave him no right.

The record shows undoubtedly that his settlement commenced about eight months before he filed his declaration, and it must be conceded that the land was of that class which had not been proclaimed for sale, and his case must be governed by the provision of that section. It declares that where the party fails to make the declaration within the three months his claim is to be forfeited and the tract awarded to the next settler in order of time on the same tract, who shall have given such notice and otherwise complied with the conditions of the law. The words "shall have given such notice," presuppose a case where some one has given such notice before the party who has thus neglected seeks to assert his right. If no other party has made a settlement or has given notice of such intention, then no one has been injured by the delay beyond three months, and if at any time after the three months, while the party is still in possession, he makes his declaration, and this is done before any one else has initiated a right of pre-emption by settlement or declaration, we can see no purpose in forbidding him to make his declaration or in making it void when made. And we think that Congress intended to provide for the protection of the first settler by giving him three months to make his declaration, and for all other settlers by saying if this is not done within three months any one else who has settled on it within that time, or at any

time before the first settler makes his declaration, shall have the better right. As Towsley's settlement and possession were continuous, and as his declaration was made before Johnson or any one else asserted claim to the land or made a settlement, we think his right was not barred by that section, under a sound construction of its meaning.

We are of opinion that the decree of the Supreme Court of Nebraska must be

AFFIRMED.

Mr. Justice CLIFFORD, dissenting:

I dissent from the judgment of the court in this case, upon the ground that the case is controlled by the act of Congress which provides that the decision of the Commissioner of the General Land Office shall be final unless an appeal is taken to the Secretary of the Interior. In my judgment the decree of the commissioner is final if no appeal is taken, and in case of appeal that the decision of the appellate tribunal created by the act of Congress is equally final and conclusive, except in cases of fraud or mistake not known at the time of the investigation by the land department.

Mr. Justice DAVIS took no part in the decision of this or the next case, being interested in the question involved.

NOTE.

At the same time with the preceding case was adjudged another from the same court with it, to wit, the case of

SAMSON *v.* SMILEY.

The case of *Johnson* v. *Towsley*, *held* applicable although no patent certificate was issued to the claimant who showed the better right of pre-emption; the general principle being laid down that when a party is deprived of his right of pre-emption otherwise perfect, by a mistaken construction of the act of Congress by the land department, equity will relieve.

IN this case the controversy had been between one Samson and a certain Smiley, and the register and receiver had decided in favor of Smiley. Samson accordingly brought the case

here. The case differed, as this court considered, in no respect from the case just decided, but one, which was that when the register and receiver decided in favor of Smiley against Samson, in the contest for the right of pre-emption to the land, they did not give him a patent certificate as they did to Towsley. The reason for this seemed to be that the contest between him and Samson was prosecuted immediately from the register and receiver's decision to the commissioner, and from the commissioner's decision affirming that of the register and receiver, to the secretary, so that there was no period, until the final decision of the latter, when either party could have been permitted to make the entry; but the record showed that, on a full and thorough investigation, all the officers of the land department decided that Smiley had established his right of pre-emption, and the secretary overruled this on the sole ground that he had filed a declaratory statement for another tract of land.

After argument by *Mr. Trumbull, for Samson et al., plaintiffs in error, and by Messrs. M. H. Carpenter, J. M. Woolworth, and A. J. Poppleton, contra,* the judgment of the court was delivered by Mr. Justice MILLER, to the effect that the land in question, having never been subject to private entry, the construction of the statute made by the secretary was erroneous, and operated to deprive Smiley of his right, otherwise perfect, to the land, and to vest the legal title, which he ought to have received, in Samson. The case came, therefore, as the court considered, within the principle just decided in *Towsley* v. *Johnson*, and the judgment of the Supreme Court of Nebraska was accordingly

AFFIRMED.

GIBSON v. CHOUTEAU.

1. Statutes of limitation of a State do not apply to the State itself, unless it is expressly designated, or the mischiefs to be remedied are of such a nature that it must necessarily be included; and they do not apply to the United States.
2. The power of Congress in the disposal of the public domain cannot be interfered with, or its exercise embarrassed by any State legislation; nor can such legislation deprive the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition.

Statement of the case.

3. The patent is the instrument which, under the laws of Congress, passes the title of the United States, and in the action of ejectment in the Federal courts for lands derived from the United States the patent, when regular on its face, is conclusive evidence of title in the patentee. And in the action of ejectment in the State courts when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent is also conclusive.
4. The occupation of lands derived from the United States, before the issue of their patent, for the period prescribed by the statutes of limitation of a State for the commencement of actions for the recovery of real property, is not a bar to an action of ejectment for the possession of such lands founded upon the legal title subsequently conveyed by the patent. Nor does such occupation constitute a sufficient equity in favor of the occupant to control the legal title thus subsequently conveyed, whether asserted in a separate suit in a Federal court, or set up as an equitable defence to an action of ejectment in a State court.
5. The doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and, where several proceedings are required to perfect a conveyance of land, it is only applied for the security and protection of persons who stand in some privity with the party that initiated the proceedings and acquired the equitable claim or right to the title. It does not affect strangers not connecting themselves with the equitable claim or right by any valid transfer from the original or any subsequent holder.

ERROR to the Supreme Court of the State of Missouri.

Gibson brought ejectment in the St. Louis Land Court against Chouteau, to recover sixty-four acres of land in the county of St. Louis, Missouri. By consent of parties the case was tried by the court without a jury. On the trial the plaintiff claimed title to the demanded premises, under a patent of the United States issued to his immediate grantor, which he produced. The facts which led to the issue of the patent were these:

As early as September, 1803, as appeared from the record, one James Y. O'Carroll obtained permission from the Spanish authorities to settle on vacant lands in the District of New Madrid, in the Territory of Louisiana. In pursuance of this permission he occupied and cultivated, previously to December 20th, of that year, portions of a tract embracing one thousand arpents of land, in that part of the country which afterwards constituted the county of New Madrid in the Territory of Missouri. After the cession of Louisiana

to the United States, he claimed the land by virtue of his settlement; and this claim was subsequently confirmed to him and his legal representatives, under different acts of Congress, to the extent of six hundred and forty acres.

In 1812 a large part of the land in the county of New Madrid was injured by earthquakes; and in 1815 Congress passed an act for the relief of parties who had thus suffered.* By this act, persons whose lands had been materially injured were authorized to locate a like quantity of land on any of the public lands in the Territory of Missouri, the sale of which was authorized by law. And it was made the duty of the recorder of land titles in the Territory, when it appeared to him, from the oath or affirmation of a competent witness or witnesses, that any person was entitled to a tract of land under the provisions of the act, to issue to him a certificate to that effect. On this certificate, upon the application of the claimant, a location was to be made by the principal deputy surveyor of the Territory, who was required to cause the location to be surveyed, and a plat of the same to be returned to the recorder with a notice designating the tract located, and the name of the claimant.

The act further provided for a report to be forwarded by the recorder to the Commissioner of the General Land Office, of the claims allowed and locations made; and for the delivery to each claimant of a certificate of his claim and location which should entitle him, on its being transmitted to the commissioner, "to a patent to be issued in like manner as is provided by law for other public lands of the United States." The act also declared, that in all cases where the location was made under its provisions, the title of the claimant to the injured land should revert to and vest in the United States.

The land claimed by O'Carroll, in New Madrid County, afterwards confirmed to him, as already stated, to the extent of six hundred and forty acres, was injured by earthquakes, and in November, 1815, the recorder of land titles in St.

* 3 Stat. at Large, 211.

Louis, upon proper proof of the fact, gave a certificate to that effect, and stating that under the act of Congress O'Carroll, or his legal representatives, were entitled to locate a like quantity on any of the public lands of the Territory of Missouri, the sale of which was authorized by law.

In June, 1818, a location of the land was made on behalf of one Christian Wilt, who had become by mesne conveyances the owner of the interest of O'Carroll. The land thus located had been previously surveyed by the deputy surveyor of the Territory, but from some unexplained cause the survey and plat thereof were not returned to the recorder, until August, 1841. The recorder then issued a patent certificate to "James Y. O'Carroll or his legal representatives." A report of the location was also made by him, as required by the act of Congress, to the Commissioner of the General Land Office, but it appeared that the survey of the location did not meet the approval of that officer, as it did not show its interferences with conflicting claims. Accordingly, in a communication dated in March, 1847, the commissioner required the surveyor-general of Missouri to examine into the interferences, and ascertain the residue of the O'Carroll claim, and stated that on the return to the land office "of a proper plat and patent certificate for said residue, a patent" would issue. Under these instructions a new survey and plat were made, showing the interferences of the survey with other claims, and on the 26th of March, 1862, were filed with the recorder, and a new patent certificate was issued. Upon the corrected survey and plat and new certificate, the patent of the United States was, in June, 1862, issued to Mary McRee, who had acquired by various mesne conveyances the interest of Wilt in the land. In August following she conveyed to the plaintiff.

On the trial, the defendants endeavored to show that they had become, through certain legal proceedings, the owners of the interest originally possessed by Wilt, and consequently had acquired the equitable title to the land upon which they could defend against the patent, under the practice which prevails in Missouri. But in this endeavor they failed, the

Supreme Court of the State holding that the conveyances under which they claimed were inoperative and void.

The defendants also relied upon a deed of Samuel McRee and wife,* executed in 1838, contending that by operation of the deed under the statutes of Missouri, the equitable title which these grantors had subsequently acquired to the land and also the legal title conveyed by the patent to Mrs. McRee enured to the benefit of the defendants; but the Supreme Court held that the deed only had the effect of a quit-claim of an existing interest, and did not affect any subsequently acquired title.

The rulings of the State court upon these grounds were not open to review in this court, as they involved no questions of Federal jurisdiction. But it also appeared in evidence that the defendants, previous to the issue of the patent, had been in the possession of the demanded premises more than ten years, the period prescribed by the statute of Missouri, within which actions for the recovery of real property must be brought. By the statutes of the State the action of ejectment will lie on certain equitable titles. It may be maintained on a New Madrid location against any person not having a better title.† The defendants, therefore, contended that the statute of limitation, which had run against the equitable title, created by the location of the O'Carroll claim, was also a bar to the present action founded upon the legal title, acquired by the patent of the United States.

The Land Court held that the effect of the patent issued by the United States to Mrs. McRee was to invest her with the legal title to the land in dispute; and that the title vested in the plaintiff through the deed to him from Mrs. McRee was superior to any title shown by the defendants to the land in question under the New Madrid certificate of location, and that the said patent having issued to Mrs. McRee within ten years next before the commencement of this suit, the possession of the defendants was not a bar to the

* The Mary McRee already named.

† General Statutes of Missouri of 1825, chap. 151, sections 1 and 11.

plaintiff's recovery, and gave verdict and judgment accordingly for the plaintiff. From the judgment the case was taken to the Supreme Court of the State, and was twice heard there. Upon the first hearing the court affirmed the decision of the inferior court, holding that "until the patent issued the legal title remained in the United States, and the statute of limitations did not begin to run against the plaintiff before the date of that patent."

On the second hearing the court adhered to all its previous rulings except that which related to the effect of the statute of limitations, and upon that it changed its previous ruling and held that the statute barred the right of action upon the patent. In its opinion given on the second decision, after referring to its previous conclusion, cited above, it said:

"This conclusion proceeded upon the ground that although the action given by the statute upon the equitable right only, which had passed out of the United States, might be barred, it did not follow that an action based upon the right of entry by virtue of the absolute legal title by patent, would also be barred. The idea that the fiction of relation could be applied not only to carry the legal title to the owner of the inceptive right through the intermediate conveyances, but also for the purpose of bringing it within the operation of the statute of limitations from the date of the inceptive equity, had not been suggested and had not occurred to us."

Again the court, after recognizing the fact that the legal title remained in the United States till the patent issued, and that the location only gave an equitable right, upon which an action was sustainable in the State courts by virtue of the State statute, said:

"The two rights of entry, therefore, are distinct in themselves, and the causes of action have a different foundation. The possession of the land is claimed in both, but by different rights, and if there were nothing more the one cause of action might be barred and not the other. But there is another principle upon which we think the statute may be made to operate here as a bar to the plaintiff's action, and that is the fiction of relation whereby the legal title is to be considered as passing

out of the United States through the patent at its date, but as instantly dropping back in time to the date of the location as the first act or inception of the conveyance, to vest the title in the owner of the equity as of that date and make it pass from him to the patentee named through all the intermediate conveyances, and so that the two rights of entry and the two causes of action are thus merged in one, and the statute may be held to have operated on both at once. The legal title, on making this circuit, necessarily runs around the period of the statute bar, and the action founded on this new right is met by the statute on its way and cut off with that which existed before."

The Supreme Court accordingly reversed the decision of the Land Court, and the case was brought here on writ of error under the 25th section of the Judiciary Act, and is reported in *Gibson* v. *Chouteau*, 8th Wallace, 314. When presented, the record disclosed questions respecting the validity of Mrs. McRee's title, the transfer of her title to the plaintiff, and the trust asserted by which it was contended that the plaintiff's title enured to the benefit of the defendants, as well as the statute of limitations. This court, therefore, as the report already mentioned shows, dismissed the writ of error, because the record did not show that the decision of the State court turned on the question of the statute of limitations or that the determination of this question against the plaintiff was essential to the second judgment rendered.

When the case went back to the Supreme Court of the State, that court set aside its judgment, stating that it had been rendered on the question of the statute of limitations; but that by a clerical error such fact was not stated therein. The case was then again submitted to that court, and the court then adjudged that the plaintiff was barred by the statute of limitations, all other questions being determined in his favor. It was this judgment which was now brought before this court on writ of error.

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

Messrs. Glover and Shepley, contra.

Opinion of the court.

Mr. Justice FIELD delivered the opinion of the court.

It is matter of common knowledge that statutes of limitation do not run against the State. That no laches can be imputed to the king, and that no time can bar his rights, was the maxim of the common law, and was founded on the principle of public policy, that as he was occupied with the cares of government he ought not to suffer from the negligence of his officers and servants. The principle is applicable to all governments, which must necessarily act through numerous agents, and is essential to a preservation of the interests and property of the public. It is upon this principle that in this country the statutes of a State prescribing periods within which rights must be prosecuted are not held to embrace the State itself, unless it is expressly designated or the mischiefs to be remedied are of such a nature that it must necessarily be included. As legislation of a State can only apply to persons and things over which the State has jurisdiction, the United States are also necessarily excluded from the operation of such statutes.*

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made. Such provision was inserted in the act admitting Missouri, and it is embodied in the present Constitution, with the further clause that the legislature shall also not interfere "with any regulation that Congress may find necessary for securing the title in such soil to the *bonâ fide* purchasers."

* United States *v.* Hoar, 2 Mason, 312; People *v.* Gilbert, 18 Johnson, 228.

The same principle which forbids any State legislation interfering with the power of Congress to dispose of the public property of the United States, also forbids any legislation depriving the grantees of the United States of the possession and enjoyment of the property granted by reason of any delay in the transfer of the title after the initiation of proceedings for its acquisition. The consummation of the title is not a matter which the grantees can control, but one which rests entirely with the government. With the legal title, when transferred, goes the right to possess and enjoy the land, and it would amount to a denial of the power of disposal in Congress if these benefits, which should follow upon the acquisition of that title, could be forfeited because they were not asserted before that title was issued.

Yet such forfeiture is claimed by the defendants in this case, and is sanctioned by the decision of the Supreme Court of Missouri. That court does not, it is true, present its decision in this light, but on the contrary it attempts to reconcile its decision with positions substantially such as we have already stated respecting the power of Congress over the public lands, and the inability of the State to interfere with the primary disposal of the soil of the United States. It declares it to be well settled, that statutes of limitation of a State cannot run against the United States, nor affect their grantees, until the title has passed from the proprietary sovereignty; that these statutes operate to bar the cause of action, not to convey the title; that no cause of action upon a right of entry by virtue of the legal title by patent can exist until the patent is issued; and that the action upon the equitable title created by the location is only given by a statute of the State; and as the two rights of entry have a different origin, that the latter, resting on the statute, might be barred, whilst that resting on the patent would continue in force, but for the operation of the fiction of relation. By a novel application of that doctrine, the court comes to the conclusion that the statute operates against both rights of entry at the same time.

By the doctrine of relation is meant that principle by

which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the day when the first proceeding was had. Thus, in the present case, the patent, which was issued in 1862, is said to take effect by relation at the time when the survey and plat of the location, made in 1818, were returned to the recorder of land titles under the act of Congress. At that time the title of the claimant to the land desired by him had its inception, and so far as it is necessary to protect his rights to the land, and the rights of parties deriving their interests from him, the patent is held to take effect by relation as of that date.*

The Supreme Court of Missouri, considering that by this doctrine of relation, the legal title, when it passed out of the United States by the patent, instantly dropped back in time to the location of the first act or inception of the conveyance, and vested the title in the owner of the equity as of that date, held that the statute intercepted the title as it passed through the intermediate conveyances from that period to the patentee. "The legal title," said the court, "in making this circuit, necessarily runs around the period of the statute bar, and the action founded upon this new right is met by the statute on its way, and cut off with that which existed before."†

The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purposes of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land, and acquired the equitable claim or right to the title.‡ The defendants in this case were strangers to

* Lessieur *v.* Price, 12 Howard, 74.

† Gibson *v.* Chouteau's Heirs, 39 Missouri, 588.

‡ Lynch *v.* Bernal, 9 Wallace, 315; Jackson *v.* Bard, 4 Johnson, 230;

that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder. The statute of limitations of Missouri did not operate to convey that claim or equitable title to them. It only extinguished the right to maintain the action of ejectment founded thereon, under the practice of the State. It left the right of entry upon the legal title subsequently acquired by the patent wholly unaffected.

In the Federal courts, where the distinction between legal and equitable proceedings is strictly maintained, and remedies afforded by law and equity are separately pursued, the action of ejectment can only be sustained upon the possession by the plaintiff of the legal title. For the enforcement of equitable rights, however clear, distinct equitable proceedings must be instituted. The patent is the instrument which, under the laws of Congress, passes the title of the United States. It is the government conveyance. If other parties possess equities superior to those of the patentee, upon which the patent issued, a court of equity will, upon proper proceedings, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or cancelling the patent.* But, in the action of ejectment in the Federal courts, the legal title must prevail, and the patent, when regular on its face, is conclusive evidence of that title.

So also in the action of ejectment in the State courts, when the question presented is whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail. For, as said in *Bagnell* v. *Broderick*,† "Congress has the sole power to declare the dignity and effect of titles emanating from the United States; and the whole legislation of the Federal government in reference to the public lands declares the patent the superior and con-

Heath *v.* Ross, 12 Id. 140; Littleton *v.* Cross, 5 Barnewall and Creswell, 325, 328.

* Stephenson *v.* Smith, 7 Missouri, 610; Barry *v.* Gamble, 8 Id. 881; Cunningham *v.* Ashley, 14 Howard, 377; Lindsey *v.* Hawes, 2 Black, 554; Stark v. Starrs, 6 Wallace, 402; Johnson *v.* Towsley, *supra*, p. 72.

† 13 Peters, 450.

clusive evidence of legal title. Until its issuance the fee is in the government, which, by the patent, passes to the grantee, and he is entitled to recover the possession in ejectment."

In several of the States, and such is the case in Missouri, equities of the character mentioned, instead of being presented in a separate suit, may be set up as a defence to the action of ejectment. The answer or plea in such case is in the nature of a bill in equity, and should contain all its essential averments. The defendant then becomes, with reference to the matters averred by him, an actor, and seeks, by the equities presented, to estop the plaintiff from prosecuting the action, or to compel a transfer of the title.*

In *Maguire* v. *Vice*,† where the plaintiff brought ejectment on a legal title, and gave in evidence a patent of the United States, and the defendant relied upon an equitable defence, the Supreme Court of Missouri said: "Although our present practice act abolishes all distinctions between legal and equitable actions, yet a party who seeks relief on a merely equitable title against a legal title must, in his pleadings, whether he is plaintiff or defendant, set forth such a state of facts as would have entitled him to the relief he seeks under the old form of proceedings. When a party by his pleadings sets forth a merely legal title, he cannot on the trial be let into the proof of facts which show that, having an equity, he is entitled to a conveyance of the legal title. If he wants such relief he must prepare his pleadings with an eye to obtain it, and this must be done, whether he is seeking relief as plaintiff or defendant."

But neither in a separate suit in a Federal court, nor in an answer to an action of ejectment in a State court, can the mere occupation of the demanded premises by plaintiffs or defendants, for the period prescribed by the statute of limitations of the State, be held to constitute a sufficient equity in their favor to control the legal title subsequently

* Estrada *v.* Murphy, 19 California, 272; Weber *v.* Marshall, Ib. 457; Lestrade *v.* Barth, Ib. 671.

† 20 Missouri, 431.

conveyed to others by the patent of the United States, without trenching upon the power of Congress in the disposition of the public lands. That power cannot be defeated or obstructed by any occupation of the premises before the issue of the patent, under State legislation, in whatever form or tribunal such occupation be asserted.*

JUDGMENT REVERSED, and the cause REMANDED FOR FURTHER PROCEEDINGS PURSUANT TO THIS OPINION.

Justices DAVIS and STRONG dissented.

NORWICH COMPANY *v.* WRIGHT.

1. The act of Congress of 1851, limiting the liability of ship-owners, includes collisions, as well as injuries to cargo; so that if a collision happens between two vessels at sea, and one of them is in fault without the privity or knowledge of her owners, the latter will only be liable for the amount of their interest in the vessel and her freight then pending; and that amount being paid into court, if insufficient to pay all the damages caused, will be apportioned *pro rata* amongst the owners of the injured vessel and of the cargoes of both vessels in proportion to their respective losses.
2. This liability of the ship-owners may be discharged by their surrendering and assigning to a trustee for the benefit of the parties injured, in pursuance of the 4th section of the act, the vessel and freight, although these may have been diminished in value by the collision, or other casualty during the voyage; and, *it seems*, that if they are totally lost the owners will be entirely discharged.
3. In this respect the act has adopted the rule of the maritime law as contradistinguished from that of the English statutes on the same subject.
4. The District Court, sitting as a court of admiralty, has jurisdiction of cases arising under the act, and may administer the law as provided in the 4th section.
5. The proper course of proceeding in such a case pointed out.

ERROR to the Circuit Court for the District of Connecticut; the case being this:

On the 3d of March, 1851, Congress passed an act† as fol-

* Wilcox *v.* Jackson, 13 Peters, 516, 517; Irvine *v.* Marshall, 20 Howard, 558; Fenn *v.* Holme, 21 Id. 481; Lindsey *v.* Miller, 6 Peters, 672.

† 9 Stat. at Large, 635.

lows—the sections in brackets, *i. e.*, the 2d and 5th sections, not being specially important in this case, and inserted only to give a more full view of the act:

"SEC. 1. No owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons, any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: *Provided*, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

["SEC. 2. If any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.]

"SEC. 3. The liability of the owner or owners of any ship or vessel, for any embezzlement, loss or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, *shipped or put on board of such ship or vessel*, or for *any loss, damage or injury by collision*, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

"SEC. 4. If any such embezzlement, loss, or destruction shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each

of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease.

["SEC. 5. 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 this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.]

"SEC. 6. Nothing in the preceding sections shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss or destruction of goods, wares, merchandise, or other property, put on board any ship or vessel, or on account of any negligence, fraud or other malversation of such master, officers, or mariners, respectively; nor shall anything herein contained lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel."

This statute being in force, the schooner Van Vliet, on the night of 18th of April, 1866, making three or four knots an hour, and the steamer City of Norwich making twelve—the schooner's course being nearly at right angles to that of the steamer—collided in Long Island Sound. The schooner sank, and both she and her cargo were lost. The steamer was greatly damaged by the blow, and, taking

fire, sank also. Her cargo was lost, but she herself was subsequently raised and repaired at great expense.

Hereupon the owners of the schooner filed a libel *in personam* in the District Court for the District of *Connecticut* against the owners of the steamer. The owners of the steamer, by way of defence, stating that the steamer had on board "a large and valuable freight belonging to various parties, much larger in value than the whole amount of the interest of the defendants in the said steamer and of her freight then pending," and that the whole of it was lost, set up that they were not in fault; that the night was dark; that the schooner had no lights; that she was seen first by the head of her sails being lighted up by the steamer's lights.

These matters set up, however, were not proved.

On the contrary, although several witnesses who saw the light of the schooner *after the collision*, testified that the green or starboard light was dim, it was clearly proved that the light was there; and there was very strong evidence to show that it was burning brightly at the time of the collision, having been specially examined both before and after it. It appeared also that the officers of another steamer, the Electra, three-quarters of a mile in the rear of the City of Norwich and directly in her track, had seen the schooner a full mile off, and some time before the occurrence happened; they seeing her, as the pilot of the Electra testified, one point on their port-bow when the City of Norwich was dead ahead. This witness stated that the schooner was a mile off from the Electra when he saw her, and that this was two minutes before the collision; that the City of Norwich blew her whistle immediately after the collision; and that he discovered the schooner two or three minutes before he heard the sound.

The District Court, after interlocutory decree in favor of the libellants, and a reference to a master, and a report, decreed for the libellants, $19,975 for the schooner and $1921 for her cargo, with interest from the date of the collision. Before the decree was passed, the respondents filed a petition wherein they alleged that proceedings *in rem* had been

commenced in behalf of said parties against the steamer in the District Court of the United States for the *Eastern District of New York for the recovery of damages for the loss of the said cargo.* They therefore prayed that they might be permitted to show by proper evidence the whole amount of damages sustained by all of said parties, including the libellants, and the value of the steamer and her freight then pending; and that the decree of the court might be so framed as to give the libellants such part or proportion of the amount of damages sustained by them as the value of steamer and freight bore to the whole amount of damages sustained by all parties by the collision. In reference to this last defence the libellants insisted:

1. That the act does not embrace injuries to other vessels by collision, but only injuries to, or loss of, cargo on board the offending vessel; and

2. That if it did embrace injuries by collision, the District Court, in that proceeding, had no power to give the respondents the relief which they sought.

The District Court held that cases of collision were within the act, but deemed the jurisdiction of that court insufficient to give relief. On appeal the Circuit Court held that cases of collision were not within the act. Hereupon the libellants appealed to this court. The appeal brought up all the questions in the cause.

Messrs. R. H. Huntley and C. R. Ingersoll, in support of the ruling below:

The act of 1851 does not apply in any of its sections to a loss that may happen to any other ship or vessel (than the owner's vessel), or to any goods, wares, or merchandise or other thing being on board of any other ship or vessel.

The words "loss, damage, or injury by collision," in the 3d section, are to be construed by the context, and relate only to the property to which the other branches of the section relate, that is, property "shipped, or put on board such ship or vessel."

The circumstances which led to the passage of the act

were notorious. The packet ship Henry Clay, a large, costly, and nearly new ship, lying at the wharf in the port of New York, having nearly completed her lading and being bound for Europe, took fire from some cause and was burned, with a cargo already laden amounting in value to perhaps half a million of dollars. Her owners, being losers to a very large amount by the burning of the ship, were proceeded against by owners of cargo to compel payment to them of its value. It was strenuously insisted, by way of defence, that even without any such statutes as exist in England, the owners could not be charged upon the usual rule of liability of common carriers at common law. No proof of actual fault or negligence, except so far as the occurrence of the fire in the ship might warrant such inference, was given or attempted. The owners were held liable. Pending that action an effort was made to procure some legislation from Congress to soften the rigor of the rule declared in that case.

Some years before the burning of the Henry Clay, and in the night of the 13th of January, 1840, the steamboat Lexington was burned upon Long Island Sound, and the disaster was accompanied by a painful loss of life and the destruction of a large amount of property. Litigation ensued, and the owners were held liable by this court, A.D. 1848, in the *New Jersey Steam Navigation Company* v. *The Merchants' Bank.**

Both of these disasters and the hardships of the law against ship-owners as common carriers were commented upon in the debates which were had upon the act now in question. And an examination of those debates shows that it was the stringent rule of the common law which made common carriers of property liable for all losses (except such as were caused by the act of God or the public enemies), however free from actual fault or negligence, that was the subject of comment; and the apparent purpose, so far as it may be gathered from those debates, was to relax *that*

* 6 Howard, 344.

rule. Nothing is said of injuries to other vessels, or the liability of ship-owners as principals for the tortious negligence of their ship-masters, officers, or crews, as their servants, by which the property of persons in no wise intrusted to them received injury. Nor was the rule of the common law which makes the master liable for the negligence of his servant in his business, the subject of review, criticism, or comment.

But passing to the act itself. It begins with a declaration that ship-owners shall not be liable for loss or damage by fire to any goods or merchandise whatever, shipped, taken in, or put on board, unless such fire is caused by the design or neglect of the owner. This has no other operation than to affect their relations as common carriers. The proviso to that section, that "nothing in *this act* shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners," indicates that Congress believed that they were dealing with a question of liability which might be the subject of a contract, not with a liability for tortious negligence to parties who stood, and who could stand, in no relation of contract whatever with such owners. The proviso, though annexed to the first section, applies plainly to the whole act.

It may be conceded that the third section contains terms which, viewed apart from the residue of the act, are broad enough to include injury to other vessels by collision. But in the construction of statutes general words are restricted in their meaning by the subject-matter of the statute, the context and apparent intent; and in an enumeration of particulars followed by general terms, a restriction of the latter to cases or things *ejusdem generis* is according to settled rule. Thus in construing any particular clause or words of a statute it is especially necessary to examine and consider the whole statute, and gather if possible from the whole the intention of the legislature.

Now in this act other sections have sole reference to the relations of ship-owners as common carriers.

Argument for the owners of the steamer.

In the fourth section, the terms "goods, wares, or merchandise, or any property whatever," are equivalent to the words in the third section, "any property, goods or merchandise," and of the words, "goods, wares, merchandise, or other property" in the sixth section; in each of which they relate solely to property of some kind put on board the vessel. And the phrase is added "on the same voyage," to confine the participation in the apportionment to the freighters for a single voyage, and not to permit the ship-owners to bring into the compensation losses sustained on prior or other voyages.

Our view has been affirmed in Massachusetts.*

If it is asked, what then do the words "for any loss, damage, or injury by collision," "or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or suffered," mean? the answer is, that having the responsibility of carrier at the common law in view, a responsibility which subjected the ship-owner for every loss not caused by the act of God, or the public enemies, some such words were necessary to cover all the grounds of their liability as carriers. It was not enough to specify "embezzlement, loss, or destruction by the master, officers, mariners, passengers, or other persons." Collision and many other acts and things might occasion loss or injury to property intrusted to them as carriers, for which but for these words they would be responsible to the full amount. The collision in the case now under consideration furnishes an illustration: for the City of Norwich having on board a valuable cargo, that cargo was lost by the collision, and that loss would be within the terms of the section. Not only so, collision and many other acts, matters, things, losses, damage, and injury might happen, be "done, occasioned, or incurred," without any fault or negligence either of the ship-owners or their masters or mariners, and be due solely to the fault or negligence of other persons, or be an accident in such sense that faulty negligence could be imputed to no one, and yet the ship-

* Walker *v.* Insurance Company, 14 Gray, 288.

owners would be liable. These classes of cases are therefore provided for, and are clearly within the design and object of the statute. There is, therefore, a large field for the operation of all the words of the third section, without extending their meaning to an injury to another vessel or goods on board thereof.

II. The act is made up from the English statutes of 7 George II, 1734, 26 George III, 1786, and 53 George III, 1813, and from a Massachusetts statute of 1818, and a Maine statute of 1821. Many of its provisions are taken bodily from those statutes, and their language cannot be interpreted without recurring to the history of that legislation.

Now the decision in *Boucher* v. *Lawson*,* that the ship-owner was answerable for an embezzlement of the cargo by the master, occasioned the statute 7 George II. This statute limited the owner's liability in respect of the *wrongful* acts of the master and mariners, such as "embezzlement or *other malversation.*" "This act," said Buller, J., in *Sutton* v. *Mitchell*,† "is as strong as possible, and was meant to protect the owner against all *treachery in the master or mariners.*" It was passed for the protection of the ship-owner as a carrier. Freighters, and owners of property on board his vessel, but no one else, were affected by the limitation it placed on his liability.

The statute of 26 George III, 1786, followed the decision in *Sutton* v. *Mitchell.* By it the ship-owner's liability was now further limited, when his freighters lost their goods by robbery or fire on board his vessel. But if his vessel had by negligence set fire to another vessel and her cargo, the statute did not relieve him from his common law responsibility. It is also certain that his liability was not limited by this act in case of any loss happening, even to his own freighters, by collision.

The statute 53 George III, 1813, which was next passed, made important innovations. It specifically contemplated two descriptions of losses, one to the cargo laden on board the ship, and the other to a disconnected ship and her cargo. It

* Reports Temp. Hardwicke, p. 85.

† 1 Term, 20.

also, for the first time, contemplated acts *omitted* to be done, "neglects," as well as acts to be done, without the fault or privity of the owner. Its main provision was as follows:

"That no person or persons who is, are, or shall be, owner or owners, a part owner or part owners, of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, *neglect*, matter, or thing done, *omitted*, or occasioned, without the fault or privity of such owner or owners, which may happen to any goods, wares, or merchandise, or other thing laden or put on board the same ship or vessel after the 1st of September, 1813, or which, after the said 1st September, 1813, *may happen to any other ship or vessel, or to any goods, wares, or merchandise, or other thing, being in or on board of any other ship or vessel*, further than the value of his or their ship or vessel, and the freight due, or to grow due, for and during the voyage, which may be in prosecution or contracted for, at the time of the happening of such loss or damage."

No language can be clearer than that which it was here deemed necessary to employ in extending the limitation to other property than that on board the ship. It was not until after, and in full view of all this legislation by Great Britain, that any act was passed in this country limiting the common law liability of the ship-owner to any extent.

Statutes of Massachusetts and Maine comprise all the legislation in the United States before the act of Congress of 1851. The act of 1851 is copied largely from them.

The statutes of Massachusetts and Maine ignore the act of 53 George III. Both relate only to the loss by embezzlement or other malversation of the master or mariners of the property on board the ship. The words which are copied into both of them from the English statute, "any act, matter, or thing, damage or forfeiture done, occasioned or incurred by the said master or mariners without the privity or knowledge of such owner," can relate, as they manifestly do in the English act, only to acts done affecting the property on board the ship.

III. But if our view in all this matter is wrong, and the

act of 1851 has the scope claimed for it on the other side, there remains the point made by the District Court, to wit, that that court cannot give relief. It is obvious that the action asked for is the action of a court of equity. But our District Courts are not courts of equity.

Moreover this proceeding is not an "appropriate proceeding" to enforce an apportionment. The defendants do not prove that they have paid or offered to pay to any one the value of their vessel; but only that certain undetermined claims for damages subsist against them. Where is the power to convert this simple proceeding between two persons into a proceeding for the condemnation of property and the apportionment of a fund in which many other persons living in various jurisdictions may be interested?

Messrs. G. B. Hibbard, E. H. Owen, and J. Halsey, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The appeal brings up all the questions in the cause. The first one is which vessel was in fault. And on this point we are satisfied from an examination of the evidence in the case with the finding of the District and Circuit Courts as to the responsibility of the steamboat for the happening of the collision. There is very strong evidence to show that the schooner's light was burning brightly, it being specially examined both before and after the collision; and that the vessel could be seen, and was seen, by another steamer a full mile off just before the collision happened. The Electra was three-fourths of a mile in rear of the City of Norwich, directly in her track, and her officers saw the schooner some time before the occurrence. They saw her one point on their port bow when the City of Norwich was dead ahead. Now, the course of the schooner was nearly at right angles to that of the two steamers. If, therefore, she was one point on the port bow of the Electra, when a mile distant, it required but little calculation to show that at that time she must have been between an eighth and a quarter of a mile from the line of direction in which the two steamers were

sailing. As she was making three or four knots an hour, and as the City of Norwich was making twelve, it must have taken the schooner, after this, two or three minutes to get up to the line of direction of the City of Norwich, during which time the latter would traverse nearly half a mile. So that when the schooner was first seen from the Electra she must have been half a mile distant from the City of Norwich, and, therefore, the theory of the claimants that she was only to be seen by reason of the lights from the City of Norwich shining on her sails, falls to the ground. If, therefore, she was seen from the Electra, more than a mile distant, she ought to have been seen from the City of Norwich, which was three-fourths of a mile nearer to her. All the circumstances mentioned by the pilot of the Electra corroborate these conclusions. He says that the schooner was a mile off from the Electra when he saw her, and that this was "*two minutes before the collision.*" He adds that the steamer City of Norwich blew her whistle immediately after the collision, and that he discovered the schooner two or three minutes before he heard the whistle. This evidence is adverted to, because it is of that circumstantial nature which often demonstrates the truth more strongly than the most positive testimony. It may be added that it is corroborated in many particulars by other evidence in the cause. As to her lights, it is admitted, or at least clearly proved, that the schooner had a green light in the proper place; but several witnesses say it was a dim light. It is proper to observe that nearly all those who say this only saw the light after the collision, the shock of which may have temporarily affected the brilliancy of the lamp. But, without pursuing the subject further, it is sufficient to say, that in our opinion the evidence is clear that the steamer was in fault in not seeing the schooner in time to prevent a collision. It was her duty to keep out of the way of the schooner; she was not only propelled by steam, but the schooner was beating against a head wind. So that every circumstance in the case cast the duty of avoiding a collision upon the steamer. Her liability is clear.

The next question is, whether the owners of the steamer are entitled to the benefits of the act of 1851, limiting the liability of ship-owners to the amount of their interest in the vessel and her freight; and, if so, whether they can have relief in the District Court in the proceedings instituted against them. This involves the true construction of that act; and, to reach this, it may be useful to take a cursory view of previous legislation on the subject in other countries as well as in this.

The history of the limitation of liability of ship-owners is matter of common knowledge. The learned opinion of Judge Ware in the case of *The Rebecca*,* leaves little to be desired on the subject. He shows that it originated in the maritime law of modern Europe; that whilst the civil, as well as the common, law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship, they were discharged.

Grotius, in his law of War and Peace,† says that men would be deterred from investing in ships if they thereby incurred the apprehension of being rendered liable to an indefinite amount by the acts of the master, and therefore, in Holland, they had never observed the Roman law on that subject, but had a regulation that the ship-owners should be bound no farther than the value of their ship and freight. The maritime law, as codified in the celebrated French Ordonnance de la Marine, in 1681, expressed the rule thus: "The proprietors of vessels shall be responsible for the acts of the master, but they shall be discharged by abandoning the ship and freight." Valin, in his commentary on this

* Ware, 187, 194.

† Book 2, c. 11, § 13. His words are: "*Navis et eorum quae in navi sunt*," "the ship and goods therein." But he is speaking of the owner's interest; and this, as to the cargo, is the freight thereon; and in that sense he is understood by the commentators.—Boulay Paty, Droit Maritime, tit. 3, § 1, p. 276.

passage,* after specifying certain engagements of the master which are binding on the owners, without any limit of responsibility, such as contracts for the benefit of the vessel, made during the voyage (except contracts of bottomry), says: "With these exceptions it is just that the owner should not be bound for the acts of the master, except to the amount of the ship and freight. Otherwise he would run the risk of being ruined by the bad faith or negligence of his captain, and the apprehension of this would be fatal to the interests of navigation. It is quite sufficient that he be exposed to the loss of his ship and of the freight, to make it his interest, independently of any goods he may have on board, to select a reliable captain." Pardessus says:† "The owner is bound civilly for all delinquencies committed by the captain within the scope of his authority, but he may discharge himself therefrom by abandoning the ship and freight; and, if they are lost, it suffices for his discharge, to surrender all claims in respect of the ship and its freight," such as insurance, &c.

The same general doctrine is laid down by many other writers on maritime law. So that it is evident that, by this law, the owner's liability was coextensive with his interest in the vessel and its freight, and ceased by his abandonment and surrender of these to the parties sustaining loss.

This rule, to a partial extent, was adopted in England by the act of 7 George II, passed in 1734. By this act, after reciting that it was of the greatest consequence to the kingdom to promote the increase of the number of ships, and to prevent any discouragement to merchants and others from being interested and concerned therein, it was enacted that no shipowner should be responsible for loss or damage to goods on board the ship by embezzlement of the master or mariners, without his privity or knowledge, further than the value of the ship and her appurtenances, and the freight due thereon for the voyage; and, if greater damage occurred, it should be averaged among those who sustained it. By 26 George

* Lib. 2, tit. 8, art 2.

† Droit Commercial, part 3, tit. 2, c. 3, § 2.

III (1786) this limitation of liability was extended to robbery and to losses in which the master and mariners had no part, and liability for loss by fire was entirely removed, as well as liability for loss of gold and jewelry, unless its nature and value were disclosed. By 53 George III (1813), the liability limitation of ship-owners was still further extended to cases of loss by *negligence* of the master and mariners, and to damage done to other ships and their cargoes, including of course, cases of collision. In the first two of these statutes it was provided that if the loss or damage fell on more than one party, either the parties injured or the ship-owners might file a bill in equity to ascertain the whole amount of loss on the one side and the value of the offending vessel and her freight on the other, so as to have a proper distribution of the latter, *pro rata*, amongst those who sustained damage. The last statute gave this remedy to the ship-owners alone, it being for their benefit and intended to prevent a multiplicity of suits against them. But they were obliged to pay the value of the vessel and her freight into court, or to give security for the amount, and to acknowledge their liability, inasmuch as the court of chancery would not investigate the question of liability. That being done, they were entitled to a stay of all suits brought against them for damages.*

Under these statutes the English courts, since the passage of the act of 53 George III (the question does not seem to have arisen before), have held that the value of the ship and freight was to be estimated as it stood immediately prior to the injury, so that if the ship were lost by the occurrence which caused it, or at any subsequent period before the completion of the voyage, the ship-owners were still liable for that value. The statutes contained no provision for a surrender and assignment of the ship and freight, but only for paying their value into court.† These decisions, it will

* See Abbott on Shipping, part 4, chap. 7.

† See Abbott on Shipping, part 4, chap. 7, § 5; Wilson *v.* Dickson, 2 Barnewall & Alderson, 2; Cannan *v.* Meaburn, 1 Bingham, 465; Brown *v.* Wilkinson, 15 Meeson & Welsby, 391; Dobree *v.* Schrœder, 2 Mylne & Craig,

be seen, create an important distinction between the English statute law and the maritime law.

Statutes similar in principle to the English acts were passed in 1818 and 1821 by the legislatures of Massachusetts and Maine, differing slightly in form. They limited the liability of the ship-owner to the amount of his interest in the ship and freight for any embezzlement or damage occasioned by the master or mariners without his privity or knowledge, and provided that if the loss or damage were sustained by several persons, and should be more than the value of the offending ship and its freight, either the persons so injured or the ship-owner, or both, might file a bill in equity for discovery and payment of the amount for which the owner might be liable, among those entitled thereto.

In 1841 the law of France was amended so as to operate still further to the advantage of the ship-owner, by enabling him to obtain, by abandonment of ship and freight, a complete discharge, not only from responsibility for the acts and defaults of the captain, but also for all his engagements and contracts relative to the ship and the voyage.

In the light of all this previous legislation, the act of Congress was passed in 1851. As we have seen, by the maritime law, the liability of the ship-owner was limited to his interest in the ship and freight for all torts of the master and seamen, whether by collisions or anything else, and sometimes even for the master's contracts; and his liability was so strictly limited that he was discharged by giving up that interest, or by the vessel being lost on the voyage, and the maritime courts found no difficulty in carrying this law into execution. By the English law, as constituted by acts of Parliament, the owner's liability was limited to the amount and value of ship and freight at the time of injury, for damages to cargo and damages to other vessels by collision; but from the restricted jurisdiction of the English admiralty courts, in order to get complete relief where there were many persons suffering damage, the ship-owners were

489; The Mary Caroline, 3 W. Robinson, 101; Leycester *v.* Logan, 3 Kay & Johnson, 446.

obliged to resort to a bill in chancery. The laws of Maine and Massachusetts seem to have limited the ship-owner's liability in cases of damage to cargo alone; and for complete relief, they refer him to a proceeding in equity.

The act of Congress seems to have been drawn with direct reference to all these previous laws, and with them before us, its language seems to be not difficult of construction. The first section exempts ship-owners from loss or damage by fire to goods on board the ship, unless caused by their own neglect. The second exempts the owners and master from liability for loss or damage to jewelry, precious metals, or money put on board the ship, unless its character and value be disclosed in writing. These two provisions were substantially contained in the English law of 1786. The third section, which is the one in question, is in the following words:

"The liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, *or for any loss, damage, or injury by collision*, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending."

Here the owner's liability is limited to the amount or value of his interest in the vessel and freight, but the section does not define at what time that interest is to be taken. The limitation embraces not only loss or damage happening to goods on board, but "any loss, damage, or injury by collision." The latter claim is independent of the preceding one. It cannot be read to mean, "loss or injury [to the goods on board] by collision," without an unauthorized interpolation. If it had said "loss, damage, or injury [thereto] by collision," it would have been confined to the goods on board the vessel. But it does not so read. The section as

constructed limits the ship-owners' liability in three classes of damage or wrong-happening without their privity, and by the fault or neglect of the master or other persons on board, viz.: 1st, damage to goods on board; 2d, damage by collision to other vessels and their cargoes; 3d, any other damage or forfeiture done or incurred.

In view of the fact that the limited liability of ship-owners was, by the general maritime law, extended to all acts of the master except contracts for the benefit of the ship, and in most places even to these; and of the fact, that the English statutes expressly extended it to cases of collision as well as to injuries to cargoes; we see no reason why the fair natural construction should not be given to the act of 1851, which makes an equally broad application of the rule, and there is nothing in the reason of the thing that should lead us to evade such a construction. The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the shipping interests of the country must flag and decline. Those who are willing to manage and work ships are generally unable to build and fit them. They have plenty of hardiness and personal daring and enterprise, but they have little capital. On the other hand, those who have capital, and invest it in ships, incur a very large risk in exposing their property to the hazards of the sea, and to the management of seafaring men, without making them liable for additional losses and damage to an indefinite amount. How many enterprises in mining, manufacturing, and internal improvements would be utterly impracticable if capitalists were not encouraged to invest in them through corporate institutions by which they are exempt from personal liability, or from liability except to a limited extent? The public interests require the investment of capital in ship-building, quite as much as in any of these enterprises. And if there exist good reasons for exempting innocent ship-owners from liability, beyond the amount of their interest, for loss or damage to goods carried in their vessels, precisely the same reasons exist for exempting them to the same ex-

tent from personal liability in cases of collision. In the one case as in the other, their property is in the hands of agents whom they are obliged to employ.

We are, therefore, of opinion that the respondents were entitled to the benefit of the act of 1851, as against the claim of the libellants.

But the claim of the libellants alone is not alleged to be greater than the value of the steamer and her freight. The libellants, therefore, would be entitled to receive the whole amount of this damage, if they were the only persons who sustained damage, or if, by reason of the nature of their claim, their lien was superior to that of the owners of the cargo lost on the steamer. Liens for reparation for wrong done are superior to any prior liens for money borrowed, wages, pilotage, &c. But they stand on an equality with regard to each other if they arise from the same cause.* We think, therefore, that the lien of the libellants for the loss of the schooner and her cargo, arising from the collision, is on an equality with the lien for the loss of the cargo of the steamer, from the same cause. This being so, the case for the application of the statute arises; for it is alleged by the libellants that the damage to the schooner and her cargo, together with the damage arising from the loss of the steamer's cargo, greatly exceeds the value of the steamer and her freight for the voyage.

We are, therefore, brought to the question whether the District Court had jurisdiction, under the fourth section of the act, to grant the respondents relief by any proceeding to apportion the damages.

As we have seen, it is declared by the third section that the liability of ship-owners for loss or damage, &c., shall not exceed the amount or value of their interest in the ship and her freight then pending. And by the fourth section it is provided:

"If any such embezzlement, loss, or destruction shall be suffered by several freighters *or owners* of goods, wares, or

* Maclachlan on Merchant Shipping, 598.

merchandise, or *any property whatever*, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses, and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer all claims and proceedings against the owner or owners shall cease."

The act does not state what court shall be resorted to, nor what proceedings shall be taken; but that the parties, or any of them, may take "*the appropriate proceedings in any court*, for the purpose of apportioning the sum for which, &c." Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the Circuit Courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the State courts have not the requisite jurisdiction. Unless, therefore, the District Courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution.

This is never to be done if it can be avoided. We have no doubt that the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding.

It is to be observed, however, that if the ship-owner desires the intervention of the court, it will not be sufficient for him simply to ask for a *pro rata* reduction of the libellants' damages, without, in some manner, tendering the corresponding *pro rata* compensation to which other parties, whose claims he sets up against the libellants, are entitled. Otherwise, he might reduce the libellants' claim without ever being obliged to respond to the other parties. The libellants are, in fact, directly interested in the existence or non-existence of the other claims for damage. If these are established, they must suffer an abatement; if not, they will be entitled to recover their entire damage. It follows, therefore, that the ship-owner must either admit the claims for damage which he thus sets up, or must ask the court to have them adjudicated. In the English practice, as the court of chancery does not investigate demands in admiralty, it required the complainant (the ship-owner) to admit his liability in advance. This is, perhaps, not necessary in an admiralty court. But it is, at least, necessary that proceedings should be instituted for ascertaining the coexisting claims which are to antagonize and operate as a means of reducing the claim of the libellants.

But in order to proceed regularly the court must have possession of the limited liability fund—that is, the proceeds or value of the ship and freight. It cannot distribute a fund of which it has not the possession. If the vessel were libelled, and either sold or appraised, and her value deposited in court, this sum, together with the amount of the freight (when proper to be added), would constitute the *res*, or fund for distribution. The case would then be free from difficulty. But the present case is a libel *in personam* in the District of Connecticut, and the steamer has, in fact, been

libelled in the Eastern District of New York, and she, or her value, is detained there. The respondents have not paid, or offered to pay, the fund into the District Court for the District of Connecticut. Nor do they allege that they have applied to the District Court for the Eastern District of New York, where the fund is, to apportion the damages incurred. Had they done this, that court might have acquired jurisdiction of the case, and made it the duty of the District Court of Connecticut, on being duly certified of the fact, to suspend further proceedings and leave the libellants to present their claim in the court of New York.

The proper course of proceeding for obtaining the benefit of the act would seem to be this: When a libel for damage is filed, either against the ship *in rem* or the owners *in personam*, the latter (whether with or without an answer to the merits) should file a proper petition for an apportionment of the damages according to the statute, and should pay into court (if the vessel or its proceeds is not already there), or give due stipulation for, such sum as the court may, by proper inquiry, find to be the amount of the limited liability, or else surrender the ship and freight by assigning them to a trustee in the manner pointed out in the fourth section. Having done this, the ship-owner will be entitled to a monition against all persons to appear and intervene *pro interesse suo*, and to an order restraining the prosecution of other suits. If an action should be brought in a State court the ship-owner should file a libel in admiralty, with a like surrender or deposit of the fund, and either plead the fact in bar in the State court or procure an order from the District Court to restrain the further prosecution of the suit. The court having jurisdiction of the case, under and by virtue of the act of Congress, would have the right to enforce its jurisdiction and to ascertain and determine the rights of the parties. For aiding parties in this behalf, and facilitating proceedings in the District Courts, we have prepared some rules which will be announced at an early day.*

* See these Rules, *supra*, vii.

The difficulty with the respondents in this case is, that they have not taken the proper steps, in the proper court, to enable them to avail themselves of the benefit of the act. The want of any uniform practice on the subject may, perhaps, be a sufficient excuse for not having done this. If proceedings are still pending in the Eastern District of New York it is not yet too late to initiate proper proceedings there for making an apportionment in the case. Meantime the decree already made must be allowed to stand at least for the purpose of showing the respondents' liability to the libellants, and the actual amount of damage which the latter have sustained, as the basis of an apportionment. The court below will be instructed to suspend further proceedings on the decree until reasonable time has been given to the respondents to take the proper steps in the District Court, where the fund is, for settling and closing up the claims of all parties interested therein.

This view of the case renders it necessary to determine another question arising in the cause for the guidance of the parties and the courts below. This is, whether the respondents, in order to avail themselves of the benefits of the act of 1851, may surrender the steamer itself, and any freight that may have accrued, under the fourth section of the act, without paying into court anything further, or whether they are bound to pay, or give security for, the value of the steamer at the time of the collision, and of the freight for the voyage. It will be necessary to know this at the first step in the proceedings. The probability is, that no freight ever actually accrued, as the cargo was never delivered in New York. Still, if the construction given by the English courts to their statute is to be followed, it matters not whether freight actually accrued or not. The owners would still be liable for what would have accrued had the voyage terminated prosperously; and it also matters not whether the steamer were lost or greatly injured. The owners would be liable for her value immediately prior to the collision.

But it will be observed that the act of Congress contains a provision for the ship-owner to discharge himself, as in the

maritime law, by giving up the vessel and her freight. This provision is not contained in any of the English or State statutes, and could not have been inserted in the act of Congress without direct reference to the like provision of the maritime codes. Could it have been inserted for any other purpose than to adopt the rule of that code? This is a question of much interest and importance.

The Supreme Court of Massachusetts, in a case much considered,* adopted the English rule, and held that a ship-owner, where the ship is lost, cannot have the benefit of the act, allowing him to relieve himself from responsibility by abandoning the ship and freight, because he cannot comply with its terms by assigning them. But surely, if the privilege exists when the vessel has been damaged at all (as it would seem that it must, if the act is to have any meaning), how can it cease to exist by any amount or degree of damage? And if the privilege exists, as long as there is anything left of the vessel to be transferred, it cannot cease when she is entirely destroyed. That would be to stand upon too nice a point of logic in giving a reasonable and practical construction to a statute. It would be to punish the unfortunate ship-owner, because his loss is total instead of partial. The late Judge Kane, of the Eastern District of Pennsylvania, in the case of *Watson* v. *Marks*,† held that the act had adopted the maritime rule, and his reasoning on the subject is very forcible and satisfactory. We do not hesitate to express our decided conviction, that the rule of the maritime law on this subject, so far as relates to torts, was intended to be adopted by the act of 1851.

It is objected, however, that the fourth section of the act does not embrace cases of damage by collision, even though they are included in the third section. But an examination of the fourth section will show that its language is very broad. Coming immediately after the provisions of the third section, which, as we have seen, provide for all kinds of loss, damage, and destruction (damage by collision in-

* Walker *v.* Insurance Company, 14 Gray, 288.

† 2 American Law Register, 157.

cluded), it says, that if any such embezzlement, loss, or destruction shall be suffered by several freighters *or owners* of goods, wares, or merchandise, or *any property whatever*, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient, &c. Surely this language is broad enough to cover damage by collision, as well as other damages. And the close connection and dependency of the two sections, require a construction to be given to the one coextensive with that given to the other, if it can possibly be done without violence to the language.

The decree of the Circuit Court will be affirmed, with directions to suspend further proceedings thereon until the respondents (the appellants in this court), shall have had such reasonable time as the Circuit Court may deem sufficient for taking the proper proceedings in the District Court for the Eastern District of New York, for apportioning the damage sustained by the various parties in this case. The costs in this court and the courts below to be equally divided between the libellants and the respondents. Also, process against the stipulators to be suspended to abide the event of the suit.

Mr. Justice STRONG was not present at the argument in this case, and took no part in the judgment.

UNITED STATES *v.* KLEIN.

1. The act of March 12th, 1863 (12 Stat. at Large, 820), to provide for the collection of abandoned and captured property in insurrectionary districts within the United States, does not confiscate, or in any case absolutely divest the property of the original owner, even though disloyal. By the seizure the government constituted itself a trustee for those who were entitled or whom it should thereafter recognize as entitled.
2. By virtue of the act of 17th July, 1862, authorizing the President to offer pardon on such conditions as he might think advisable, and the proclamation of 8th December, 1863, which promised a restoration of all rights

of property, except as to slaves, on condition that the prescribed oath be taken and kept inviolate, the persons who had faithfully accepted the conditions offered became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war.

8. The repeal, by an act of 21st January, 1867 (after the war had closed), of the act of 17th July, 1862, authorizing the executive to offer pardon, did not alter the operation of the pardon, or the obligation of Congress to give full effect to it if necessary by legislation.

4. The proviso in the appropriation act of July 12th, 1870 (16 Stat. at Large, 235), in substance—

> "That no pardon or amnesty granted by the President shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; and that no such pardon or amnesty heretofore put in evidence on behalf of any claimant in that court be considered by it, or by the appellate court on appeal from said court, in deciding upon the claim of such claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in the Court of Claims, or on appeal therefrom, . . . but that proof of loyalty (such as the proviso goes on to mention), shall be made irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And that in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant on any other proof of loyalty than such as the proviso requires, this court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction:
>
> "And further, that whenever any pardon shall have heretofore been granted by the President to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the act of March 12th, 1863; and such pardon shall recite, in substance, that such person took part in the late rebellion, or was guilty of any act of rebellion against, or disloyalty to, the United States, and such pardon shall have been accepted, in writing, by the person to whom the same issued, without an express disclaimer of and protestation against such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in and give aid and comfort to the late rebellion, and did not maintain true allegiance or consistently adhere to the United States, and on proof of such pardon and acceptance the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant"—

is in conflict with the views expressed in paragraphs 1, 2, and 3, above; and is unconstitutional and void. Its substance being that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, both in the Court of Claims and in this court; it invades the powers both of the judicial and of the executive departments of the government.

Statement of the case.

THIS was a motion by *Mr. Ackerman*, *Attorney-General*, in behalf of the United States, to remand an appeal from the Court of Claims which the government had taken in June, 1869, with a mandate that the same be dismissed for want of jurisdiction as now required by law.

The case was thus:

Congress, during the progress of the late rebellion, passed various laws to regulate the subject of forfeiture, confiscation, or appropriation to public use without compensation, of private property whether real or personal of non-combatant enemies.

The first was the act of July 13th, 1861.* It made liable to seizure and forfeiture all property passing to and fro between the loyal and insurrectionary States, and the vessels and vehicles by which it should be attempted to be conveyed.

So an act of August 6th, 1861,† subjected to seizure and forfeiture all property of every kind, used or intended to be used in aiding, abetting, or promoting the insurrection, or allowing or permitting it to be so used.

These statutes require judicial condemnation to make the forfeiture complete.

A more general law, and one upon which most of the seizures made during the rebellion was founded, is the act of July 17th, 1862.‡ It provides for the punishment of treason, and specifies its disqualifications and disabilities. In its sixth section, it provides that every person who shall be engaged in or be aiding the rebellion, and shall not cease and return to his allegiance within sixty days after proclamation made by the President of the United States, shall forfeit all his property, &c. The proclamation required by this act was issued by the President on the 25th day of July, 1862.§ The sixty days expired September 23d, 1862.

On the 12th of March, 1863, Congress passed another species of act—the one entitled "An act to provide for the

* 12 Stat. at Large, 257.
† Ib. 319.
‡ Ib. 589.
§ Id. 1266.

collection of abandoned property, &c., in insurrectionary districts within the United States." The statute authorized the Secretary of the Treasury to appoint special agents to receive and collect all abandoned or captured property in any State or Territory in insurrection: "*Provided*, That such property shall not include any kind or description which has been used, or which was intended to be used, for waging or carrying on war against the United States, such as arms, ordnance, ships, steamboats, or other watercraft, and their furniture, forage, military supplies, or munitions of war."

The statute went on:

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

Some other acts, amendatory of this one or relating to the Court of Claims, required proof of the petitioner's loyalty during the rebellion as a condition precedent to recovery.

By the already-mentioned confiscation act of July 17th, 1862, the President was authorized by proclamation to extend to persons who had participated in rebellion, pardon, and amnesty, with such exceptions, and at such times, and on such conditions as he should deem expedient for the public welfare.

And on the 8th of December, 1863, he did issue his proclamation, reciting the act, and that certain persons who had been engaged in the rebellion desired to resume their allegiance and reinaugurate loyal State governments within and for their respective States. And thereupon pro-

claimed that a full pardon should be thereby granted to them, with restoration of all rights of property, except as to slaves, and in property cases where rights of third parties shall have intervened; and upon condition that every such person shall take and subscribe a prescribed oath of allegiance, and thenceforward keep and maintain said oath inviolate, &c.

Under this proclamation, V. F. Wilson, who during the rebellion had voluntarily become the surety on the official bonds of certain officers of the rebel confederacy, and so given aid and comfort to it, took, February 15th, 1864, this oath of allegiance, and had kept the same inviolate.

He himself having died in 1865, one Klein, his administrator, filed a petition in the Court of Claims, setting forth Wilson's ownership of certain cotton which he had abandoned to the treasury agents of the United States, and which they had sold; putting the proceeds into the Treasury of the United States, where they now were, and from which the petitioner sought to obtain them. This petition was filed December 26th, 1865.

The section of the act of 1862, by which the President was authorized to extend pardon and amnesty on such conditions as he should deem expedient for the public welfare, was repealed on the 21st of January, 1867.*

The Court of Claims, on the 26th May, 1869, decided that Wilson had been entitled to receive the proceeds of his cotton, and decreed $125,300 to Klein, the administrator of his estate. An appeal was taken by the United States June 3d, following, and filed in this court on the 11th December, of the same year.

Previously to this case of Klein's the Court of Claims had had before it the case of one Padelford, quite like this one; for there also the claimant, who had abandoned his cotton and now claimed its proceeds, having participated in the rebellion, had taken the amnesty oath. The Court of Claims held that the oath cured his participation in the rebellion,

* 14 Stat. at Large, 377.

and so it gave him a decree for the proceeds of his cotton in the treasury. The United States brought that case here by appeal,* and the decree of the Court of Claims was affirmed; this court declaring that although Padelford had participated in the rebellion, yet, that having been pardoned, he was as innocent in law as though he had never participated, and that his property was purged of whatever offence he had committed and relieved from any penalty that he might have incurred. The judgment of this court, to the effect above mentioned, was publicly announced on the 30th of April, 1870.

Soon after this—the bill making appropriations for the legislative, executive, and judicial expenses of the government for the year 1870–71, then pending in Congress—the following was introduced as a proviso to an appropriation of $100,000, in the first section, for the payment of judgments in the Court of Claims, and with this proviso in it the bill became a law July 12th, 1870:†

"*Provided*, That no pardon or amnesty granted by the President, whether general or special, by proclamation or otherwise, nor any acceptance of such pardon or amnesty, nor oath taken, or other act performed in pursuance or as a condition thereof, shall be admissible in evidence on the part of any claimant in the Court of Claims as evidence in support of any claim against the United States, or to establish the standing of any claimant in said court, or his right to bring or maintain suit therein; nor shall any such pardon, amnesty, acceptance, oath, or other act as aforesaid, heretofore offered or put in evidence on behalf of any claimant in said court, be used or considered by said court, or by the appellate court on appeal from said court, in deciding upon the claim of said claimant, or any appeal therefrom, as any part of the proof to sustain the claim of the claimant, or to entitle him to maintain his action in said Court of Claims, or on appeal therefrom; but the proof of loyalty required by the Abandoned and Captured Property Act, and by the sections of several acts quoted, shall be made by proof of the matters re-

* United States v. Padelford, 9 Wallace, 531.

† 16 Stat. at Large, 235.

quired, irrespective of the effect of any executive proclamation, pardon, amnesty, or other act of condonation or oblivion. And in all cases where judgment shall have been heretofore rendered in the Court of Claims in favor of any claimant, on any other proof of loyalty than such as is above required and provided, and which is hereby declared to have been and to be the true intent and meaning of said respective acts, the Supreme Court shall, on appeal, have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction.

"*And provided further*, That whenever any pardon shall have heretofore been granted by the President of the United States to any person bringing suit in the Court of Claims for the proceeds of abandoned or captured property under the said act, approved 12th March, 1863, and the acts amendatory of the same, and such pardon shall recite in substance that such person took part in the late rebellion against the government of the United States, or was guilty of any act of rebellion against, or disloyalty to, the United States; and such pardon shall have been accepted in writing by the person to whom the same issued without an express disclaimer of, and protestation against, such fact of guilt contained in such acceptance, such pardon and acceptance shall be taken and deemed in such suit in the said Court of Claims, and on appeal therefrom, conclusive evidence that such person did take part in, and give aid and comfort to, the late rebellion, and did not maintain true allegiance or consistently adhere to the United States; and on proof of such pardon and acceptance, which proof may be heard summarily on motion or otherwise, the jurisdiction of the court in the case shall cease, and the court shall forthwith dismiss the suit of such claimant."

The motion already mentioned, of the Attorney-General, that the case be remanded to the Court of Claims with a mandate that the same be dismissed for want of jurisdiction, as *now* required by law, was, of course, founded on this enactment in the appropriation bill of July 12th, 1870.

Mr. Akerman, Attorney-General, Mr. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, in support of the motion:

The United States as sovereign are not liable to suit at

all, and if they submit themselves to suit it is *ex gratiâ*, and on such terms as they may see fit.

Accordingly the right of the Court of Claims to entertain jurisdiction of cases in which the United States are defendants, and to render judgments against them, exists only by virtue of acts of Congress granting such jurisdiction, and it is limited precisely to such cases, both in regard to *parties* and to the *cause of action*, as Congress has prescribed, which body may also define *the terms on which judgments shall be rendered against the government*, either as to classes of cases or as to individual cases.

Rules of evidence are at all times subject to legislative modification and control, and the alterations which are enacted therein by the legislature may be made applicable as well to existing as to future causes of action. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the state is exercising its acknowledged powers.

From the foregoing propositions it follows:

1. That Congress may prescribe what shall or shall not be received in evidence in support of a claim on which suit is brought against the government, or in support of the right of the claimant to maintain his suit, and, on the other hand, may declare what shall be the effect of certain evidence when offered in behalf of the government.

2. That it may withdraw entirely from the consideration of the court evidence of a particular kind in behalf of the claimant, even after the same has been submitted to and received by the court.

3. That it may, upon the presentation of proof of a certain description in behalf of the government, determine the jurisdiction of the court over the particular subject.

4. That it may, even in cases where judgment has been rendered in favor of the claimant on certain proof, and notwithstanding the proof was competent at the time of the rendering of the judgment, interpose when such cases are afterwards brought before the appellate court and require the same to be dismissed by the latter.

These different things are what are done, and no more is done by different parts of the proviso in question.

Messrs. Bartley and Casey, P. Phillips, Carlisle, McPherson, and T. D. Lincoln, arguing in this or similar cases against the motion.

The CHIEF JUSTICE delivered the opinion of the court.

The general question in this case is whether or not the proviso relating to suits for the proceeds of abandoned and captured property in the Court of Claims, contained in the appropriation act of July 12th, 1870, debars the defendant in error from recovering, as administrator of V. F. Wilson, deceased, the proceeds of certain cotton belonging to the decedent, which came into the possession of the agents of the Treasury Department as captured or abandoned property, and the proceeds of which were paid by them according to law into the Treasury of the United States.

The answer to this question requires a consideration of the rights of property, as affected by the late civil war, in the hands of citizens engaged in hostilities against the United States.

It may be said in general terms that property in the insurgent States may be distributed into four classes:

1st. That which belonged to the hostile organizations or was employed in actual hostilities on land.

2d. That which at sea became lawful subject of capture and prize.

3d. That which became the subject of confiscation.

4th. A peculiar description, known only in the recent war, called captured and abandoned property.

The first of these descriptions of property, like property of other like kind in ordinary international wars, became, wherever taken, *ipso facto*, the property of the United States.*

The second of these descriptions comprehends ships and vessels with their cargoes belonging to the insurgents or

* Halleck's International Law.

employed in aid of them; but property in these was not changed by capture alone but by regular judicial proceeding and sentence.

Accordingly it was provided in the Abandoned and Captured Property Act of March 12th, 1863,* that the property to be collected under it "shall not include any kind or description used or intended to be used for carrying on war against the United States, such as arms, ordnance, ships, steamboats and their furniture, forage, military supplies, or munitions of war."

Almost all the property of the people in the insurgent States was included in the third description, for after sixty days from the date of the President's proclamation of July 25th, 1862,† all the estates and property of those who did not cease to aid, countenance, and abet the rebellion became liable to seizure and confiscation, and it was made the duty of the President to cause the same to be seized and applied, either specifically or in the proceeds thereof, to the support of the army.‡ But it is to be observed that tribunals and proceedings were provided, by which alone such property could be condemned, and without which it remained unaffected in the possession of the proprietors.

It is thus seen that, except to property used in actual hostilities, as mentioned in the first section of the act of March 12th, 1863, no titles were divested in the insurgent States unless in pursuance of a judgment rendered after due legal proceedings. The government recognized to the fullest extent the humane maxims of the modern law of nations, which exempt private property of non-combatant enemies from capture as booty of war. Even the law of confiscation was sparingly applied. The cases were few indeed in which the property of any not engaged in actual hostilities was subjected to seizure and sale.

The spirit which animated the government received special illustration from the act under which the present case arose. We have called the property taken into the custody

* 12 Stat. at Large, 820. † Ib. 1266. ‡ Ib. 590.

of public officers under that act a peculiar species, and it was so. There is, so far as we are aware, no similar legislation mentioned in history.

The act directs the officers of the Treasury Department to take into their possession and make sale of all property abandoned by its owners or captured by the national forces, and to pay the proceeds into the national treasury.

That it was not the intention of Congress that the title to these proceeds should be divested absolutely out of the original owners of the property seems clear upon a comparison of different parts of the act.

We have already seen that those articles which became by the simple fact of capture the property of the captor, as ordnance, munitions of war, and the like, or in which third parties acquired rights which might be made absolute by decree, as ships and other vessels captured as prize, were expressly excepted from the operation of the act; and it is reasonable to infer that it was the purpose of Congress that the proceeds of the property for which the special provision of the act was made should go into the treasury without change of ownership. Certainly such was the intention in respect to the property of loyal men. That the same intention prevailed in regard to the property of owners who, though then hostile, might subsequently become loyal, appears probable from the circumstance that no provision is anywhere made for confiscation of it; while there is no trace in the statute book of intention to divest ownership of private property not excepted from the effect of this act, otherwise than by proceedings for confiscation.

In the case of Padelford we held that the right to the possession of private property was not changed until actual seizure by proper military authority, and that actual seizure by such authority did not divest the title under the provisions of the Abandoned and Captured Property Act. The reasons assigned seem fully to warrant the conclusion. The government constituted itself the trustee for those who were by that act declared entitled to the proceeds of captured and abandoned property, and for those whom it should there-

after recognize as entitled. By the act itself it was provided that any person claiming to have been the owner of such property might prefer his claim to the proceeds thereof, and, on proof that he had never given aid or comfort to the rebellion, receive the amount after deducting expenses.

This language makes the right to the remedy dependent upon proof of loyalty, but implies that there may be proof of ownership without proof of loyalty. The property of the original owner is, in no case, absolutely divested. There is, as we have already observed, no confiscation, but the proceeds of the property have passed into the possession of the government, and restoration of the property is pledged to none except to those who have continually adhered to the government. Whether restoration will be made to others, or confiscation will be enforced, is left to be determined by considerations of public policy subsequently to be developed.

It is to be observed, however, that the Abandoned and Captured Property Act was approved on the 12th of March, 1863, and on the 17th of July, 1862, Congress had already passed an act—the same which provided for confiscation—which authorized the President, "at any time hereafter, by proclamation, to extend to persons who may have participated in the existing rebellion, in any State or part thereof, pardon and amnesty, with such exceptions and at such time and on such conditions as he may deem expedient for the public welfare." The act of the 12th of March, 1863, provided for the sale of enemies' property collected under the act, and payment of the proceeds into the treasury, and left them there subject to such action as the President might take under the act of the 17th of July, 1862. What was this action?

The suggestion of pardon by Congress, for such it was, rather than authority, remained unacted on for more than a year. At length, however, on the 8th of December, 1863,* the President issued a proclamation, in which he referred to that act, and offered a full pardon, with restoration of all

* 13 Stat. at Large, 737.

rights of property, except as to slaves and property in which rights of third persons had intervened, to all, with some exceptions, who, having been engaged in the rebellion as actual participants, or as aiders or abettors, would take and keep inviolate a prescribed oath. By this oath the person seeking to avail himself of the offered pardon was required to promise that he would thenceforth support the Constitution of the United States and the union of the States thereunder, and would also abide by and support all acts of Congress and all proclamations of the President in reference to slaves, unless the same should be modified or rendered void by the decision of this court.

In his annual message, transmitted to Congress on the same day, the President said "the Constitution authorizes the Executive to grant or withhold pardon at his own absolute discretion." He asserted his power "to grant it on terms as fully established," and explained the reasons which induced him to require applicants for pardon and restoration of property to take the oath prescribed, in these words: "Laws and proclamations were enacted and put forth for the purpose of aiding in the suppression of the rebellion. To give them their fullest effect there had to be a pledge for their maintenance. In my judgment they have aided, and will further aid, the cause for which they were intended. To now abandon them would not only be to relinquish a lever of power, but would also be a cruel and astounding breach of faith. . . For these and other reasons it is thought best that support of these measures shall be included in the oath, and it is believed the Executive may lawfully claim it in return for pardon and restoration of forfeited rights, which he has clear constitutional power to withhold altogether or grant upon the terms which he shall deem wisest for the public interest."

The proclamation of pardon, by a qualifying proclamation issued on the 26th of March, 1864,* was limited to those persons only who, being yet at large and free from confine-

* 13 Stat. at Large, 741.

ment or duress, shall voluntarily come forward and take the said oath with the purpose of restoring peace and establishing the national authority.

On the 29th of May, 1865,* amnesty and pardon, with the restoration of the rights of property except as to slaves, and that as to which legal proceedings had been instituted under laws of the United States, were again offered to all who had, directly or indirectly, participated in the rebellion, except certain persons included in fourteen classes. All who embraced this offer were required to take and subscribe an oath of like tenor with that required by the first proclamation.

On the 7th of September, 1867,† still another proclamation was issued, offering pardon and amnesty, with restoration of property, as before and on the same oath, to all but three excepted classes.

And finally, on the 4th of July, 1868,‡ a full pardon and amnesty was granted, with some exceptions, and on the 25th of December, 1868,§ without exception, unconditionally and without reservation, to all who had participated in the rebellion, with restoration of rights of property as before. No oath was required.

It is true that the section of the act of Congress which purported to authorize the proclamation of pardon and amnesty by the President was repealed on the 21st of January, 1867; but this was after the close of the war, when the act had ceased to be important as an expression of the legislative disposition to carry into effect the clemency of the Executive, and after the decision of this court that the President's power of pardon "is not subject to legislation;" that "Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders."‖ It is not important, therefore, to refer to this repealing act further than to say that it is impossible to believe, while the repealed provision was in full force, and the faith of the legis-

* 13 Stat. at Large, 758. † 15 Id. 699. ‡ Ib. 702.
§ Ib. 711. ‖ 14th January, 1867.

lature as well as the Executive was engaged to the restoration of the rights of property promised by the latter, that the proceeds of property of persons pardoned, which had been paid into the treasury, were to be withheld from them. The repeal of the section in no respect changes the national obligation, for it does not alter at all the operation of the pardon, or reduce in any degree the obligations of Congress under the Constitution to give full effect to it, if necessary, by legislation.

We conclude, therefore, that the title to the proceeds of the property which came to the possession of the government by capture or abandonment, with the exceptions already noticed, was in no case divested out of the original owner. It was for the government itself to determine whether these proceeds should be restored to the owner or not. The promise of the restoration of all rights of property decides that question affirmatively as to all persons who availed themselves of the proffered pardon. It was competent for the President to annex to his offer of pardon any conditions or qualifications he should see fit; but after those conditions and qualifications had been satisfied, the pardon and its connected promises took full effect. The restoration of the proceeds became the absolute right of the persons pardoned, on application within two years from the close of the war. It was, in fact, promised for an equivalent. "Pardon and restoration of political rights" were "in return" for the oath and its fulfilment. To refuse it would be a breach of faith not less "cruel and astounding" than to abandon the freed people whom the Executive had promised to maintain in their freedom.

What, then, was the effect of the provision of the act of 1870* upon the right of the owner of the cotton in this case? He had done certain acts which this court† has adjudged to be acts in aid of the rebellion; but he abandoned the cotton to the agent of the Treasury Department, by whom it has been sold and the proceeds paid into the Treasury of the

* 16 Stat. at Large, 235. † United States v. Padelford, 9 Wallace, 531.

United States; and he took, and has not violated, the amnesty oath under the President's proclamation. Upon this case the Court of Claims pronounced him entitled to a judgment for the net proceeds in the treasury. This decree was rendered on the 26th of May, 1869; the appeal to this court made on the 3d of June, and was filed here on the 11th of December, 1869.

The judgment of the court in the case of Padelford, which, in its essential features, was the same with this case, was rendered on the 30th of April, 1870. It affirmed the judgment of the Court of Claims in his favor.

Soon afterwards the provision in question was introduced as a proviso to the clause in the general appropriation bill, appropriating a sum of money for the payment of judgments of the Court of Claims, and became a part of the act, with perhaps little consideration in either House of Congress.

This proviso declares in substance that no pardon, acceptance, oath, or other act performed in pursuance, or as a condition of pardon, shall be admissible in evidence in support of any claim against the United States in the Court of Claims, or to establish the right of any claimant to bring suit in that court; nor, if already put in evidence, shall be used or considered on behalf of the claimant, by said court, or by the appellate court on appeal. Proof of loyalty is required to be made according to the provisions of certain statutes, irrespective of the effect of any executive proclamation, pardon, or amnesty, or act of oblivion; and when judgment has been already rendered on other proof of loyalty, the Supreme Court, on appeal, shall have no further jurisdiction of the cause, and shall dismiss the same for want of jurisdiction. It is further provided that whenever any pardon, granted to any suitor in the Court of Claims, for the proceeds of captured and abandoned property, shall recite in substance that the person pardoned took part in the late rebellion, or was guilty of any act of rebellion or disloyalty, and shall have been accepted in writing without express disclaimer and protestation against the fact so recited, such pardon or acceptance shall be taken as conclusive evidence

in the Court of Claims, and on appeal, that the claimant did give aid to the rebellion; and on proof of such pardon, or acceptance, which proof may be made summarily on motion or otherwise, the jurisdiction of the court shall cease, and the suit shall be forthwith dismissed.

The substance of this enactment is that an acceptance of a pardon, without disclaimer, shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of the rights conferred by it, both in the Court of Claims and in this court on appeal.

It was urged in argument that the right to sue the government in the Court of Claims is a matter of favor; but this seems not entirely accurate. It is as much the duty of the government as of individuals to fulfil its obligations. Before the establishment of the Court of Claims claimants could only be heard by Congress. That court was established in 1855* for the triple purpose of relieving Congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.† Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to Congress.

In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for Congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the Secretary of the Treasury of the amount required to pay each claimant.‡ This court being of opinion§ that the provision for an estimate was inconsistent with the finality essential to judicial decisions, Congress repealed that provision.‖ Since then the Court of Claims has exercised

* 10 Stat. at Large, 612. † Ib. ‡ 12 Ib. 765.
§ 2 Wallace, 561. ‖ 14 Stat. at Large, 9.

all the functions of a court, and this court has taken full jurisdiction on appeal.*

The Court of Claims is thus constituted one of those inferior courts which Congress authorizes, and has jurisdiction of contracts between the government and the citizen, from which appeal regularly lies to this court.

Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold the right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make "such exceptions from the appellate jurisdiction" as should seem to it expedient.

But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the President the effect which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal. We had already decided that it was our duty to consider them and give them effect, in cases like the present, as equivalent to proof of loyalty. It provides that whenever it shall appear that any judgment of the Court of Claims shall have been founded on such pardons, without other proof of loyalty, the Supreme Court shall have no further jurisdiction of the case and shall dismiss the same for want of jurisdiction. The proviso further declares that every pardon granted to any suitor in the Court of Claims and reciting that the person pardoned has been guilty of any act of rebellion or disloyalty, shall, if accepted in writing without disclaimer of the fact recited, be taken as conclusive evidence in that court and on appeal, of the act recited; and on proof of pardon or acceptance, summarily made on motion

* 14 Stat. at Large, 44, 391, 444.

or otherwise, the jurisdiction of the court shall cease and the suit shall be forthwith dismissed.

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it?

We think not; and thus thinking, we do not at all question what was decided in the case of *Pennsylvania* v. *Wheeling Bridge Company*.* In that case, after a decree in this court that the bridge, in the then state of the law, was a nuisance and must be abated as such, Congress passed an act legalizing the structure and making it a post-road; and the court, on a motion for process to enforce the decree, held that the bridge had ceased to be a nuisance by the exercise of the constitutional powers of Congress, and denied the motion. No arbitrary rule of decision was prescribed in that case,

* 18 Howard, 429.

but the court was left to apply its ordinary rules to the new circumstances created by the act. In the case before us no new circumstances have been created by legislation. But the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The Constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

The rule prescribed is also liable to just exception as impairing the effect of a pardon, and thus infringing the constitutional power of the Executive.

It is the intention of the Constitution that each of the great co-ordinate departments of the government—the Legislative, the Executive, and the Judicial—shall be, in its sphere, independent of the others. To the executive alone is intrusted the power of pardon; and it is granted without limit. Pardon includes amnesty. It blots out the offence pardoned and removes all its penal consequences. It may be granted on conditions. In these particular par-

dons, that no doubt might exist as to their character, restoration of property was expressly pledged, and the pardon was granted on condition that the person who availed himself of it should take and keep a prescribed oath.

Now it is clear that the legislature cannot change the effect of such a pardon any more than the executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end.

We think it unnecessary to enlarge. The simplest statement is the best.

We repeat that it is impossible to believe that this provision was not inserted in the appropriation bill through inadvertence; and that we shall not best fulfil the deliberate will of the legislature by DENYING the motion to dismiss and AFFIRMING the judgment of the Court of Claims; which is

ACCORDINGLY DONE.

Mr. Justice MILLER (with whom concurred Mr. Justice BRADLEY), dissenting.

I cannot agree to the opinion of the court just delivered in an important matter; and I regret this the more because I do agree to the proposition that the proviso to the act of July 12th, 1870, is unconstitutional, so far as it attempts to prescribe to the judiciary the effect to be given to an act of pardon or amnesty by the President. This power of pardon is confided to the President by the Constitution, and whatever may be its extent or its limits, the legislative branch of the government cannot impair its force or effect in a judicial proceeding in a constitutional court. But I have not been able to bring my mind to concur in the proposition that, under the act concerning captured and abandoned property, there remains in the former owner, who had given aid and

comfort to the rebellion, any interest whatever in the property or its proceeds when it had been sold and paid into the treasury or had been converted to the use of the public under that act. I must construe this act, as all others should be construed, by seeking the intention of its framers, and the intention to restore the proceeds of such property to the loyal citizen, and to transfer it absolutely to the government in the case of those who had given active support to the rebellion, is to me too apparent to be disregarded. In the one case the government is converted into a trustee for the former owner; in the other it appropriates it to its own use as the property of a public enemy captured in war. Can it be inferred from anything found in the statute that Congress intended that this property should ever be restored to the disloyal? I am unable to discern any such intent. But if it did, why was not some provision made by which the title of the government could at some time be made perfect, or that of the owner established? Some judicial proceeding for confiscation would seem to be necessary if there remains in the disloyal owner any right or interest whatever. But there is no such provision, and unless the *act* intended to forfeit absolutely the right of the disloyal owner, the proceeds remain in a condition where the owner cannot maintain a suit for its recovery, and the United States can obtain no perfect title to it.

This statute has recently received the attentive consideration of the court in two reported cases.

In the case of the *United States* v. *Anderson*,* in reference to the relation of the government to the money paid into the treasury under this act, and the difference between the property of the loyal and disloyal owner, the court uses language hardly consistent with the opinion just read. It says that Congress, in a spirit of liberality, constituted the government a trustee for *so much* of this property as belonged to the faithful Southern people, and while it directed that *all* of it should be sold and its proceeds paid into the treasury, gave to *this class* of persons an opportunity to establish

* 9 Wallace, 65.

their right to the proceeds. Again, it is said, that "the measure, in itself of great beneficence, was practically important only in its application to the *loyal Southern* people, and sympathy for their situation doubtless prompted Congress to pass it." These views had the unanimous concurrence of the court. If I understand the present opinion, however, it maintains that the government, in taking possession of this property and selling it, became the trustee of all the former owners, whether loyal or disloyal, and holds it for the latter until pardoned by the President, or until Congress orders it to be restored to him.

The other case which I refer to is that of *United States* v. *Padelford*.* In that case the opinion makes a labored and successful effort to show that Padelford, the owner of the property, had secured the benefit of the amnesty proclamation *before* the property was seized under the same statute we are now considering. And it bases the right of Padelford to recover its proceeds in the treasury on the fact that *before the capture* his *status* as a loyal citizen had been restored, and with it all his rights of property, although he had previously given aid and comfort to the rebellion. In this view I concurred with all my brethren. And I hold now that as long as the possession or title of property remains in the party, the pardon or the amnesty remits all right in the government to forfeit or confiscate it. But where the property has already been seized and sold, and the proceeds paid into the treasury, and it is clear that the statute contemplates no further proceeding as necessary to divest the right of the former owner, the pardon does not and cannot restore that which has thus completely passed away. And if such was not the view of the court when Padelford's case was under consideration I am at a loss to discover a reason for the extended argument in that case, in the opinion of the court, to show that he had availed himself of the amnesty before the seizure of the property. If the views now advanced are sound, it was wholly immaterial whether Padelford was pardoned before or after the seizure.

* 9 Wallace, 531.

CARROLL *v.* UNITED STATES.

In a claim by an administrator of a deceased person, against the United States, under the Abandoned and Captured Property Act of March 12th, 1863, which makes proof that the owner never gave aid or comfort to the rebellion, a condition precedent to recovery, it is no bar that the *decedent* gave such aid or comfort, the property having been taken after the decedent's death and from the administrator, and not from *him*. The owner, within the sense of the statute, was the administratrix.

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

The act of March 12th, 1863, "to provide for the collection of abandoned property in insurrectionary districts within the United States," enacts that:

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

Under this act, Mrs. Lucy Carroll, administratrix of her husband, George Carroll, presented a claim for the proceeds in the treasury of certain cotton. The husband, as appeared from the findings of the court, resided in Arkansas during the first years of the late civil war, and had raised and was owner of certain cotton. He died in September, 1863. During his life he had given aid to the rebellion.

The cotton, upon his death, came into the possession of the claimant as administratrix, and was in her possession at the time it was captured by the army of the United States. She offered evidence to establish her own loyalty, and that she never gave aid or comfort to the rebellion, which seems to have been rejected by the court. The estate was insolvent;

the creditors numerous, and there was no proof in respect to their loyalty.

The Court of Claims decided as a conclusion of law from these facts that the claimant's right as administratrix depended upon proof of the loyalty of the decedent, and, it being shown that he voluntarily gave aid and comfort to the rebellion, dismissed the petition.

Mr. B. H. Bristow, Solicitor-General, in support of the ruling below:

1. It is only in her representative capacity that Mrs. Carroll is entitled to demand the proceeds of the cotton, and her petition is framed exclusively upon this idea. Whether the cotton was seized before or after the husband's death, or whether his "claim" to the proceeds existed only after his death, the fact nevertheless remains that the only claim now presented is by his legal representative, and the relief sought is in virtue of his right. It is therefore clear that *his* loyalty alone is the proper subject of inquiry.

2. But if it be true, that the loyalty of the husband need not be proved, the requirement of the statute still exists, and can only be met by proof of the loyalty of some party beneficially interested in the property. And hence the loyalty of the heirs at law, or of the creditors, in case of an insolvent estate (as is the case here), must be proved.

If proof of the loyalty of a mere trustee or administrator be held to be a sufficient compliance with the requirement of the statute, then in all cases of the death of disloyal owners of captured and abandoned property, the interposition of a loyal representative is all that would be necessary to secure to disloyal parties the benefits of an act passed in the interest of persons who had adhered to the Union during the rebellion. Such could not have been the intention of Congress.

Mr. R. M. Corwine, contra, for the claimant.

The CHIEF JUSTICE delivered the opinion of the court.

We think that the Court of Claims erred in the decision given by it. The statute of March 12th, 1863, makes the

right to recover depend on proof of ownership of the abandoned or captured property, of right to the proceeds, and of the fact that the owner gave no aid or comfort to the rebellion. It is plain to us that the ownership to be proved was that which existed at the time of capture or abandonment, and that the right to the proceeds was that which existed at the time of the petition filed in the Court of Claims. These titles, in their nature, capable of separation, coexisted in the petitioner. True, her ownership was not absolute, nor was her right to the proceeds absolute. She could claim only in a representative capacity—first, in right of the intestate, and, secondly, as trustee for creditors and distributees. At the time of the death of the intestate the cotton was in his possession, unaffected by any proceeding in confiscation. After his death, and upon appointment of his widow as administratrix, the title vested in her unforfeited. It was a title upon which she could maintain trespass or trover.* And it was the only title to the property subsisting at the time of the capture and sale and payment of the proceeds into the treasury. The statute does not make it the duty of the court to inquire whether the intestate who had been the owner gave aid and comfort to the rebellion, but whether such aid or comfort was given by the actual owner at the time of capture. This owner, within the sense of the statute, was the administratrix. It would be much more reasonable to institute such inquiries in respect to the creditors and distributees than in respect to the intestate. But such an investigation might be endless, and could not, we think, have been contemplated by the legislature.

We think, therefore, that the Court of Claims erred in not admitting the proof offered by the petitioner, and for this cause the decree must be

REVERSED.

* Redfield on Wills, 114, 116; 1 Williams on Executors and Administrators, 596; McVaughters *v.* Elder, 2 Brevard, 313; Lawrence *v.* Wright, 23 Pickering, 129.

ARMSTRONG *v.* UNITED STATES.

1. The President's proclamation of the 25th December, 1868, granting "unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, &c., with restoration of all rights, privileges, and immunities under the Constitution, and the laws which have been made in pursuance thereof," granted pardon unconditionally and without reserve; and enables persons otherwise entitled to recover from the United States, the proceeds of captured and abandoned property, under the Abandoned and Captured Property Act, to recover it though no proof be made, as was required by that act, that the claimant never gave any aid or comfort to the rebellion.
2. The proclamation referred to, is a public act, of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect.

APPEAL from the Court of Claims.

Mrs. Armstrong filed a claim in the court below for the proceeds of certain cotton under the "Abandoned and Captured Property Act," the provisions of which are quoted in the preceding case, page 151. The Court of Claims found that the cotton was raised by the claimant; that in the latter part of 1863, or early in 1864, there were on her plantation one hundred and twenty bales of cotton, which were taken possession of by the United States military forces and removed to Little Rock, Arkansas; that, prior to July, 1864, one hundred and two bales of this cotton were in the hands of the treasury agents, and were taken and used by the military forces in the works of defence around the city of Little Rock; that sixty bales, when taken out of the defences, were identified as belonging to the claimant; and with other cotton identified as belonging to other parties, and one hundred and seventeen sacks of loose cotton which came out of the fortifications and not identified, were shipped to the treasury agent at Cincinnati, sold, and the proceeds paid into the treasury. The claimant was proved to have given no active aid to the rebellion, except that on the approach of the Union army she fled south with thirty or forty of her slaves to avoid emancipation. This was in Septem-

ber, 1863. Judgment was rendered against her on the 4th of April, 1870, and an appeal taken to this court.

Mr. R. M. Corwine, for the appellant; Mr. B. H. Bristow, contra; the argument being directed chiefly to the point of Mrs. Armstrong's loyalty, and as to how far her going south with her slaves to avoid the emancipation of them, was proof of want of it.

The CHIEF JUSTICE delivered the opinion of the court.

The "Abandoned and Captured Property Act" provides for the restoration of the proceeds of property on proof that the claimant has never given any aid or comfort to the present rebellion. The Court of Claims seem to have thought that going south with her slaves was evidence that she did give aid or comfort to the rebellion. On this point it is not now necessary that we express an opinion; for the President of the United States, on the 25th of December, 1868, issued a proclamation, reciting that "a universal amnesty and pardon for participation in said rebellion, extended to all who have borne any part therein, will tend to secure permanent peace, order, and prosperity throughout the land, and to renew and fully restore confidence and fraternal feeling among the whole people, and their respect for, and attachment to, the National government, designed by its patriotic founders for the general good;" and granting, "unconditionally, and without reservation, to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution, and the laws which have been made in pursuance thereof."*

We have recently held, in the case of the *United States* v. *Klein*,† that pardon granted upon conditions, blots out the offence, if proof is made of compliance with the conditions;

* 15 Stat. at Large, 711.

† *Supra*, p. 142.

Statement of the case.

and that the person so pardoned is entitled to the restoration of the proceeds of captured and abandoned property, if suit be brought within "two years after the suppression of the rebellion." The proclamation of the 25th of December granted pardon unconditionally and without reservation. This was a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect. The claim of the petitioner was preferred within two years. The Court of Claims, therefore, erred in not giving the petitioner the benefit of the proclamation.

Its judgment must be REVERSED, with directions to proceed

IN CONFORMITY WITH THIS OPINION.

[See the next case.]

PARGOUD *v.* UNITED STATES.

The President's proclamation of December 25th, 1868, granting pardon and amnesty unconditionally and without reservation to all who participated, directly or indirectly, in the late rebellion, relieves claimants of captured and abandoned property from proof of adhesion to the United States during the late civil war. It is unnecessary, therefore, in a claim in the Court of Claims, under that act, to prove such adhesion or personal pardon for taking part in the rebellion against the United States.

APPEAL from the Court of Claims.

Pargoud filed a claim in the court below to recover under the Abandoned and Captured Property Act, the proceeds of certain cotton. This act, as by reference to its provisions, on page 151, *supra*, will be seen, makes "proof that the claimant had never given aid or comfort to the late rebellion" a prerequisite to recovery. Pargoud's petition, however, averred no loyalty at all. On the contrary, it set forth in the first sentence of it "that he was guilty of participating in the rebellion against the United States," adding, however, "that he had been duly and legally pardoned for such participa-

tion by the President of the United States, and that he had received a pardon under the great seal dated on the 11th day of January, 1866, which had been duly accepted by him, and that his acceptance, duly notified to the Secretary of State, was now on file in the office of that department; and that he had complied with all the legal formalities in such case made and provided, and under the proclamations of amnesty and pardon issued by the President of the United States, now stands and is entitled to be considered in law as if he never had, in point of fact, participated in the late rebellion against the United States, and consequently he now avers that in legal intendment and under the allegations already made, he has at all times borne true allegiance to the government of the United States, and that he has not in any way aided, abetted, or given encouragement to the rebellion against the United States."

The Court of Claims decided against the claimant on the ground that the petition did not aver that he had given no aid or comfort to the rebellion, nor sufficiently aver a pardon by the President.

Pargoud now brought the case here, where, on a motion made by the *Attorney-General*, *Mr. Akerman*, *and supported by Mr. Bristow*, *the Solicitor-General*, to dismiss it for want of jurisdiction—they relying on the proviso to act of July 12th, 1870 (sometimes called the "Drake Amendment"), quoted *supra*, 133, in *Klein* v. *United States* (the said amendment not having been then as yet declared, by the judgment in that case, to be void), to show that the pardon ought not to be regarded—and *Mr. P. Phillips opposing the motion*—the whole matter was elaborately and ably argued.

The CHIEF JUSTICE now gave the judgment of the court.

We have recently decided, in the case of *Armstrong* v. *United States*,* that the President's proclamation of December 25th, 1868, granting pardon and amnesty unconditionally and without reservation to all who participated, directly

* *Supra*, the case immediately preceding.

or indirectly, in the late rebellion, relieves claimants of captured and abandoned property from proof of adhesion to the United States during the late civil war. It was unnecessary, therefore, to prove such adhesion or personal pardon for taking part in the rebellion against the United States.

The judgment of the Court of Claims dismissing the petition is

REVERSED.

SEMMES *v.* HARTFORD INSURANCE COMPANY.

1 A condition in a contract of insurance that no suit or action shall be sustainable unless commenced within the *time of twelve months next after the loss shall occur*, and in case such action shall be commenced after the expiration of twelve months *next after such* loss, that the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim, does not operate in case of a war between the countries of the contracting parties, as does a *statute* of limitations in like case. And under such a contract the term of twelve months, which it allowed the plaintiff for bringing his suit, does not, as it does in the case of a *statute* of limitation, open and expand itself so as to receive within it the term of legal disability created by the war and then close together at each end of that period so as to complete itself, as though the war had never occurred.

2. However, in the case of such a contract followed by a war, the disability to sue imposed on a plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss.

IN error to the Circuit Court for the District of Connecticut.

Semmes sued the City Fire Insurance Company, of Hartford, in the court below, on the 31st of October, 1866, upon a policy of insurance, for a loss which occurred on the 5th day of January, 1860. The policy as declared on showed as a condition of the contract, that payment of losses should be made in sixty days after the loss should have been ascertained and proved.

The company pleaded that by the policy itself it was expressly provided that no suit for the recovery of any claim

upon the same should be sustainable in any court unless such suit should be commenced within the term of twelve months next after any loss or damage should occur; and that in case any such suit should be commenced after the expiration of twelve months next after such loss or damage should have occurred, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced. And that the plaintiff did not commence this action against the defendants within the said period of twelve months next after the loss occurred.

To this plea there were replications setting up, among other things, that the late civil war prevented the bringing of the suit within the twelve months provided in the condition, the plaintiff being a resident and citizen of the State of Mississippi and the defendant of Connecticut during all that time.

The plea was held by the court below to present a good bar to the action, notwithstanding the effect of the war on the rights of the parties.

That court, in arriving at this conclusion, held, first, that the condition in the contract, limiting the time within which suit could be brought, was, like the statute of limitation, susceptible of such enlargement, in point of time, as was necessary to accommodate itself to the precise number of days during which the plaintiff was prevented from bringing suit by the existence of the war. And ascertaining this by a reference to certain public acts of the political departments of the government, to which it referred, found that there was, between the time at which it fixed the commencement of the war and the date of the plaintiff's loss, a certain number of days, which, added to the time between the close of the war and the commencement of the action, amounted to more than the twelve months allowed by the condition of the contract.

Judgment being given accordingly in favor of the company the plaintiff brought the case here.

The point chiefly discussed here was when the war began

and when it ceased; *Mr. W. Hamersley, for the plaintiff in error*, contending that the court below had not fixed right dates, but had fixed the commencement of the war too late and its close too early, and he himself fixing them in such a manner as that even conceding the principle asserted by the court to be a true one, and applicable to a *contract* as well as to a statute of limitation, the suit was still brought within the twelve months.

The counsel, however, denied that the principle did apply to a contract, but contended that the whole condition had been rendered impossible and so abrogated by the war, and that the plaintiff could sue at any time within the general statutory term, as he now confessedly did.

Mr. R. D. Hubbard, contra.

Mr. Justice MILLER delivered the opinion of the court.

It is not necessary, in the view which we take of the matter, to inquire whether the Circuit Court was correct in the principle by which it fixed the date, either of the commencement or cessation of the disability to sue growing out of the events of the war. For we are of opinion that the period of twelve months which the contract allowed the plaintiff for bringing his suit does not open and expand itself so as to receive within it three or four years of legal disability created by the war and then close together at each end of that period so as to complete itself, as though the war had never occurred.

It is true that, in regard to the limitation imposed by statute, this court has held that the time may be so computed, but there the law imposes the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other. If the law did not, by a necessary implication, take this time out of that prescribed by the statute, one of two things would happen: either the plaintiff would lose his right of suit by a judicial construction of law which deprived him of the right to sue yet permitted the statute to run until

it became a complete bar, or else, holding the statute under the circumstances to be no bar, the defendant would be left, after the war was over, without the protection of any limitation whatever. It was therefore necessary to adopt the time provided by the statute as limiting the right to sue, and deduct from that time the period of disability.

Such is not the case as regards this contract. The defendant has made its own special and hard provision on that subject. It is not said, as in a statute, that a plaintiff shall have twelve months from the time *his cause of action accrued* to commence suit, but twelve months from the time of *loss;* yet by another condition the loss is not payable until sixty days after it shall have been ascertained and proved. The condition is that no suit or action shall be sustainable unless commenced within the *time of twelve months next after the loss shall occur*, and in case such action shall be commenced after the expiration of twelve months *next after such* loss, the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim. Now, this contract relates to the twelve months next succeeding the occurrence of the loss, and the court has no right, as in the case of a statute, to construe it into a number of days equal to twelve months, to be made up of the days in a period of five years in which the plaintiff could lawfully have commenced his suit. So also if the plaintiff shows any reason which in law rebuts the presumption, which, on the failure to sue within twelve months, is, by the contract, made conclusive against the validity of the claim, that presumption is not revived again by the contract. It would seem that when once rebutted fully nothing but a presumption of law or presumption of fact could again revive it. There is nothing in the contract which does it, and we know of no such presumptions of law. Nor does the same evil consequence follow from removing absolutely the bar of the contract that would from removing absolutely the bar of the statute, for when the bar of the contract is removed there still remains the bar of the statute, and though the plaintiff may show by his disability to sue a sufficient answer to the twelve months provided by the con-

tract, he must still bring his suit within the reasonable time fixed by the legislative authority, that is, by the statute of limitations.

We have no doubt that the disability to sue imposed on the plaintiff by the war relieves him from the consequences of failing to bring suit within twelve months after the loss, because it rendered a compliance with that condition impossible and removes the presumption which that contract says shall be conclusive against the validity of the plaintiff's claim. That part of the contract, therefore, presents no bar to the plaintiff's right to recover.

As the Circuit Court founded its judgment on the proposition that it did, that judgment must be

REVERSED AND THE CASE REMANDED FOR A NEW TRIAL.

REICHE *v.* SMYTHE, COLLECTOR.

Where an act of 1861 exempted from duty "animals of all kinds; birds, singing and other, and land and water fowls," and a later act levied a duty of 20 per cent. "on all horses, mules, cattle, sheep, hogs, *and other live animals*," *held* that birds were not included in the terms "other live animals." The second statute must be read by the light of the first.

ERROR to the Circuit Court for the Southern District of New York; the case being thus:

The 23d section of the act of March 2d, 1861, chap. 68,* provides, that

"The importation of the articles hereinafter mentioned and embraced in this section shall be exempt from duty:

"'Animals, living, of all kinds; birds, singing and other, and land and water fowls.'"

This provision being in force, an act of May 16th, 1866,† was passed, which provided—

"That on and after the passage of this act there shall be

* 12 Stat. at Large, 193. † 14 Ib. 48.

levied, collected, and paid, on all *horses*, *mules*, *cattle*, *sheep*, *hogs*, and *other live animals* imported from foreign countries, a duty of 20 per centum *ad valorem*."

In this state of legislation, and after the passage of the second of the above-mentioned acts, one Reiche imported into New York a lot of canary and other birds, on which the collector exacted a duty of 20 per centum *ad valorem*, which was paid under protest. Reiche brought this suit in the court below to recover the money. The only inquiry was whether living birds at the date of this importation were dutiable.

The court below decided that they were, and judgment being given accordingly the importer brought the case here.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, and in support of the ruling below:

It may be urged on the other side that inasmuch as Congress, in the act of 1861, named "animals, living, of all kinds," and in the same section also mentioned "birds, singing and other," &c., the intention was to recognize a restricted meaning of the word "animals," as not including "birds," and to introduce and sanction such restricted meaning as a definition of the terms "living animals" and "live animals" when used in the revenue laws; so that when, in the act of 1866, a duty was imposed upon all live animals, without mentioning birds, the legislature must be understood to have intended that the latter should not be included, but should remain exempt.

The answer is, that the various duty acts are too full of examples of tautology and repetition to warrant such a conclusion; that they often show needless particularity in enumeration, accompanied by general terms plainly including the same things also mentioned in detail. Thus, in section 22 of the act of 1861, a duty is imposed upon "articles worn by men, women, or children, of whatever material composed," &c.; and yet, notwithstanding these comprehensive terms, there follow, in the same section, numerous particu-

lars already clearly embraced in those terms, as "bracelets, braids, chains, curls, ringlets, braces, suspenders, caps, hats," &c. Like repetitions are found in the 13th section of the act of July 14th, 1862,* and in schedule C, in the act of July 30th, 1846.†

The phrase, all "other live animals," as employed in the act of 1866, is clear, comprehensive, and explicit. The addition of the designation of birds, in a single instance, in a former act, is a casual circumstance of too slight significance to warrant a practical interpolation, in the later special statute, of an exception to its plain import.

Mr. Frederick Chase, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The act of 1866 in its terms is comprehensive enough to include birds, and all other living things endowed with sensation and the power of voluntary motion, and if there had not been previous legislation on the subject there might be some justification for the position, that Congress did not intend to narrow the meaning of the language employed. If it be true that it is the duty of the court to ascertain the meaning of the legislature from the words used in the statute and the subject-matter to which it relates, there is an equal duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention.‡ And it is fair to presume in case a special meaning were attached to certain words in a prior tariff act, that Congress intended they should have the same signification when used in a subsequent act in relation to the same subject-matter.

This act of 1861 was in force when the act of 1866—the act in controversy—was passed, and it will be seen that birds and fowls are not embraced in the term "animals," and that they are free from duty, not because they belong to the class of "living animals of all kinds," but for the

* 12 Stat at Large, 555. † 9 Id. 44.

‡ Brewer *v.* Blougher, 14 Peters, 178.

reason that they are especially designated. It is quite manifest that Congress, adopting the popular signification of the word "animals," applied it to quadrupeds, and placed birds and fowls in a different classification. Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are *in pari materiâ*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.*

If it be used in a different sense in the act of 1866, its meaning instead of being extended is narrowed, for all animals not *ejusdem generis* "with horses, mules, cattle, sheep, and hogs," are excluded from the operation of the revenue laws. By the act of 1861, living animals of all kinds, whether domesticated or not, could be imported without paying a duty. The law of 1866 steps in and imposes a duty on domestic quadrupeds, leaving the act of 1861 applicable to all other quadrupeds, and to birds and fowls.

The case of *Homer* v. *The Collector*,† is in principle not unlike this. The object of that suit was to ascertain whether, under the tariff act of 1857, almonds were placed in the category of dried fruits, on which a small duty was imposed. It was contended as the article was popularly classed among the dried fruits of the table, with raisins, dates, &c., and as it was not named specifically in the changes in the act of 1857, that it properly belonged to the schedule providing for dried fruits. But the court held that as a duty had been imposed on almonds, *eo nomine*, in previous tariff acts, the article was not, for revenue purposes, within the general term of dried fruit, although in popular language and commercial usage such was its signification.

JUDGMENT REVERSED, AND A VENIRE DE NOVO AWARDED.

* Dwarris on Statutes, pp. 701–766.

† 1 Wallace, 486.

PUMPELLY *v.* GREEN BAY COMPANY.

1. Where a plea relies on a statute authority as a defence, it must allege the facts which it asserts to be so authorized, and cannot plead generally that it complied with the statute. Hence a plea is bad which states that defendant raised the water in a lake no higher than the statute authorized, when the State forbid the water being raised above its ordinary level.
2. Where a declaration charges a defendant with overflowing the plaintiff's land by raising the water in the lake, a plea containing neither a denial of what is alleged nor authority for doing it is bad.
3. By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use.
4. And the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.
5. It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the Constitution.
6. The backing of water so as to overflow the lands of an individual, or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation.
7. This proposition is sustained by the decisions of the Supreme Court of Wisconsin construing the provision of the constitution of that State on the subject, and by many other adjudged cases in this country.
8. The cases which hold that remote and consequential injury to private property by reason of authorized public improvements is not taking such property for public use have many of them gone to the utmost limit of that principle, and some beyond it, though the principle is a sound one in its proper application to many injuries so originating.
9. Lands sold by the United States with no reservation, though bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other private property.

ERROR to the Circuit Court of the United States for the District of Wisconsin; the case being thus:

The Constitution of Wisconsin ordains that

"The property of no person shall be taken for public use without just compensation therefor."

With this provision in force as fundamental law, one Pumpelly, in September, 1867, brought trespass on the case against the Green Bay and Mississippi Canal Company for overflowing 640 acres of his land, by means of a dam erected across Fox River, the northern outlet of Lake Winnebago, by which, as the declaration averred, the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam in 1861 to the commencement of this suit; the water coming with such a violence, the declaration averred, as to tear up his trees and grass by the roots, and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him. The canal company pleaded six pleas, of which the second was the most important, but of which the fourth and sixth may also be mentioned.

This second plea was divisible, apparently, into two parts.

The *first* part set up (quoting it entire) a statute of Wisconsin Territory, approved March 10th, 1848, by which one Curtis Reed and his associates were authorized to construct a dam across Fox River, the northern outlet of Winnebago Lake, to enable them to use the waters of the river for hydraulic purposes.

The second section of the act quoted read thus:

"Said dam shall not exceed seven feet in height above high-water mark of said river: *Provided*, that said dam shall not raise the water in Lake Winnebago above its ordinary level.

"And the said Curtis Reed and his associates, their heirs and assigns, shall be subject to, and entitled to, all the benefit and provisions of the Act relating to Mills and Mill-dams, approved January 13th, 1840."

[NOTE.—"The 'Act relating to Mills and Mill-dams, approved January 13th, 1840,' thus referred to in the statute of 1848, as an act to which Reed and his associates should be subject, was an act of Wisconsin which provided a special remedy for persons whose lands were overflowed or otherwise injured by mill-dams. Section 4 was as follows:

Statement of the case.

"'Any person whose land is overflowed or otherwise injured by such dam may obtain compensation therefor upon his complaint before the District Court for the county where the land, or any part thereof, lies; provided, that no compensation shall be awarded for any damages sustained more than three years before the institution of the suit.'"

"Sections 5 to 27, inclusive, provided for the manner of prosecuting the suit, the form, effect, and mode of enforcing the judgment, and for appeals and proceedings thereon. Section 28 was thus:

"'No action shall be sustained at common law for the recovery of damages for the erecting, maintaining, or using any mill or mill-dam, except as provided in this act.'"]

The plea, still continuing its first part, averred that Reed and an associate commenced the building of this dam; that by certain legislation of Wisconsin (now become a State) it was afterwards adopted as part of the system of improving the navigation of the Fox River, and became the property of the defendants. The plea, after referring to the provisions of the act of 1848, averred

"That the said dam was built to the same height and in the same manner, and to no greater height and in no different manner from that duly authorized under and according to the provisions aforesaid, and to no greater height than was authorized by the act aforesaid, approved March 10th, 1848.

"That the said dam has ever since been and is now continued and maintained at the same and no greater height, and in the same and no different manner from that to which and in which it was originally built and erected as aforesaid."

In what might be distinguished as its second part, the plea having set forth and pleaded in the first, as already indicated, that the legislature of Wisconsin after it had become a State passed an act to provide for the improvement of the Fox and Wisconsin Rivers; that Doty and his associate accepted the terms of the act; that under the act a board of public works was organized, which, through Doty and his associate, built the dam—went on to say, that by subsequent legislation, in the years 1861 and 1866, the present defendants were made a corporation under the laws of Wisconsin,

and became possessed of the "River Improvement," so called, and of its dams, water-powers, "also all other rights, privileges, franchises, easements, and appurtenances of all kinds described in the acts of the legislature of Wisconsin, &c., . . . including the easement or right to overflow, as hereinafter mentioned." The plea then proceeded to say that by the act of building and completing the dam, &c., and by means of the waters of Lake Winnebago, Reed and Doty, and the State by its board of public works, did, as they lawfully might do, seize, and, to the extent necessary and for the purposes of a water-power and of the said improvement, take possession of the lands and premises, trees, grass, herbage, drains, ditches, &c , in the declaration mentioned, to the extent that the same were, as therein alleged, destroyed, damaged, overflowed, saturated, and subverted, and otherwise injured; that the seizure and taking possession were so made and done under claim and color of right and title duly made by virtue of the laws of Wisconsin, and that the defendant had done as lawfully it might.

THE FOURTH plea set forth the legislation authorizing the erection of the dam and the improvement of the river, the title of the defendant to the improvement and its privileges and duties in relation thereto—all as in the second plea—and alleged that the dam was completed in the year 1852; that the State, by its board of public works, seized so much of the plaintiff's land as was overflowed and as was necessary for this improvement, and ever since the completion of the dam, in 1852, that the State, its successors, and the defendant, had held, and that the defendant now held the same; that such seizure was made under claim and color of right and title, by virtue of the laws of Wisconsin; publicly and notoriously, and with the knowledge and acquiescence of the plaintiff, and under like claim and color, and in like manner had since been held; that the plaintiff, at the time of such seizure, was seized in fee and was in possession of the land described in the declaration, subject to the rights acquired by the State by its seizure and possession; that

during all the said time—*i. e.*, since the completion of the dam, in 1852—the plaintiff had been under no disability which disabled him from bringing suit.

THE SIXTH plea alleged that by the Ordinance of 1787, the act of Congress of August 7th, 1789, the act establishing the territorial government of Wisconsin, the act admitting the State of Wisconsin into the Union, the Constitution of the State of Wisconsin, and the laws of the United States and of the State of Wisconsin, it was declared that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places, &c., should be common highways and forever free; that the Fox and Wisconsin Rivers and Lake Winnebago were and ever had been of the navigable waters thus referred to; that the Fox River was a navigable water leading into the St. Lawrence.

The plea then set out the legislation in regard to the improvement, the incorporation of the Fox and Wisconsin Improvement Company, the organization, incorporation, and title of the canal company (the defendant), as set forth before, and further alleged that the dam was built and maintained under the authority of the laws of the United States and of the State of Wisconsin, and the board of public works; that as constructed and maintained, it was and is an essential portion of the works for the improvement of the navigability of the Fox and Wisconsin Rivers, and to the proper development as common navigable highways; that the ordinance, the laws of Congress and of the State, granted and assigned to the defendant, the improvement and the easement, right and privilege of overflowing, &c., the lands described in the declaration, to the extent necessary to improve the navigability of said rivers; that under a treaty with the Winnebago Indians, in 1832, the United States patented certain land (of which the plaintiff's was a part) to one Theresa Paquette; that she, the said Theresa and original grantor of the lands described in the declaration, and all the subsequent grantees thereof, including the plaintiff, purchased with full notice of, and subject to, the easement

and right aforesaid; and which easement and right was granted to the State prior to the original grant of title to plaintiff's land, which is alleged to have been in 1849.

A *general* demurrer to these three pleas being overruled by the court, the plaintiff brought the case here.

Messrs. B. J. Stevens and H. L. Palmer, in support of the ruling below:

I. The fact that our dam causes an overflow, even if the fact were conceded, does not make us liable anywhere. For the second section of the act of March 10th, 1848, gave us a right to build a dam of seven feet, or of any greater height, above high-water mark in Fox River, provided only that such dam did not raise the water in Lake Winnebago above its ordinary level. And it gave us a right to build to the seven feet, let the result be what it might. This is the fair construction of the *proviso*. Now we have pleaded that we built the dam just as the statute authorized us to build it; that is to say, conceding an overflow, that we have built it seven feet high and no more. These facts being admitted by the demurrer, the judgment was properly given for the defendant.

Further than this, the Mill-dam Act of 1840 having provided a special remedy for injuries sustained by the owners of lands overflowed by mill-dams, the remedy thus provided is the only one available to the land-owner, and excludes all others.

II. Passing to the second part of the plea, we come to a grave question in State constitutional law; but here, too, we say that the plaintiff has no claim, and that the demurrer was rightly overruled.

The Fox River being a public navigable river, and a common public highway (as it will be admitted in virtue of well-known public legislation to be), *primâ facie* and of common right belongs to the sovereign power. The lands of individuals bounded on this public navigable river and on the lakes through which it runs, and which form a part of it,

were indeed granted to those individuals by the State or National government; but neither the State nor the government thereby divested itself of the right and power of improving the navigation of the river, and may improve it without liability for remote and consequential damages to individuals.

In *Lansing* v. *Smith*,* a statute of New York authorized the construction of a basin in the Hudson at Albany, and erections whereby the docks, &c., of the plaintiff were rendered inaccessible by vessels and much depreciated in value. But it was determined that the act, although it provided no compensation for such injury, was not unconstitutional, either as taking private property for public use without compensation or as impairing the obligation of contracts; that the plaintiff had not at common law, as owner of the adjacent soil, nor by virtue of a grant from the State for land under water opposite to the shore, and under which he claimed, a right "to the natural flow of the river with which the State had no right to interfere by any erection in the bed of the river or in any other manner."

The doctrine of this case was followed in Pennsylvania, in *McKeen* v. *The Delaware Division Canal Company*.† That was an action to recover damages for injuries alleged to have been sustained by the plaintiff, by reason of the erection by the defendant of a dam across the Lehigh River for the purpose of improving the navigation of the river, which caused the water to flow back into the plaintiff's mill-race and thereby injured his fall and water-power. The court held that this was but the common case of a consequential injury, and that the injury "which followed the raising of the water in the stream to improve navigation was not a taking of his property, but one merely consequential, which he must suffer without compensation, unless the State should choose out of grace to concede it." "Every one," says the court, "who buys property on a navigable stream purchases subject to the superior rights of the Commonwealth to regulate and

* 8 Cowen, 146.

† 49 Pennsylvania State, 424.

Argument for the builders of the dam.

improve it for the benefit of all her citizens." This same view is had in numerous Pennsylvania cases;* and these cases are, we think, approved by this court in *Rundle* v. *Delaware and Raritan Canal Company*.†

In *Canal Appraisers* v. *The People*,‡ a New York case, it was determined that "if, in the improvement of the navigation of a public river, the waters of a tributary stream are so much raised as to destroy a valuable mill site situated thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws, directing compensation to be made for private property taken for public use."

To the same effect is *The People* v. *The Canal Appraisers*,§ decided in the same State by the Court of Appeals, in 1865; *Fitchburg Railroad Co.* v. *Boston and Maine Railroad Co.*,‖ in Massachusetts; *Hollister* v. *The Union Company*,¶ in Connecticut; *Commissioners of Homochitto* v. *Withers*,** in Mississippi, and *Hanson* v. *La Fayette*,†† in Louisiana.

But we must direct particular attention to the Wisconsin case of *Alexander* v. *City of Milwaukee*.‡‡ The plaintiff there owned lots on the Milwaukee River, on which he had docks and a shipyard. The city of Milwaukee, under legislative authority, constructed the existing "straight cut" harbor, for the purpose of improving navigation and promoting the interests of commerce. By reason of the construction of the harbor, the waters of the lake were from time to time driven through the cut and upon and over the plaintiff's premises, washed away his buildings, materials, and portions of the

* Monongahela Navigation Co. *v.* Coons, 6 Watts & Sergeant, 101; Susquehanna Canal Co. *v.* Wright, 9 Id. 9; Henry *v.* Pittsburg and Alleghany Bridge Co., 8 Id. 85; Monongahela Navigation Co. *v.* Coon, 6 Barr, 379; Mifflin *v.* Railroad Co., 4 Harris, 182; New York and Erie R. R. Co. *v.* Young, 9 Casey, 175; Monongahela Bridge Co. *v.* Kirk, 46 Pennsylvania State, 112; Watson *v.* P. & C. R. R. Co., 1 Wright, 469; Shrunk *v.* Schuylkill Navigation Co., 14 Sergeant & Rawle, 71.

† 14 Howard, 80.

‡ 17 Wendell, 571.

§ 33 New York, 461.

‖ 3 Cushing, 58.

¶ 9 Connecticut, 435.

** 29 Mississippi, 21.

†† 18 Louisiana, 295.

‡‡ 16 Wisconsin, 247.

lots, and filled up the channel of the river opposite the plaintiff's premises, so as to render it useless, and substantially destroyed his shipyard. The action was to recover the damages thus sustained. The Supreme Court held that the city was not liable for the consequential damages produced by the improvement to property in the vicinity of such improvement, no part of which was taken or used therefor; and "that the making of a public improvement in the vicinity of private property, which is incidentally injured thereby, or diminished in volume, but no part of which is taken or used for such improvement, is not a taking of private property for public use within the meaning of the Constitution."

Thus it seems clear that a State may, in the interest of the public, erect such works as may be deemed expedient for the purpose of improving the navigation and increasing usefulness of a navigable river, without rendering itself liable to individuals owning land bordering on such river, for injuries to their lands resulting from their overflow by reason of such improvements.

In this case, whatever has been done by way of improving the Fox River; whatever has been done by way of erecting and maintaining the dam in question, has been done by the State itself or by its express authority. The defendant's lands have not been *taken or appropriated.* They are only affected by the overflow occasioned by raising the water in Lake Winnebago. Whatever may be the extent of this injury, it is remote and consequential and without remedy.

III. The fourth and sixth pleas involve in the main the same constitutional question as here raised. The court will itself consider any points of difference.

Messrs. J. M. Gillet and D. Taylor, contra.

Mr. Justice MILLER delivered the opinion of the court.

The second plea, the most important, is technically liable to the objection that it relies on two substantially different grounds of defence, but as the demurrer was general and

not special, and as the part of it which sets up the first of these defences may be treated as mere inducement to the other, we will consider whether there is found in the plea any sufficient defence to the cause of action set out in the declaration.

This first part of the plea is clearly designed to present this defence, that the dam was authorized by statute and built in conformity to the specific requirements of the act, so that the defendants are not liable for exceeding the authority which it conferred, and that for any injury to the plaintiff's property arising from this lawful erection of the dam his only remedy was the one provided in the act referred to, concerning mills and mill-dams. As this enacted that persons whose lands were overflowed might obtain compensation upon complaint before the District Court of the county where the land lay, and that no action at common law should be sustained for such damages, except as provided in the act; if the remainder of the plea is good, it is a defence to the present suit. But this part of the plea is defective in this. It is contended by the counsel for the defendants that the second section of the act authorizes them to build their dam seven feet above high-water mark of the *river* at all events, and that the restriction that the water of the *lake* shall not be raised above its ordinary level is only applicable to such raising, if the dam should exceed the first limitation; while the counsel for the plaintiff asserts that both limitations were effectual, and that if the dam raised the water in the lake above its ordinary level the law was violated, though it may not have reached the seven feet above high-water of the river.

It will be seen that the plea, in averring that the dam, when completed, was no higher than the statute authorized, pleads a conclusion of law, and does not state the facts on which the court can construe the law for itself and ascertain if the fact pleaded is a good defence. This is bad pleading. It is also liable to the objection that it does not either deny the allegation of the declaration, that the dam raised the water in Winnebago Lake so as to overflow the plaintiff's land,

nor admit that allegation and aver that they were authorized to do so by the statute. But, as we are of opinion that the statute did not authorize the erection of a dam which would raise the water of the lake above the ordinary level, and as the plea does not deny that the dam of the defendant did so raise the water of the lake, we must hold that, so far as the plea relies on this statute as a defence, it is fatally defective.

But this same plea further alleges that the legislature of Wisconsin, after it became a State, projected a system of improving the navigation of the Fox and Wisconsin Rivers, which adopted the dam of Reid and Doty, then in process of construction, as part of that system; and that, under that act, a board of public works was established, which made such arrangements with Reid and Doty that they continued and completed the dam; and that, by subsequent legislation, changing the organization under which the work was carried on, the defendants finally became the owners of the dam, with such powers concerning the improvement of the navigation of the river as the legislature could confer in that regard. But it does not appear that any statute made provision for compensation to the plaintiff, or those similarly injured, for damages to their lands. So that the plea, as thus considered, presents substantially the defence that the State of Wisconsin, having, in the progress of its system of improving the navigation of the Fox River, authorized the erection of the dam as it now stands, without any provision for compensating the plaintiff for the injury which it does him, the defendant asserts the right, under legislative authority, to build and continue the dam without legal responsibility for those injuries.

And counsel for the defendant, with becoming candor, argue that the damages of which the plaintiff complains are such as the State had a right to inflict in improving the navigation of the Fox River, without making any compensation for them.

This requires a construction of the Constitution of Wisconsin; for though the Constitution of the United States provides that private property shall not be taken for public

use without just compensation, it is well settled that this is a limitation on the power of the Federal government, and not on the States. The Constitution of Wisconsin, however, has a provision almost identical in language, viz.: that "the property of no person shall be taken for public use without just compensation therefor."* Indeed this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no State is now without it, and the only question that we are to consider is whether the injury to plaintiff's property, as set forth in his declaration, is within its protection.

The declaration states that, by reason of the dam, the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam, in the year 1861, to the commencement of the suit in the year 1867, and the nature of the injuries set out in the declaration are such as show that it worked an almost complete destruction of the value of the land.

The argument of the defendant is that there is no *taking* of the land within the meaning of the constitutional provision, and that the damage is a consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury

* Sec. 13, Article 1.

to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors.

In the case of *Sinnickson* v. *Johnson*,* the defendant had been authorized by an act of the legislature to shorten the navigation of Salem Creek by cutting a canal, and by building a dam across the stream. The canal was well built, but the dam caused the water to overflow the plaintiff's land, for which he brought suit. Although the State of New Jersey then had no such provision in her constitution as the one cited from Wisconsin, the Supreme Court held the statute to be no protection to the action for damages. Dayton, J., said "that this power to take private property reaches back of all constitutional provisions; and it seems to have been a settled principle of universal law that the right to compensation is an incident to the exercise of that power; that the one is inseparably connected with the other; that they may be said to exist, not as separate and distinct principles, but as parts of one and the same principle." For this proposition he cites numerous authorities, but the case is mainly valuable here as showing that overflowing land by backing the water on it was considered as "taking" it within the meaning of the principle.

In the case of *Gardner* v. *Newburgh*,† Chancellor Kent granted an injunction to prevent the trustees of Newburg from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this though there was no provision in the

* 2 Harrison, New Jersey, 129. † 2 Johnson's Chancery, 162.

Constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principles and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of the defendants' counsel, would, like overflowing the land, be called only a consequential injury.

If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the Constitution it would become an instrument of oppression rather than protection to individual rights.

But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water-courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.* And perhaps no State court has given more frequent utterance to the doctrine that overflowing land by backing water on it from dams built below is within the constitutional provision, than that of Wisconsin. In numerous cases of this kind under the Mill and Mill-dam Act of that State this question has arisen, and the right of the mill-owner to flow back the water has

* Angell on Water-courses, § 465 a; Hooker *v.* New Haven and Northampton Co., 14 Connecticut, 146; Rowe *v.* Granite Bridge Co., 21 Pickering, 344; Canal Appraisers *v.* The People, 17 Wendell, 604; Lackland *v.* North Missouri Railroad Co., 31 Missouri, 180; Stevens *v.* Proprietors of Middlesex Canal, 12 Massachusetts, 466.

been repeatedly placed on the ground that it was a taking of private property for public use. It is true that the court has often expressed its doubt whether the use under that act was a public one, within the meaning of the Constitution, but it has never been doubted in any of those cases that it was such a *taking* as required compensation under the Constitution.* As it is the constitution of that State that we are called on to construe, these decisions of her Supreme Court, that overflowing land by means of a dam across a stream is taking private property, within the meaning of that instrument, are of special weight if not conclusive on us. And in several of these cases the dams were across navigable streams.

It is difficult to reconcile the case of *Alexander* v. *Milwaukee*,† with those just cited, and in its opinion the court seemed to feel the same difficulty. They assert that the weight of authority is in favor of leaving the party injured without remedy when the damage is inflicted for the public good, and is remote and consequential. There are some strong features of analogy between that case and this, but we are not prepared to say, in the face of what the Wisconsin court had previously decided, that it would hold the case before us to come within the principle of that case. At all events, as the court rests its decision upon the general weight of authority and not upon anything special in the language of the Wisconsin bill of rights, we feel at liberty to hold as we do that the case made by the plaintiff's declaration is within the protection of the constitutional principle embodied in that instrument.

We are not unaware of the numerous cases in the State courts in which the doctrine has been successfully invoked that for a consequential injury to the property of the individual arising from the prosecution of improvements of roads, streets, rivers, and other highways, for the public

* Pratt *v.* Brown, 3 Wisconsin, 613; Walker *v.* Shepardson, 4 Id. 511; Fisher *v.* Horicon Iron Co., 10 Id. 353; Newell *v.* Smith, 15 Id. 104; Goodall *v.* City of Milwaukee, 5 Id. 39; Weeks *v.* City of Milwaukee, 10 Id. 242

† 16 Wisconsin, 248.

good, there is no redress; and we do not deny that the principle is a sound one, in its proper application, to many injuries to property so originating. And when, in the exercise of our duties here, we shall be called upon to construe other State constitutions, we shall not be unmindful of the weight due to the decisions of the courts of those States. But we are of opinion that the decisions referred to have gone to the uttermost limit of sound judicial construction in favor of this principle, and, in some cases, beyond it, and that it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle. Beyond this we do not go, and this case calls us to go no further.

We are, therefore, of opinion that the second plea set up no valid defence, and that the demurrer to it should have been sustained.

The fourth plea recites substantially the same statutes, and acts of the defendants and their predecessors as the second plea, and avers that the dam was completed to its present height in 1852, and that the defendants have ever since had, used, and enjoyed the easement of overflowing the plaintiff's lands with his acquiescence, and that they had done this under color of right, and as they lawfully might do.

If this is intended as a plea of prescription for an easement the time is not long enough. It requires twenty years. If it is designed as a plea of disseizin it is bad, because it avers that the plaintiff has all the time been seized in fee and in possession of the land in controversy.

But the foundation of the plea seems to be the authority conferred by the various statutes of Wisconsin mentioned in the second plea. We have already held that the defendants

were not protected by the act of March 10th, 1848, because they exceeded the authority conferred by it, and that, as to the plaintiff's rights, the subsequent statutes were void because they contained no provision for compensation. There is, therefore, no light in which we can view this fourth plea that makes it a good one. The demurrer to it should have been sustained.

The sixth plea, after setting up all the matters alleged in the second, and also that by the Ordinance of 1787 and the subsequent legislation of Congress, the navigable streams of that territory were to be forever preserved as free highways, then avers that the land of the plaintiff came to him through a reservation in an Indian treaty in favor of one Therese Pacquett, who received a patent from the United States in 1849. It is alleged that this title came to the plaintiff burdened with an easement in favor of improving the navigation of the Fox River, which authorized the injuries complained of, and of which, therefore, he could not complain.

We do not think it necessary to consume time in proving that when the United States sells land by treaty or otherwise, and parts with the fee by patent without reservations, it retains no right to take that land for public use without just compensation, nor does it confer such a right on the State within which it lies; and that the absolute ownership and right of private property in such land is not varied by the fact that it borders on a navigable stream.

The demurrer to this plea should also have been sustained.

JUDGMENT REVERSED, and the case remanded to the Circuit Court for further proceedings

NOT INCONSISTENT WITH THIS OPINION.

STEINBACH *v.* INSURANCE COMPANY.

On a policy of insurance requiring, though in a printed part, that fire *works* should be specially written in it, and which added 50 cents on the $100 as premium for insuring them, *Held* that evidence was rightly refused to prove that they constituted "an article in the line of a German jobber and importer," the stock of which sort of dealer by a *written* description had been insured, with a privilege to keep fire *crackers*.

ERROR to the Circuit Court of the United States for Maryland.

Steinbach sued the Relief Fire Insurance Company on a policy of insurance against fire.

The subject insured was described *in writing*, as follows, in the body of the policy:

"On his stock of fancy goods, toys, and other articles in his line of business, contained in the brick building situated, &c., and now in his occupancy *as a German jobber and importer*. Privileged to keep *fire-crackers* on sale."

The premium paid was 40 cents on the $100.

It was provided in the *printed* part of the policy that

"If the premises should be used for the purpose of carrying on therein any trade or occupation, or for storing or keeping therein articles denominated hazardous, or extra hazardous, or specially hazardous, in the second class of hazards annexed to the policy, except as herein specially provided for, or hereinafter agreed to by this corporation in writing upon the policy, the policy shall be of no effect."

Among the second class of hazards, classed as hazardous No. 2, were enumerated "fire-crackers in packages," and it was stated that they add to the rate of premium 10 cents per $100. And classed as specially hazardous were "*fireworks*," it being stated that articles in that class add 50 cents or more to the rate, and to be covered must be specially written in the policy.

The plaintiff proved that the stock of goods in his store was insured in five other companies; in four of which there were the words, "fireworks permitted."

Argument for the assured.

The fire, about which there was no doubt, originated in the fireworks that the plaintiff had in store for sale; and this being admitted, the plaintiff offered to prove "that fireworks constituted an article in the line of business of a German jobber and importer." The defendant objected and the court refused to admit the evidence. The plaintiff excepted, and on writ of error brought by him after judgment against him, the question was whether, in its refusal, the court had erred.

Messrs. A. Sterling, Jr., and A. Wolff, for the plaintiff in error:

1. The written part of the policy controls the printed part.

2. For the purpose of showing that the written part of the policy covered fireworks, it was proper to prove what "articles" were in the plaintiff's "line of business as a German jobber and importer," and it was a question for the jury whether fireworks were part of the stock of fancy goods, toys, and other articles in the plaintiff's line of business.

3. Although fireworks and other articles kept on hand by the plaintiff and by persons in his line of business are enumerated in the printed part of the policy as "hazardous," "extra hazardous," or "specially hazardous," and are required, in order to be insured, to be specified in the policy in writing, yet if it can be proved that fireworks were kept on sale by the plaintiff and constituted an "article in his line of business, &c.," then fireworks are within the language of the written part, and are insured without reference to the printed part, and are in law "specified in the policy in writing."

The insurer, instead of enumerating specially all the plaintiff's stock of goods which he intended to cover by the policy, comprised them in a general description in writing, by specifying them as all articles in the plaintiff's line of business as a German jobber and importer, and thereby insured all articles so kept by the insured, and necessary for the proper carrying on of his business.

Mr. William Shepard Bryan, contra.

Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

The only question in this case arises upon the construction of the policy sued upon.

It contained a clause providing that fireworks, among other things, should be specially written in the policy. Otherwise they were not to be covered by the insurance. It is not pretended that fireworks are included under the name of fire-crackers. But the plaintiff contends that they are included in the description of "other articles in his line of business." The answer to this is, that the policy itself requires that fireworks shall be specially written in it. They are among the goods described as specially hazardous, and add 50 cents on the $100 to the ordinary rate of insurance.

It is impossible to think they are described by the general terms used in the policy. The insurance was at the ordinary rates. There can be no doubt that the evidence was properly rejected; and the judgment of the Circuit Court must, therefore, be

AFFIRMED.

PHILIP ET AL. *v.* NOCK.

The right given by the acts of February 18th, 1861, and July 20th, 1870, of appeal or writ of error without regard to the sum in controversy in questions arising under laws of the United States, granting or conferring to authors or inventors the exclusive right to their inventions or discoveries, applies to controversies between a patentee or author and alleged infringer as well as to those between rival patentees.

MOTION to dismiss an appeal from the Supreme Court of the District of Columbia.

The Judiciary Act of 1789, as is known, gives jurisdiction to this court in ordinary cases only "where the matter in dispute exceeds the sum or value of $2000."

The Patent Act of February 18th, 1861,* provides that

"From *all* judgments and decrees of any Circuit Court, ren-

* 12 Stat. at Large, 130.

dered in any action, suit, controversy, or case at law or in equity, *arising under any law of the United States granting or confirming* to authors the exclusive right to their respective writings, or to *inventors the exclusive right to their inventions or discoveries*, a writ of error or appeal, as the case may require, shall lie, at the instance of either party, to the Supreme Court of the United States, in the same manner and under the same circumstances as is now provided by law in other judgments and decrees of such Circuit Courts, *without regard to the sum or value in controversy in the action.*"

In this state of the statutory law, one Nock, inventor of locks, sued Philip & Solomon as infringers. He laid his damages at $5000 and got judgment for $500. To this Philip & Solomon took a writ of error.

After this, that is to say, July 20th, 1870, Congress passed another act,* thus:

"A writ of error or appeal to the Supreme Court of the United States shall lie from all judgments and decrees of any Circuit Court, or of any District Court exercising the jurisdiction of a Circuit Court, or of the Supreme Court of the District of Columbia or of any Territory, in any action, suit, controversy, or case, at law or in equity, *touching patent rights*, in the same manner and under the same circumstances as in other judgments and decrees of such Circuit Courts, *without regard to the sum or value in controversy.*"

Mr. G. W. Paschall, in support of his motion to dismiss:

The language of the act of 1870 is broader than that of the act of 1861; but as the former act was not passed until after this writ was taken, of course the writ, if sustainable at all, must rest on the act of 1861.

Now a suit against a naked infringer of a patent, is not within the letter, and certainly not within the spirit of that act. That act may well apply to the interference cases arising between rival patentees, or to controversies between such patentees, or those claiming under them—cases which properly involve the construction of the patent laws; where

* 16 Stat. at Large, 207.

no amount can be said to be involved, but only the rights of inventors, to the benefit of their discoveries, as against the government or other inventors — without allowing a naked trespasser the benefit of appeal simply because he disputes the validity of a patent. The assumption really is that the validity of every patent may be attacked by any trespasser in a collateral way. Is this admissible?

Mr. R. D. Mussey, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The patent law of February, 1861, gives to parties to suits arising under any law of the United States giving to inventors the exclusive right to their inventions or discoveries, a writ of error or appeal to the Supreme Court of the United States without regard to the sum in controversy. The act of 1870 does not alter the right of appeal or to a writ of error in this respect.

The motion to dismiss must, therefore, be

DENIED.

HAMPTON v. ROUSE.

In a writ of error to a joint judgment against several, all must join. The omission of one or more is an irregularity for which the writ will be dismissed; a matter often held.

THIS was a motion to dismiss a writ of error to the Circuit Court for the Southern District of Mississippi.

It appeared from the record that Wade Hampton, Wade Hampton, Jr., and J. M. Howell, were defendants in the court below to an action of ejectment, and that the bill of exceptions, on which the writ of error was sued out, was tendered by them jointly. The judgment was against the defendant in the singular, but, as the verdict was joint, this court considered it obvious that this was a mere clerical error, and that the judgment, doubtless, followed the verdict.

Statement of the case.

Wade Hampton alone prosecuted the writ of error, and there appeared to have been no summons and severance or other equivalent proceeding.*

Mr. P. Phillips, in support of the motion; Mr. W. W. Boyce, contra.

The CHIEF JUSTICE:

It has often been held that in a writ of error to a joint judgment against several, all must join; and that the omission of one or more, without such proceeding, is an irregularity for which the writ will be dismissed.† The motion in the present case must, therefore, be

GRANTED.

WELLS *v.* MCGREGOR.

1. A decree of the highest court of a State affirming an order of an inferior court, by which a motion to set aside a sheriff's return to an execution was allowed and an *alias* execution awarded, is not a "final judgment" within the meaning of the 22d section of the Judiciary Act, nor within the meaning of the 9th section of the organic act of the Territory of Montana, giving appeals from the Supreme Court of the Territory to this court.
2. Writs of error from this court must bear the teste of the Chief Justice.

MOTION, by *Mr. Robert Leech*, to dismiss a writ of error to the Supreme Court of Montana; the case being thus:

The 22d section of the Judiciary Act of 1789,‡ gives writs of error to Circuit Courts of the United States from this court in cases of "final judgment," in certain cases specified.

The 1st section of the act of September 29th, 1789, entitled "An act to regulate process in the courts of the United States,"§ provides that "all writs and processes issuing from

* See Masterson *v.* Herndon, 10 Wallace, 416.

† Williams *v.* Bank of the United States, 11 Wheaton, 414; Owings *v.* Kincannon, 7 Peters, 399; The Protector, 11 Wallace, 82.

‡ 1 Stat. at Large, 84. § Ib. 93.

a Supreme or Circuit Court shall bear the teste of the Chief Justice of the Supreme Court."

The 9th section of the act of Congress organizing the Territory of Montana, approved May 26th, 1864,* provides that "writs of error and appeals from the final decisions of the Supreme Court of said Territory, shall be allowed, and may be taken to the Supreme Court of the United States, in the same manner, and under the same regulations, as from the Circuit Courts of the United States."

The present writ of error, as the record showed, was brought to revise the decision of the Supreme Court of the Territory of Montana affirming an order of the District Court of the Third Judicial District of the Territory, by which a motion to set aside a sheriff's return to an execution was allowed, and an *alias* execution awarded. The writ bore the teste of the clerk of the Supreme Court of the Territory of Montana.

Mr. Leech in support of his motion contended, that only "final judgments" could come here, and that what was brought here was not one; and that the teste should have been by the Chief Justice of this court.

Mr. F. A. Dick, contra.

The CHIEF JUSTICE:

We have often held that such orders as that which the Supreme Court of the Territory of Montana affirmed, are within the discretion of the inferior court. They are not final judgments, within the meaning of the Judiciary Act of 1789.† Of course they are not within the meaning of the 9th section of the organic act of the Territory.‡ It appears also that the writ of error bears the teste of the clerk of the Supreme Court of the Territory of Montana, and not the teste of the Chief Justice of this court. But the statute

* 13 Stat. at Large, 88, 89.

† Cook *v.* Burnley, 11 Wallace, 676 Phillips's Practice, 66.

‡ 13 Stat. at Large, 89.

makes teste of the Chief Justice indispensable,* and we have no power to change its requirements.

On both grounds, therefore, the writ of error must be

DISMISSED.

PENNSYLVANIA COLLEGE CASES.

The legislature of Pennsylvania chartered a college "at Canonsburg," by the name of the Jefferson College, "*in* Canonsburg," giving to it a constitution and declaring that the same should "be and remain the inviolable constitution of the said college forever," and should not be "altered or alterable by any ordinance or law of the said trustees or in any other manner than by an act of the legislature" of Pennsylvania. The college becoming in need of funds put into operation a plan of endowment whereby in virtue of different specific sums named, different sorts of scholarships were created; one, *ex. gr.*, by which on paying $400 a subscriber became entitled to a perpetual scholarship, capable of being sold or bequeathed; and another by which, on payment of $1200, he became entitled to a perpetual scholarship entitling a student to tuition, room-rent, and boarding; this sort of scholarship being capable, by the terms of the subscription, of being disposed of as other property. But nothing was specified in this plan as to where this education, under the scholarships, was to be. On payment of the different subscriptions, certificates were issued by the college, certifying that A. B. had paid $——, which entitled him "to a scholarship as specified in the plan of endowment adopted by the trustees of Jefferson College, Canonsburg," &c. An act of legislature, in 1865, by consent of the trustees of the college at Canonsburg and of the trustees of another college at Washington, Pennsylvania, seven miles from Canonsburg, created a new corporation, consolidating the two corporations, vesting the funds of each in the new one, and in their separate form making them to cease, but providing that all the several liabilities of each, including the scholarships, should be assumed and discharged without diminution or abatement by the new corporation. Notwithstanding the act of Assembly, the collegiate buildings, &c., of Jefferson College were left at Canonsburg, and certain parts of the collegiate course were still pursued there; the residue being pursued at Washington College, Washington. Subsequently, in 1869—the then existing Constitution of Pennsylvania (one adopted in 1857, allowing the legislature of the State "to alter, revoke, or annul any charter of incorporation thereafter granted, whenever in their opinion it may be injurious to the citizens, . . . in such

* 1 Stat. at Large, 93.

Statement of the case.

manner, however, that no injustice shall be done to the *corporators*") being in force—a supplement to this act of 1865 was passed, "closely uniting" the several departments of the new college created by the act of 1865, and authorizing the trustees of it to locate them either at Canonsburg, Washington, or some other suitable place within the Commonwealth; they giving to whichever of the two towns named, had the college taken away from it, or to both if it was taken away from both, an academy, normal school, or other institution of a grade lower than a college, with some property of the college for its use. *Held*, that the legislature of Pennsylvania, by its act of 1869, had not passed any law violating the obligation of a contract.

ERROR in three different suits to the Supreme Court of Pennsylvania, there and here, argued and adjudged together; the case being thus:

On the 15th of January, 1802, the legislature of Pennsylvania incorporated a college in the western part of Pennsylvania known as Jefferson College. The title of the act was, "An act for the establishment of a college *at Canonsburg*, in the county of Washington, in the Commonwealth of Pennsylvania."

The preamble set forth that "the establishment of a college *at Canonsburg*," &c., "for the instruction of youth in the learned languages, in the arts and sciences, and in useful literature, would tend to diffuse information and promote the public good." The statute in its enacting part proceeded:

"SECTION 1. That there be erected and hereby is erected and *established in Canonsburg*, &c., a college, &c., under the management, direction, and government of a number of trustees, not exceeding twenty-one," &c.

"SECTION 2. The said trustees and their successors shall *forever hereafter be* one body politic and corporate, with *perpetual succession* in deed and in law, to all intents and purposes whatever, by the name, style, and title of 'The Trustees of Jefferson College, *in Canonsburg*, in the county of Washington.'"

There was given to the trustees the usual corporate powers, with all other powers, &c., usual in other colleges in the United States.

Section 3d provided for meetings of the trustees, "*at the*

town of Canonsburg," for making by-laws and ordinances for the government of the college, &c., principal and professors, &c.

Section 5th provided for the succession in the trustees, how misnomers in gifts or grants by deeds, or in devises or bequests, should be treated; adding,

"And the constitution of the said college herein and hereby declared and established, *shall be and remain the inviolable constitution of the said college forever*, and the same shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an act of the legislature of this Commonwealth."

In pursuance of this act the Jefferson College was established. Several buildings for a college were erected. The State made donations to the institution from time to time, and from these or other sources a library, as also a chemical and astronomical apparatus, was brought together.

In the year 1806, the same legislature incorporated another college, establishing it at the town of Washington, just seven miles from Canonsburg, where the former college had been established. Thus, although in the faculties of both colleges there have been from time to time professors of eminent ability and learning, and though from both colleges have come men who have done honor to the institutions in which they were reared, it yet came to pass—with the multiplicity of colleges throughout the State—that these two, so near to each other, slenderly endowed, and in a part of Pennsylvania until quite late times neither rich nor populous, never thrived; on the contrary, rather labored with existence. Accordingly, in 1853, the trustees of Jefferson College put into operation a plan of endowment whereby on the payment of $25 the subscriber to the plan became entitled to a single scholarship; on the payment of $50 to a family scholarship; on the payment of $100 to tuition for thirty years; on the payment of $400 to a perpetual scholarship, to be designated by whatever name the subscriber might select; it being provided that such a scholarship might be disposed of by sale or devised by will as any other

property; by the payment of $1200 to a scholarship in full, entitling the holder to the tuition, room-rent, and boarding of one student in perpetuity; it being provided that such a scholarship might be disposed of as any other property. But in this "Plan of Endowment," as the paper proposing it was called, nothing was said of education at Canonsburg specifically, though it was declared that when $60,000 were subscribed "the trustees of the college should issue certificates guaranteeing to the subscribers the privileges above enumerated." Of these various scholarships upwards of 1500 were sold. To each of the subscribers to this plan of endowment a certificate in this form was issued under the seal of the corporation:

"*Endowment Fund of Jefferson College, Pennsylvania.*

"This certifies that A. B. has paid —— dollars, which entitles him to the privileges of a —— scholarship, as specified in the Plan of Endowment adopted by the trustees of Jefferson College, *in Canonsburg*, in the county of Washington, transferable only on the books of the college, personally or by attorney, on presentation of this certificate.

"Witness the seal of said corporation and the signatures of the president and secretary thereof, *at Canonsburg*, the —— day of ——, A.D. 185 .

"WILLIAM JEFFREY,
President.

[CORPORATE SEAL.] "JAMES MCCULLOUGH,
Secretary."

But this scheme did not prove an entirely wise one; for though it procured a certain amount of money for an endowment fund, it brought upon the college a large body of students to be educated at rates entirely too low, and the college was deprived of its former resources of tuition fees; always very small, but still much greater than the interest on the sum which now entitled a student, and even a whole family of students, to be educated, without paying anything. Thus it was with the Jefferson College, at Canonsburg. The other college, at Washington, adopted apparently some similar

scheme and flourished no more than the Jefferson. Both colleges during the rebellion fell into a condition of debility undesirable for seats of learning.*

In this state of things, there having been a proposition to make a union of the colleges, a convention of the alumni of both was held at Pittsburg, September 27th, 1864, and the members of this convention having "discussed in a candid and fraternal spirit the proposed union of the colleges," passed a series of resolutions, of which this was the first:

"That we see the hand of Providence pointing to the union of the two ancient colleges, whose sons we are, and fixing the present as the time for the happy consummation by such evident facts as these: The great and constantly increasing number of literary institutions in the land; the urgent need in Western Pennsylvania of an eminently influential and richly endowed college; the desire for a union of Jefferson and Washington, so generally entertained, and so frequently and earnestly expressed; the proximity of the said colleges, soon to be made more apparent by the completion of a connecting railway; the very unsatisfactory condition of their antiquated buildings; the reduced number of students, partly the result of our national troubles; the inadequacy of the old salaries to meet the demands of the times and afford the professors a competent support; the difficulty of obtaining aid for either institution in its separate existence; the several offers made by liberal and reliable men to furnish large amounts of funds in case a union is effected, and depending also upon that event; the probable donation by our legislature of a valuable grant of lands given by Congress to the State for the advancement of agricultural knowledge."

The convention then went on and recommended a plan of

* The net endowment of the institution in 1865, from all sources, was about $56,100. The income of this fund, at 6 per cent., equal to $3366, aided by contingent, matriculation, and diploma fees, amounting together to about $1111 per annum, composed the resources of Jefferson College, the scholarships issued by it having cut off the revenue from tuition. The annual expenditures of the institution were in excess of its income, although the cash salary of the president was only $1200 and the highest salary paid to a professor was $800.

union for the two colleges and the procuring of appropriate legislation to effect the consolidation.

The matter in its general aspect was assented to by the boards of trustees of the respective colleges, and in the following year, March 4th, 1865, an act was passed by the legislature of Pennsylvania to carry out a union.

The title of the act was, "An act to unite the colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one corporation, under the name of Washington and Jefferson College."

Its *preamble* recites that "the trustees of those colleges (Jefferson and Washington) *have agreed upon a union* thereof, and have besought this General Assembly to *give thereto* the sanction and aid of a legislative enactment."

Section 1 united the two colleges into one corporation by the name aforesaid.

Section 2 vested all the property and funds of each in the new corporation, "and all the several liabilities of said two colleges or corporations, by either of them suffered or created, *including the scholarships heretofore granted by, and now obligatory upon each of them, are hereby imposed upon and declared to be assumed by the corporation hereby created, which shall discharge and perform the same without diminution or abatement.*"

Section 3 declared the objects of the corporation and provided how the trustees were to be selected and continued, and prescribed their powers and duties.

Section 10 directed that there should be four periods or classes of study, denominated the freshman, sophomore, junior, and senior classes.

Section 11 created two additional departments of study, the scientific and preparatory; the first to qualify students for business avocations, the second for admission to the first, or to the freshman class of the college.

Section 12 provided prospectively for an agricultural department.

Section 13 declared "that the studies of the senior, junior, and sophomore classes shall be pursued at or near *Canonsburg*, in the county of Washington, and those of the fresh

man class and of the preparatory, scientific, and agricultural departments at or near *Washington*, in said county," and provided how the income of endowment funds should be apportioned, &c.

Section 14 committed the instruction and government of the three higher classes named, to the president and professors of those classes, and the instruction and government of the freshman class and the departments, to the vice-president and professors, or instructors of their appropriate studies, &c.

Section 18 enacted:

"That from and after the organization of the corporation hereby created, as herein provided, *the colleges of Jefferson and Washington*, named in the first section of the act, *shall be dissolved*, except so far as may be found necessary to enable them to close up their business affairs and to perfect the transfer of their property and rights to the corporation by this act created."

When this new act was passed (A. D. 1865), the then existing or amended constitution of Pennsylvania,* adopted in 1857, was in force. That constitution provided that:

"The legislature shall have power to *alter, revoke, or annul any charter of incorporation hereafter conferred by or under any special or general law*, whenever, in their opinion, it may be injurious to the citizens of the Commonwealth; in such manner, however, that no injustice shall be done to the *corporators*."

Under the act of Assembly of 1865, a new state of things as prescribed by it was set in operation. But the good effects anticipated from a union on this plan did not come. The new college did not thrive. And in 1868 another convention of alumni was held, in which various resolutions were passed, among them one expressing "the conviction of the convention that a *complete consolidation* of the two departments should be immediately effected, so as to have them occupy buildings situated in *the same place*." And in consequence of this the board of trustees of the college,

* Article 1, § 26.

through a series of committees, took the matter into consideration, the result of the whole being the recommendation of further legislation, in the direction pointed out by the convention of the alumni.

"A supplement" to the act of March 4th, 1865, was then, February 26th, 1869, passed. Section 1st enacted "that as soon as the necessary preliminary arrangements could be made and suitable buildings provided, the *several departments* of Washington and Jefferson College should be closely united, and located either at Canonsburg, Washington, or some *other* suitable place *within this commonwealth*, to be fixed by the vote of not less than two-thirds of the trustees," &c.

Section 5 provided for an "academy, normal school, or other institution of lower grade than a college," to be given by the trustees to the unsuccessful one of the two places named, or to both, if the college is taken "elsewhere," with some real or personal property of the college for the use of such academy, &c.

Section 6 made it "lawful for *any* incorporated college or institution of learning, within this commonwealth, to unite with Washington and Jefferson College, and consolidate their property and funds for educational purposes, on such terms and conditions as may be agreed upon."

With the exception that this act obliged the college to be fixed somewhere in the State of Pennsylvania, it followed the exact language of a draft which had been prepared by the committee of the board of trustees of the college, and reported to it as advisable. This draft had been approved without dissent by the board, twenty-five members out of thirty-one composing it being present at the meeting; and a committee had been appointed by it to visit Harrisburg and procure its enactment.

After the supplement was obtained it was accepted by the board, and the whole college fixed at Washington, with more effective means of education, including an endowment of $50,000, made by people of that place on condition that the whole college should be so fixed.

In this state of t ings, six persons (with whom afterwards

one hundred and eight others asked to become, and were admitted, co-plaintiffs), holders of the scholarship certificates, issued as already mentioned by the trustees of Jefferson College, in 1853, filed a bill in equity, in the Supreme Court of Pennsylvania, against *the two corporations*, wherein they set forth the incorporation of Jefferson College at Canonsburg, the buildings it had erected, and the gifts and endowments which it had received and possessed; that in 1853, the trustees of the college devised and put in operation the plan of endowment already mentioned, and evidenced by certificates of scholarship, issued by them, under the corporate seal, &c.; whereby, tuition, &c., in said college, was granted to the holders, they paying into the corporate treasury therefor various sums of money, according to the grade or quantity of the scholarship, specifying it all as already stated on page 192; that one thousand five hundred of these certificates were issued, of which one thousand two hundred were yet outstanding; that the complainants, "residents of Canonsburg and its vicinity, relying upon the good faith of the said trustees, and the perpetuity of said college at Canonsburg, bought and still held such certificates of scholarships, believing that thereby they could have their sons or descendants educated at said college, in Canonsburg, without the expense and risk of sending them from home;" that on March 4th, 1865, the legislature of Pennsylvania passed the act already mentioned as of that date (reciting it), and on the 26th of February, 1869, "a supplement" to the said act of 1865 (reciting the supplement); that the trustees of Jefferson College in Canonsburg, &c., had accepted the said act of 1865, and had joined in uniting said two colleges, and had removed the freshmen class and the preparatory and scientific departments from Canonsburg to Washington, seven miles distant; and that the trustees of the college called "Washington and Jefferson College," formed under the act of 1865, were about to remove the college library, apparatus, classes, and professors from Canonsburg to Washington, and to dispose of the college buildings, &c., at Canonsburg, so as to deprive the plaintiffs of the tuition, &c., agreed to be

there given to them; and that the defendants justified the proposed action, under the supplement of 1869; that the said scholarship certificates constituted subsisting *contracts* between the complainants and the trustees of Jefferson College, in Canonsburg, &c., entitling them to have the granted tuition, &c., at that place, in the college there; and that if said acts of 1865 and 1869 were to have effect, they would be irreparably injured, and the contracts impaired; that said acts of 1865 and 1869 were invalid and unconstitutional, because impairing the obligations of subsisting contracts; and therefore repugnant to the 10th section of the first article of the Constitution of the United States, which declares that no State shall pass any law "impairing the obligation of contracts."

The *prayer* of the bill accordingly was:

1. That said acts of 1865 and 1869 be declared null and void, as repugnant to the said prohibitions, in that they undertook to change the location of the said college, its classes, buildings, and property, from Canonsburg to Washington, or elsewhere.

2. For injunction against making such change or removal.

The case came up on bill and answer. There was no dispute about facts. The question was the validity of the "supplemental" act of 1869; the question, namely, whether the contract of scholarships between the complainants and others and Jefferson College, did not interpose a constitutional barrier to any legislative grant of authority to the trustees of the college to surrender its former charter and accept a new one, by which the college was eventually removed from Canonsburg to Washington, in the same county.

At the same time was filed in the same court another bill; one by "the trustees of *Jefferson College in Canonsburg, in the county of Washington*" (the old corporation of 1802), against "Washington and Jefferson College" (the corporation of 1865), setting out their old charter of 1802, gifts and donations to carry *it* out, and specially $5000 given, bequeathed by benevolent persons to the complainants as a permanent fund, to be kept separate from other funds, for educating

poor and pious young men; the scholarships, &c., all, much as in the preceding case.

There was also filed a third bill by five persons, "members of the boards of *trustees of Washington and Jefferson.*" Their complaint being more especially of the supplement of 1869, and of its impairing the obligation of the contracts raised by the act of 1865. All three bills originated apparently in one view, and had apparently one purpose, the different forms of effort being resorted to, the one in aid of the other; and so that if one form of proceeding was found open to fatal objection, one or both of the others might be resorted to with better prospect of success.

The Supreme Court of Pennsylvania, after a full consideration of the case (Thompson, C. J., delivering its judgment), dismissed all the bills, holding in effect:

1st. That the legislation complained of did not, in point of fact, infringe the said contracts.

2d. That even if the contracts were so affected by the legislation, yet their obligation could not be said to be impaired in a legal sense, because the acceptance of the legislation by the trustees of Jefferson College concluded the complainants; and, also, 3d, because the acts of Assembly in question were passed by the legislature of Pennsylvania, in the exercise of a power so to do, reserved (as to the act of 1865) in the original charter of Jefferson College and (as to the act of 1869) given by the amended constitution of Pennylvania.

Messrs. G. W. Woodward, G. Shiras, J. Veech, and B. Crumine, for the plaintiffs in error:

The three cases may be here, as they have been elsewhere, treated as one. We proceed to discuss the principles meant to be presented, without embarrassing ourselves or the court with that which is the mere accident, outwork, and mechanism of the cases.

And we select as the case which best presents our views, the first one; that one in which the bill is filed by the holders of the scholarships.

Argument for the holders of the scholarships.

By clear and necessary implication arising from the whole transaction, and visible in the certificate given in the matter, Canonsburg is recognized as the place where the education was to be given. The *title* of the original act is, "An act for the establishment of a college at Canonsburg." The *preamble* recited that "the establishment of a college at Canonsburg would promote the public good." "The trustees and their successors, it is enacted, shall forever thereafter be one body politic and corporate, with perpetual succession, by the name of 'The Trustees of Jefferson College, in Canonsburg.'" Pursuant to this charter an institution had been established and had flourished for half a century, when the trustees devised a plan of endowment, and induced the complainants to become contributors thereto by the purchase of scholarships.

Of the 1500 scholarships sold, several hundred were bought and are held by residents of Canonsburg. All the 114 complainants are of this class. What did the contributors expect at the time the contracts were made? What did the trustees *know* that they expected? And what did the trustees themselves intend? What, in short, did all parties mean? Certainly to get the tuition from Jefferson College, at Canonsburg; from that college, *permanently* fixed there. A college is not an ambulatory institution, but a stationary one.

It is unimportant that the place of performance may have been but *implied*. Implied contracts are as much within the protection of the Constitution as express ones.

Now the place of performance in such contracts as contracts for education at a particular place is an essential part of the contract. In this case the subscriptions were largely by the people of Canonsburg, who wished to have their sons instructed without the cost and without that exposure to perils which come from sending them away from home. When you compel them to send their sons away the contract is worthless.

In *Daily* v. *The Genesee College*,* in the Supreme Court of

* Not yet in the published reports.

New York, Genesee College had been incorporated in 1849, and buildings erected at Lima, Livingston County, New York; scholarships were issued by the institution, and subscribed and paid for by the plaintiffs; subsequently, under an offer of $200,000 from the Conference of the Methodist Church, at Syracuse, New York, the trustees of the college resolved to abandon Lima and remove the college to Syracuse, and applied for an act of Assembly to authorize the removal. At that juncture a bill was filed by some of the scholarship holders, and an injunction asked for and obtained, restraining the defendants from the removal of the college. The ground upon which the injunction was put was, that in the case of a scholarship issued by a college having an established location, the *place where the tuition is to be given is an essential part of the contract.* Says Johnson, J., in his opinion granting the injunction:

"It is plain that neither party had any other place in contemplation, and that must of necessity have been the place agreed upon, as definitely and certainly as though it had been specified in the most exact and unequivocal terms in the certificate. The place of performance, in this as in all other contracts, is a material part of such contract, *and the obligation can neither be satisfied nor discharged by tender of performance at another place.*"

Suppose the trustees of Jefferson College, without having procured any legislative authority, had refused to furnish tuition at Canonsburg to the holders of scholarships, but had tendered performance in Massachusetts, Louisiana, or California, would not such conduct have been a breach of their contract? If so, is not the same conduct, when done under guise of legislative authority, equally a breach of contract, if so be that the legislature have no valid power to authorize such a departure from the obvious intent of the contract?

Then, are the holders of the scholarship contracts in any way estopped because of the act of the trustees of Jefferson College in accepting the act of 1865?

The parties to the contract in question are the trustees of

Jefferson College (the grantors), and the subscribers to the plan of endowment (the grantees named in the several scholarships). Now it is a strange state of the law, if one of the said parties, the trustees, can, by a voluntary dissolution—one not brought about by legal proceedings to forfeit for some abuse, but brought about by their own act of *procuring and accepting* an act of Assembly dissolving the corporation—escape from the obligations of their contracts.

Admitting the general rule to be that a private corporation may surrender its franchises, yet it cannot be successfully invoked by the defendants, because the trustees of Jefferson College were mere trustees, and not owners of the college fund; their powers extended to its preservation and proper application, but not to consenting to its withdrawal from the existing beneficiaries. This corporation is an eleemosynary one; and the difference between this class of corporations and corporations for gain is obvious and well settled. The latter to a large degree may do what they please. They have no interests to consult but those of their corporators. Those interests will prevent their abusing their trusts. But eleemosynary corporations are trustees of a sacred trust. For the most part they are managing the property of the departed. They are bound to respect in the highest degree the objects and directions declared by their founders and benefactors. They cannot surrender their franchises at pleasure.

The case of *State* v. *Adams** is in point. By the charter of "St. Charles College," it was required to be "an institution purely literary, affording instruction in ancient and modern languages, the sciences and liberal arts, and not including or supporting by its funds any department for instruction in systematic or polemic theology." An amendment of the charter, approved February 6th, 1847, provided that "the concurrence of the Missouri Annual Conference of the Methodist Episcopal Church South," should be requisite in filling all vacancies in the board. *Held*, that the amendment, by requiring the concurrence in the choice of curators,

* 44 Missouri, 570.

of an ecclesiastical body representing one of the religious denominations of the State, endangered, in this regard, the principles of the foundation; and, even if it did not, it changed the character of the administration of the trust, hindered the free choice of their successors, according to the will of the founder, by the men to whom he had intrusted his bounty, and essentially impaired the contract upon which he advanced it. *Held*, further, that the curators, or trustees, of an eleemosynary institution have no power over the charter, but on the contrary it is their creator and their absolute rule of conduct; that the beneficial interest in the college fund belongs neither to them nor the State, but to the beneficiaries only, who, from the nature of the case, cannot consent to any changes in the charter; *that hence its essential conditions are permanent, so far as change depends upon consent, and the acceptance of a legislative amendment to the charter of such an institution by the board of curators gives it no validity.*

The inability to make any improper legislative change is recognized also in *Allen* v. *McKeen.**

Indeed the provision in the 5th section of the original charter of Jefferson College, that the constitution of the college shall be and remain the inviolable constitution of the said college forever, and the same shall not "be altered or alterable by any ordinance or law of the said trustees," disabled the trustees from assisting in the destruction of the subject of their trust.

Admitting then, as we think it must be admitted, that the proposed changes in name, character, and location of the college, disregard what was meant to be the contract, and that the consent of the board of trustees to the act of 1865 cannot validate it, can that act be sustained as a valid exercise by the legislature of the powers reserved in the 5th section of the original charter of 1802, declaring that the constitution of the college "shall not be *altered*" in any other manner than by an act of the legislature of this Commonwealth.

1. The provision does not confer upon or reserve to the

* 1 Sumner, 300.

legislature the power to revoke and resume the franchises granted by the act of 1802, and to confer them and the property acquired under them upon a new and different corporation. A power to *alter* the constitution of the college is not a power to *revoke* and *destroy* it. A right to alter is consistent with the perpetual existence of the college.* Such a provision is only intended to meet those altered conditions of society and pursuits whereby a strict adherence to all the formal requirements of a foundation might defeat its object.

2. But, conceding that the reserved power to alter is equivalent to a power to revoke, and that a power to modify is the same thing with a power to terminate and destroy, and that the exercise of such a reserved power might be valid, as between the college and the State, still it is invalid and unconstitutional so far as third parties holding contracts affected by it, are concerned. It is apparent, upon the face of the contracts held by the complainants, that they did not contemplate the contingency of a legislative subversion of their obligation. It may be said indeed holders were bound to know that the legislature might exercise its reserved power; but this is a begging of the question. It is true, they were bound to know the reserved power of the legislature; but they also had knowledge of the limits of legislative power, and the restraints imposed by the Constitution of the United States for the guarantee and protection of contracts, and that the obligation of contracts were sacred and beyond the reach of legislative action.

In *Oldtown and Lincoln Railroad Company* v. *Veazie*,† the charter required that not less than eleven thousand shares should be subscribed before the subscription could be enforced by calls. The defendant subscribed for one thousand shares. Only nine thousand five hundred shares were subscribed in all. A supplemental act was then passed, reducing the limits to eight thousand shares. It was held that the re-

* Allen *v.* McKeen, *supra*, p. 204; Sage *v.* Dillard, 15 Ben. Monroe, 340.

† 39 Maine, 571; and see Commonwealth *v.* The Essex Company. 13 Gray, 239; Durfee *v* Old Colony Railroad, 3 Allen, 230.

served power to amend the charter did not authorize a change in the liability of the stockholders as between themselves.

Messrs. J. A. Wills and J. S. Black, contra:

The people of Canonsburg are the real complainants here; and three suits instead of one, it is understood by all, have been brought only that the chances of success may be increased by an adoption of various forms of presenting the case. Waiving technical matters—such as the obvious and conclusive one in the second suit, that there is now no such corporation as the old Jefferson College at Canonsburg, and therefore no such complainant in existence as sues in that case—we go at once to merits. All the cases alike present as their strongest feature—and their only feature with even apparent strength—the arrangement about the scholarships. They all set up a contract, and the obligation of it impaired. There is no other case.

Now the case is in *equity;* the parties ask for that which is conscionable. Such parties must have a good case in conscience themselves. But on what do they stand as their very best ground? On certain alleged contracts (of which they have had the benefit since 1853), whereby four years of instruction, including that of the preparatory department, at a respectable college is demanded for the annual interest of $50, say $3 a year; a *family* scholarship, for an indefinite number of boys, for four or five years each, for the interest of $100, say $6 a year; a perpetual scholarship, for the interest of $400, say $24 a year; a scholarship in full, entitling the holder to the tuition, room-rent, and boarding of one student in perpetuity, for the interest of $1200, say $72 a year. In point of fact, as must be obvious to all, this plan of endowment was really expected by the college to bring to it that which should be gifts. An apparent equivalent was professed to be returned as a graceful mode of asking, and that the college might not appear a mendicant. Certainly the trustees never expected that—unless exceptionally, and in cases where gratuitous education would in any event have been given—the contributors to the plan would avail them-

selves rigorously of their part of the matter. It is only the complainants—people of Canonsburg—who have done so. No college could exist on such a scheme actually enforced, as this plan set forth. It is the inequitable exaction by people like the complainants—people of Canonsburg—of what they call their *rights* under these scholarships—that Jefferson College was reduced to a condition that, in order to live at all, it had to seek union with a stronger one. The case then, to begin with, is defective in equity. And on a bill to cancel all the scholarships, a chancellor no doubt, on return of the money and interest, would give the college relief.

But if the case had full equity, how does the case stand? There are here said to be many scholarships outstanding. But the rights would be the same had only a single one been created. Yet can it be that a college by making a single contract of such a kind, puts it beyond both the power of the legislature and of itself, to do that which both may deem vital to the existence of the college, or even to give effect to the contract itself in any form? For the question may be often—as it actually was in regard to Jefferson College—a question between utter extinction and a changed form of existence.

The general right of a private corporation to surrender its franchises must be admitted. There may be some distinctions as respects eleemosynary corporations, but in cases where both corporation and State, that is to say, where grantor and grantee alike consent, the general rule can be qualified only by some plain injury to private right, in the face of what either State or corporation was bound to do.

Now here the charter of 1802 is "alterable," and may be "altered" by the legislature. The power is given in a form elliptical indeed, but abundantly plain. Admit that a power to alter is not a power to destroy, still has there been any destroying here? There is nothing either in the plan of endowment or in the certificate which makes it obligatory to give the promised education at Canonsburg. There is no "contract" that it shall be there. Nor can any one affirm

even that the trustees intended or the contributors, many of whom did not live at Canonsburg, expected that it should always be there. Here were two colleges, put in very early times, in small towns of Western Pennsylvania, within seven miles of each other; with colleges all about the State. Little sagacity is required to see that such doings could have been the fruit of nothing but of temporary village rivalries. From the days of their foundation both colleges languished, and from a short term after those days the court may well believe, what many in that region well know, that a union was contemplated. It has been contemplated these fifty years and more. The difficulty has been how to overcome the local interests, and how to dispose of the supernumerary president and professors. In view of all this—so easily to be apprehended by the court, and so well known to opposing counsel—it cannot be affirmed that it was certainly even so much as *expected* by all that the education was to be forever at Canonsburg. And the absence from the plan of endowment and the certificates given under it of any provision that it should be there, raises a probability that the matter of union was in the minds of both parties concerned. But be that as it may, an expectation is not of necessity a contract, nor the disappointment of one, an infringement of the Constitution. The only contract then is for education, &c. The whole of *that* contract is "imposed" and "assumed," "without diminution or abatement" on, and by the new college created in 1865; saved, therefore, in perfection and identity. What, therefore, the act of 1865 did was not a destruction of the right, but a change "intended to meet those altered conditions of society and pursuits, whereby a strict adherence to all the formal requirements of a foundation might defeat its object," the exact case in which opposing counsel admit that a change in the charter is an alteration and not a destruction. Such control over corporations has always been exercised in Pennsylvania, where there is no court of chancery, by the legislature as *parens patriæ*.

The case of *Daily* v. *The Genesee College* seems to have been a question between the holders of scholarships and the

trustees acting without legislative authority. And *The State* v. *Adams* goes no further than to say that the trustees of a college, even with the sanction of the State, cannot consent to an amendment of the charter of a college, the effect of which is fundamentally to change the objects, purposes, and administration of the trust. To such a doctrine we agree.

The case is thus disposed of. It may be added that the holders of the scholarships do not appear to have made any objection to the act of 1865. With that act they were apparently satisfied. If they were, then the surrender of the charter of Jefferson College, and the acceptance of the new one, was with the assent, in point of fact, of the trustees, the legislature, and the holders of scholarships; in other words, with an assent of every interest in the college. All came voluntarily into the new corporation; a corporation over which by the amended constitution of 1857, the legislature had from the hour of its creation a very large control. The holders of the scholarships are not *corporators*. Independently of which no injustice has been done them. On the contrary, they may get a good education at Washington, instead of getting no education anywhere. For Jefferson College, Canonsburg, was in the article of death, when a new and higher existence was given to it.

Mr. Justice CLIFFORD delivered the opinion of the court.

Jefferson College was incorporated on the fifteenth of January, 1802, by the name of the Trustees of Jefferson College in Canonsburg in the county of Washington, for the education of youth in the learned languages and the arts, sciences, and useful literature. By the charter it was declared that the trustees should be a body politic and corporate, with perpetual succession, in deed and in law, to all intents and purposes whatsoever, and that the constitution of the college "shall not be altered or alterable by any ordinance or law of the said trustees, nor in any other manner than by an act of the legislature of the Commonwealth."

Washington College was incorporated on the twenty-

eighth of March, 1806, by the name of The Trustees of Washington College for the education of youth in the learned and foreign languages, the useful arts, sciences, and literature, and was located in the town of Washington, seven miles distant from Jefferson College, in the same county.

Experience showed in the progress of events that the interests of both institutions would be promoted in their union, and the friends of both united in a common effort to effect that object. Application was accordingly made to the legislature for that purpose, and on the fourth of March, 1865, the legislature passed the "Act to unite the colleges of Jefferson and Washington, in the county of Washington, and to erect the same into one corporation under the name of Washington and Jefferson College." Enough is stated in the preamble of the act to show that the application was made to promote the best interests of both institutions, and that the legislative act which is the subject of complaint was passed at their united request and to sanction the union which their respective trustees had previously agreed to establish. Inconveniences resulted from the provisions contained in the thirteenth section of the act, which impliedly forbid any change in the sites of the respective colleges, and also provided that the studies of certain classes of the students should be pursued at each of the two institutions, and to that end prescribed certain rules for appropriating to each certain portions of the income derived from the funds of the institution, and the manner in which the same should be expended and applied by the trustees. Such embarrassments increasing, the legislature passed a supplementary act, providing that the several departments of the two colleges should be closely united, and that the united institution should be located as therein prescribed. Measures were also prescribed in the same act for determining the location of the united institution, and it appears that those measures, when carried into effect, resulted in fixing the location at Washington, in the county of the same name. Certain parties are dissatisfied with the new arrangement, and

Restatement of the case in the opinion.

it appears that, on the twenty-fourth of August, 1869, three bills in equity were filed in the State court, praying that the last-named act of the legislature may be declared null and void as repugnant to the ninth article of the constitution of the State, and to the tenth section of the first article of the Federal Constitution. Different parties complain in each of the several cases, but the subject-matter of the complaint involves substantially the same considerations in all the cases. Those complaining in the first case are the trustees of Jefferson College. Complainants in the second case are certain members of the board of trustees of Washington and Jefferson College, who oppose the provisions of the act of the twenty-sixth of February, 1869, and deny that the board of trustees, even by a vote of two-thirds of the members, as therein required, can properly remove the college or dispose of the college buildings as therein contemplated. Objections are made by the complainants in the last case to both the before-mentioned acts of the legislature, and they claim the right to ask the interposition of the court, upon the ground that they are owners of certain scholarships in Jefferson College, as more fully set forth in the bill of complainant, and they pray that both of the said acts of Assembly may be declared null and void for the same reasons as those set forth in the other two cases.

I. Examination of these cases will be made in the order they appear on the calendar, commencing with the case in which the trustees of Jefferson College are the complainants. They bring their bill of complaint against the two colleges as united, under the first act of Assembly passed for that purpose. Service was made and the respondents appeared and pleaded in bar that the complainants, as such trustees, duly accepted the act of Assembly creating the union of the two institutions, and that having accepted the same they, as a corporation, became dissolved and ceased to exist, and have no authority to maintain their bill of complaint. Apart from the plea in bar they also filed an answer, but as the whole issue is presented in the plea in bar it will not be necessary to enter into those details. Opposed to that plea

is the replication of the complainants, in which they deny the allegation that they, as a corporation, became dissolved or that they ceased to exist as alleged in the plea in bar, and renew their prayer for relief. Both parties were heard, and the Supreme Court of the State entered a decree for the respondents, dismissing the bill of complaint. Decrees for the respondents were also entered in the other two cases, and the respective complainants sued out writs of error under the twenty-fifth section of the Judiciary Act, and removed the respective causes into this court for re-examination.

Whether the act of Assembly in question in this case is or not repugnant to the constitution of the State is conclusively settled against the complainants by the decision in this very case, and the question is not one open to re-examination in this court, as it is not one of Federal cognizance in a case brought here by a writ of error to a State court. Nothing, therefore, remains to be examined but the second question presented in the pleadings, which is, whether the supplementary act of Assembly uniting the two institutions and providing that there should be but one location of the same for any purpose, impairs the obligation of the contract between the State and the corporation of Jefferson College, as created by the original charter; or, in other words, whether it is repugnant to the tenth section of the first article of the Federal Constitution.

Corporate franchises granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, as the grant under such circumstances becomes a contract within the protection of that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of contracts.* Charters of private corporations are regarded as executed contracts between the government and the corporators, and the rule is well settled that the legislature cannot repeal, impair, or alter such a

* Dartmouth College *v.* Woodward, 4 Wheaton, 700.

charter against the consent or without the default of the corporation judicially ascertained and declared.* Of course these remarks apply only to acts of incorporation which do not contain any reservations or provisions annexing conditions to the charter modifying and limiting the nature of the contract. Cases often arise where the legislature, in granting an act of incorporation for a private purpose, either make the duration of the charter conditional or reserve to the State the power to alter, modify, or repeal the same at pleasure. Where such a provision is incorporated in the charter it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution. Such a power also, that is the power to alter, modify, or repeal an act of incorporation, is frequently reserved to the State by a general law applicable to all acts of incorporation, or to certain classes of the same, as the case may be, in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition nor any allusion to such a reservation.† Reservations in such a charter, it is admitted, may be made, and it is also conceded that where they exist the exercise of the power reserved by a subsequent legislature does not impair the obligation of the contract created by the original act of incorporation. Subsequent legislation altering or modifying the provisions of such a charter, where there is no such reservation, is certainly unauthorized if it is prejudicial to the rights of the corporators, and was passed without their assent, but the converse of the proposition is also true, that if the new provisions altering and modifying the charter were passed with the assent of the corporation and they were duly accepted

* Fletcher *v.* Peck, 6 Cranch, 136; Terrett *v.* Taylor, 9 Id. 51.

† Dartmouth College *v.* Woodward, 4 Wheaton, 708; General Hospital *v.* Insurance Co., 4 Gray, 227; Suydam *v.* Moore, 8 Barbour, 358; Angel & Ames on Corporations (9th ed.), § 767, p. 787.

by a corporate vote as amendments to the original charter they cannot be regarded as impairing the obligation of the contract created by the original charter.* Private charters or such as are granted for the private benefit of the corporators are held to be contracts because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired without the assent of the corporators than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or in some general law of the State which was in operation at the time the charter was granted.†

Apply those principles to the case under consideration and it is quite clear that the decision of the State court was correct, as the fifth section of the charter, by necessary implication, reserves to the State the power to alter, modify, or amend the charter without any prescribed limitation. Provision is there made that the constitution of the college shall not be altered or alterable by any ordinance or law of the trustees, "nor in any other manner than by an act of the legislature of the Commonwealth," which is in all respects equivalent to an express reservation to the State to make any alterations in the charter which the legislature in its wisdom may deem fit, just, and expedient to enact, and the donors of the institution are as much bound by that provision as the trustees.‡

* Mumma *v.* Potomac Co., 8 Peters, 286; Dartmouth College *v.* Woodward, 4 Wheaton, 712; Slee *v.* Bloom, 19 Johnson, 474; Riddle *v.* Locks and Canals, 7 Massachusetts, 185; McLaren *v.* Pennington, 1 Paige's Chancery, 107; Lincoln *v.* Kennebec Bank, 1 Greenleaf, 79; Navigation Co *v.* Coon, 6 Pennsylvania State, 379; Com. *v.* Cullen, 13 Id. 133; Sprague *v.* Railroad, 19 Id. 174; Joy *v.* Jackson Co., 11 Michigan, 155.

† Cooley on Constitutional Limitations, 279; Binghamton Bridge Case, 3 Wallace, 51; Piqua Bank *v.* Knoop, 16 Howard, 369; Vincennes University *v.* Indiana, 14 Howard, 268; Planters' Bank *v.* Sharp, 6 Id. 301.

‡ Railroad *v.* Dudley, 14 New York, 354; Plank Road *v.* Thatcher, 1 Kernnan, 102.

Suppose, however, the fact were otherwise, still the respondents must prevail, as it is admitted that the complainants accepted the act passed to unite the two colleges and to erect the same into one corporation, which supports to every intent the respondents' plea in bar and utterly disproves the allegations of the complainants' replication denying that the complainant corporation was dissolved before their bill of complaint was filed. Doubts have often been expressed whether a private corporation can be dissolved by the surrender of its corporate franchise into the hands of the government, but the question presented in this case is not of that character, as the act of the legislature uniting the two colleges did not contemplate that either college as an institution of learning should cease to exist, or that the funds of either should be devoted to any other use than that described in the original charters. All that was contemplated by the act in question was that the two institutions should be united in one corporation, as requested by the friends and patrons of both, that they might secure greater patronage and be able to extend their usefulness and carry out more effectually the great end and aim of their creation. Authorized as the act of the legislature was by the reservation contained in the original charter, and sanctioned as the act was by having been adopted by the corporators, it is clear to a demonstration that the act uniting the two colleges was a valid act, and that the two original corporations became merged in the one corporation created by the amendatory and enabling act passed for that purpose, and that neither of the original corporations is competent to sue for any cause of action subsequent in date to their acceptance of the new act of incorporation.*

II. Sufficient has already been remarked to show that the case of the dissenting trustees of the new corporation, which is the second case, is governed by the same principles as the preceding case. They admit that the act of the legislature

* Revere *v.* Copper Co., 15 Pickering, 351; Attorney-General *v.* Clergy Society, 10 Richardson's Equity, 604.

uniting the two colleges in one corporation was duly accepted by the original corporators, and they also admit in effect that it is a valid law. Express provision was therein made that the two colleges should be united in one corporation by the name of Washington and Jefferson College, and that the new corporation should possess and enjoy all the capacities, powers, privileges, immunities, and franchises which were possessed and enjoyed by the original institutions and the trustees thereof, "with such enlargements and subject to such changes therein as are made by this act." Accepted as that act was by the trustees of the original institutions, they not only ratified the reservation contained in the fifth section of the charter of Jefferson College, but they in express terms adopted the changes made in the amended charter uniting the two institutions in one corporation.

Viewed in the light of these suggestions the present case stands just as it would if the reservation contained in the original charter had been in terms incorporated into the new charter uniting the two institutions into one corporation, which the complainants in this case admit is a valid act of the legislature. Such an admission, however, is not necessary to establish that fact, as the act was passed by the assent of the two corporations and in pursuance of the reserved power to that effect contained in the original charter of the corporation to which the complaining corporators in the preceding case belonged. Grant that the power existed in the legislature to pass the act uniting the two institutions and it follows that the supplementary act which was passed to render the first act practically available is also a rightful exercise of legislative authority, as it is clear that substantially the same reservation is contained in the act providing for the union of the two institutions as that contained in the original charter by virtue of which the act was passed uniting the two institutions in one corporation.* Tested by these considerations the court here is of the opinion that

* Bailey *v.* Hollister, 26 New York, 112; Sherman *v* Smith, 1 Black, 587.

the decision of the State court in the second case is also correct.

III. Plans of various kinds were devised by the trustees of Jefferson College and put in operation for the endowment of the institution; and, among others, was the plan of establishing what was called the scholarships, whereby a contributor on payment of twenty-five dollars became entitled to tuition for one person for a prescribed period, called a right to a single scholarship; or, on payment of fifty dollars, to a family scholarship; or, on payment of one hundred dollars, to tuition for thirty years; or, on payment of four hundred dollars, to a perpetual scholarship, to be designated by whatever name the contributor might select. Contracts of the kind were outstanding at the respective times when each of the two acts of the legislature in question was passed, and the complainants in the third case are owners of such scholarships, and they bring their bill of complaint, for themselves and such other persons owning such scholarships as may desire to unite in the bill for the relief therein prayed. They pray that both of the before-mentioned acts of the legislature may be declared null and void as repugnant both to the State and Federal Constitution, but it will be sufficient to remark, without entering into any further explanations, that the second question is the only one which can be re-examined in this court. What they claim is that the acts of the legislature in question impair the obligation of their contracts for scholarship as made with the trustees of Jefferson College before the two institutions were united in one corporation. Reference must be made to the charter creating the union as well as to the original charters in order to ascertain whether there is any foundation for the allegations of the bill of complaint.

By the first section of the act creating the union it is provided that the new corporation "shall possess and enjoy all the capacities, powers, privileges, immunities, and franchises which were conferred upon and held by said colleges of Jefferson and Washington and the trustees thereof, with such enlargements and subject to such changes therein as are

made by this act." Section two also provides that all the real and personal property held and possessed by or in trust for the said colleges, with all endowment funds, choses in action, stocks, bequests, and devises, and all other rights whatever to them belonging, are thereby transferred to and vested in the new corporation; and the further provision is that "all the several liabilities of said two colleges or corporations, by either of them suffered or created, including the scholarships heretofore granted by and obligatory upon each of them, are hereby imposed upon and declared to be assumed by the corporation hereby created, which shall discharge and perform the same without diminution or abatement."

Undoubtedly the corporate franchises of the two institutions were contracts of the description protected by that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of contracts, but the contract involved in such an act of incorporation is a contract between the State and the corporation, and as such the terms of the contract may, as a general rule, be altered, modified, or amended by the assent of the corporation, even though the charter contains no such reservation and there was none such existing in any general law of the State at the time the charter was granted. Persons making contracts with a private corporation know that the legislature, even without the assent of the corporation, may amend, alter, or modify their charters in all cases where the power to do so is reserved in the charter or in any antecedent general law in operation at the time the charter was granted, and they also know that such amendments, alterations, and modifications may, as a general rule, be made by the legislature with the assent of the corporation, even in cases where the charter is unconditional in its terms and there is no general law of the State containing any such reservation. Such contracts made between individuals and the corporation do not vary or in any manner change or modify the relation between the State and the corporation in respect to the right of the State to alter, modify, or amend such a charter,

as the power to pass such laws depends upon the assent of the corporation or upon some reservation made at the time, as evidenced by some pre-existing general law or by an express provision incorporated into the charter. Cases arise undoubtedly where a court of equity will enjoin a corporation not to proceed under an amendment to their charter passed by their assent, as where the effect would be to enable the corporation to violate their contracts with third persons, but no such question is here presented for the decision of this court, nor can it ever be under a writ of error to a State court. Questions of that kind are addressed very largely to the judicial discretion of the court and create the necessity for inquiry into the facts of the case and for an examination into all the surrounding circumstances.* Beyond doubt such a question may be presented in the Circuit Court in the exercise of its jurisdiction, concurrent with the State courts, but it is clear that such a question can never be brought here for re-examination by a writ of error to a State court, as such a writ only removes into this court the questions, or some one of the questions, described in the twenty-fifth section of the Judiciary Act.† Considerations of that kind must, therefore, be dismissed, as the only question presented for decision is whether the acts of the legislature mentioned in the bill of complaint impair the obligation of the contracts for scholarship made by the complainants with the trustees of Jefferson College.

Decided cases are referred to in which it is held that the trustees of such an institution, where the terms of the charter amount to a contract and the charter contains no reservation of a right to alter, modify, or amend it, cannot consent to any change in the charter made by the legislature, which contemplates a diversion of the funds of the institution to any other purpose than that described and declared in the original charter. All, or nearly all of such decisions are based on a state of facts where an attempt was made to take

* Hascall *v.* Madison University, 8 Barbour, 174.

† Ward *v.* The Society of Attorneys, 1 Collyer Chancery Cases, 377.

the control of such an institution from one religious sect or denomination and to give the control of it to another and a different sect or denomination, in violation of the intent and purpose of the original donors of the institution.* Questions of that kind, however, are not involved in the present record, nor do the court intend to express any opinion in respect to such a controversy. Charters of the kind may certainly be altered, modified, or amended in all cases where the power to pass such laws is reserved in the charter or in some antecedent general law, nor can it be doubted that the assent of the corporation is sufficient to render such legislation valid, unless it appears that the new legislation will have the effect to change the control of the institution, or to divert the fund of the donors to some new use inconsistent with the intent and purpose for which the endowment was originally made.† Consent of the corporation, it is conceded, is sufficient to warrant alteration, modification, and amendments in the charters of moneyed, business, and commercial corporations, and it is not perceived that the question presented in this record stands upon any different footing from such as arise out of legislation of that character, as the principal objection to the legislation in question is that the removal of Jefferson College to the newly selected location exposes the complainants, as owners of the scholarships, to increased expense and to additional inconvenience.‡ They do not pretend that the effect of the new legislation will be to lessen the influence and usefulness of the college, or to divert the funds to a different purpose from that which was intended by the donors, nor that it will have the effect to change the character of the institution from the original purpose and design of its founders. Pretences of the kind, if set up, could not be supported, as the whole record shows that the two acts of Assembly were passed at the earnest solicitation of the patrons of the two institutions as well as at the request of the respective boards of trustees.

* State *v.* Adams, 44 Missouri, 570.

† Railroad *v.* Canal Co., 21 Pennsylvania State, 22.

‡ Allen *v.* McKeen, 1 Sumner, 299.

Even suppose that the consent of the corporation is no answer to the objections of the complainants, still the decree of the State court must be affirmed, as it is clear that the reservation in the charter fully warranted the legislature in passing both the acts which are the subject of complaint.* Suggestion may be made that the reservation even in the original charter is not expressed in direct terms, but the terms are the same as those employed in the charter which was the subject of judicial examination in the case of *Commonwealth* v. *Bonsall et al.*,† which was decided more than thirty years ago by the Supreme Court of the State. Provision was made in the charter in that case that the constitution of a certain public school should not be altered or alterable by any law of the trustees, or in any other manner than by an act of the legislature of this State. When incorporated the charter of the school provided that the trustees should be chosen by such persons as had contributed or should contribute to the amount of forty shillings for the purposes of the corporation. Pursuant to the petition of the trustees the legislature passed an act which repealed that clause of the charter, and provided that all the citizens residing within the limits of the township should be entitled to vote at all such elections, and the Supreme Court of the State held unanimously that the act of Assembly was a valid act, even though it was not accepted by the corporation. Reference is made to that case to show that the clause in the charter of Jefferson College, called the reservation, furnished complete authority to alter, modify, or amend the charter, and certainly it must be conceded that that case is a decisive authority to that point.‡

Controlled by these reasons the court is of the opinion that the act uniting the two colleges in one corporation was a valid act even as against the complainants in the third case.

* People *v.* Manhattan Co., 9 Wendell, 351; Roxbury *v.* Railroad Co., 6 Cushing, 424; White *v.* Railroad, 14 Barbour, 559.

† 3 Wharton, 566.

‡ State *v.* Miller, 2 Vroom, 521 Story *v.* Jersey City et al., 1 C. E. Green, N. J., 13.

They complain also of the supplementary act, but they hardly contend that the legislature, in passing the act to unite the two institutions, parted with any power which was reserved in the original charter of Jefferson College to enact any proper law to alter, modify, or amend the act providing for that union. Extended argument upon that topic does not seem to be necessary, as there is not a word in the act which favors such a construction or which gives such a theory the slightest support. Proper care was taken by the legislature to protect the rights of these complainants by incorporating into the act uniting the two colleges a provision that the new corporation should discharge and perform those liabilities without diminution or abatement. Such contracts were made with the trustees and not with the State, and it is a mistake to suppose that the existence of such a contract between the corporation and an individual would inhibit the legislature from altering, modifying, or amending the charter of the corporation by virtue of a right reserved to that effect, or with the assent of the corporation, if, in view of all the circumstances, the legislature should see fit to exercise that power.

DECREE IN EACH CASE AFFIRMED.

INSURANCE COMPANY v. WILKINSON.

1. The assured, in a life policy in reply to the question, "had she ever had a serious personal injury," answered "no." She had, ten years before, fallen from a tree. The criteria of a serious personal injury considered.
2. This is not to be determined exclusively by the impressions of the matter at the time; but its more or less prominent influence on the health, strength, and longevity of the party is to be taken into account, and the jury are to decide from these and the nature of the injury whether it was so serious as to make its non-disclosure avoid the policy.
3. Insurance companies who do business by agencies at a distance from their principal place of business are responsible for the acts of the agent within the general scope of the business intrusted to his care, and no limitations of his authority will be binding on parties with whom he deals which are not brought to their knowledge.

Statement of the case.

4. Hence, when these agents, in soliciting insurance, undertake to prepare the application of the insured, or make any representations to the insured as to the character or effect of the statements of the application, they will be regarded, in doing so, as the agents of the insurance companies, and not of the insured.
5. This principle is rendered necessary by the manner in which these agents are sent over the country by such companies, and stimulated by them to exertions in effecting insurance, which often lead to a disregard of the true principles of insurance as well as fair dealing.
6. In such cases the insurers cannot protect themselves under instructions to their agents, that they are only agents for the purpose of receiving and transmitting the application and the premium.
7. Therefore, where the agent had inserted in the application for life insurance a representation of the age of the mother of the assured at the time of her death, which was untrue, but which the agent himself obtained from a third person, and inserted without the assent of the assured, it was the act of the company, and not of the assured, and did not invalidate the policy.
8. To permit verbal testimony to show how this was done by the agent does not contradict the written contract, though the application was signed by the party. It proceeds on the ground that it was not his statement, and that the insurance company, by the acts of their agent in the matter, are estopped to set up that it is the representation of the assured.

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

The Union Mutual Insurance Company, of Maine, insured the life of Mrs. Malinda Wilkinson in favor of her husband. Both husband and wife, prior to the rebellion, had been slaves, and the husband came to Keokuk, Iowa, from Missouri. The company did business in Keokuk (where the application was made and the policy delivered), through an agent, one Ball, to whom it furnished blank applications. The mode of doing business appeared to have been that the agent propounded certain printed questions, such as are usual on applications for insurance on lives, contained in a form of application, and took down the answers; and when the application was signed by the applicant, the friend and physician forwarded it to the company, and if accepted, the policy was returned to this agent, who delivered it and collected and transmitted the premiums.

On this form of application were the usual questions to be

answered by the person proposing to effect the assurance; and by the terms of the policy it became void if any of the representations made proved to be untrue.

Among the questions was this one:

"Has the party ever had any *serious* illness, local disease, or *personal injury;* if so, of what nature, and at what age?"

And the question was answered:

"No."

So, too, after an interrogatory as to whether the parents were alive or dead,—they being, in the case of Mrs. Wilkinson, both dead,—were the questions and answers:

"*Question.* Mother's age, at her death?
"*Answer.* 40.
"*Question.* Cause of her death?
"*Answer.* Fever."

Mrs. Wilkinson having died, and the company refusing to pay the sum insured, Wilkinson, the husband, brought suit in the court below to recover it. The defence was that the answers as above given to the questions put were false; that in regard to the first one, Mrs. Wilkinson, in the year 1862, had received a serious personal injury, and that in regard to the others, the mother had not died at the age of 40, but at the earlier age of 23, and had died not of fever but of consumption.

As to the first matter, that of the personal injury, the judge (under a rule of practice in the State courts of Iowa, adopted by the Circuit Court of that district, and which allows the jury in addition to its general verdict to find also special verdicts and answers to interrogatories put), required the jury to respond to certain interrogatories. These and the answers to them were thus:

"*Interrogatory.* Did Malinda Wilkinson, in the year 1862, receive a serious personal injury, by falling from a tree?

"*Answer.* Yes, injured; not seriously.

"*Interrogatory.* Were the effects of such fall temporary, and had these effects wholly passed away without influencing or

affecting her subsequent health or length of life prior to the time when the application for insurance in this case was taken?

"*Answer.* Yes."

As to the other matter, the age at which the mother died and the disease which caused her death, evidence having been given by the defendant tending to show that she died at a much younger age than forty years, and of consumption, the plaintiff, in avoidance of this, was permitted (under the plaintiff's objection and exception) to prove that the agent of the insurance company, who took down the answers of the applicant and his wife to all the interrogatories, was told by both of them that they knew nothing about the cause of the mother's death, or of her age at the time; that the wife was too young to know or remember anything about it, and that the husband had never known her; and to prove that, there was present at the time the agent was taking the application, an old woman, who said that *she* had knowledge on that subject, and that the agent questioned her for himself, and from what *she* told him he filled in the answer which was now alleged to be untrue, without its truth being affirmed or assented to by the plaintiff or the wife.

This the jury found in their special verdict, as they had the other facts, and found that the mother died at the age of 23; did not die of consumption; and that the applicant did not know when the application was signed how the answer to the question about the mother's age and the cause of her death had been filled in.

In charging the jury, the court said, on the first branch of the case—that relating to the personal injury—that if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defence to the action; but, on the other hand, that if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-

disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

On the second branch—that relating to the age of the mother—the court said to the jury, that if the applicant did not know at what age her mother died, and did not state it, and declined to state it, and that her age was inserted by the agent upon statements made to him by others in answer to inquiries *he* made of them, and upon the strength of his own judgment, based upon data thus obtained, it was no defence to the action to show that the agent was mistaken, and that the mother died at the age of 23 years.

Verdict and judgment having gone for the plaintiff, the insurance company brought the case here on error.

Messrs. G. G. Wright, Gilmore, and Anderson, for the plaintiff in error:

I. In the instruction in the first branch of the case (where the subject of the injury arose), the court told the jury that they were to be the judges as to the *seriousness* or extent of any unreported personal injury; to consider how far it affected the health or life; that they were to weigh its effect as increasing or not increasing the responsibility of the insurance; that temporary injuries were to be disregarded, and only those considered which were permanent or which might affect the life or health of the assured in after years. Now what is the case? Here is an association which has made life insurance its special business through a long term of time; which carefully and accurately systematizes the principles which shall enable it to estimate longevity; which from a comparison of a multitude of examples, has learned to estimate in figures, the probable hereditary transmission of certain diseases; the effect of different occupations upon the life and health; the probable result of the various forms of accidental injury, as creating predisposition to disease; whose experience has taught it how to place an average pecuniary value on each different form of injury, on its extent, its duration, and the time when it happened. This association proposes to issue life policies, and says to each applicant,

"Give us accurate answers to all the questions which we propound. Before we can accept or reject your application or fix your rate of insurance, you must inform us truly as to the facts of which we inquire; your personal and family history are as material as your age." The applicant answers untruly, it may be from carelessness, or it may be wilfully. The consequences are the same. The policy is issued to a person in name, who differs from the person described in the application, just so far as the facts are conceded or perverted.

Now with such a case the jury are instructed that they may pass upon the materiality of the answers. What is this but an instruction that they may make a new contract for the parties, and then enforce it by their verdict.

All the statements in the application are express warranties; and nothing is so well settled in the law of insurance as that if there is a warranty, it is a part of the contract that the matter is such as it is represented to be. The materiality or immateriality signifies nothing. The decisions to this effect are fully set forth in the seventh edition of Smith's Leading Cases, vol. 1, p. 783; note to *Carter* v. *Boehm*.

The simple question to be determined, was whether Mrs. Wilkinson, in 1862, by falling from a tree, met with a personal injury which was "serious" at the time when it occurred; not whether it was material as affecting the hazard of the insurance; and not whether its effects were temporary and passed away without permanent injury. These were questions which the company was entitled to determine for itself, either on the statement of the fact alone, or by seeking further information. It was entitled to know the truth, and the application did not state it.

II. On the remaining part of the case the question to be discussed is, had the court and jury, under any pretence whatever, any right to take into evidence the parol statements made by the applicant, or others, which were contemporaneous with the signing of the application. The plaintiff sues on that contract as it stands. It had not been reformed in equity; but stood, on the day of trial, just as the

respective parties had signed it. We have, then, this anomalous position in a court of law: the plaintiff sues on a *written* contract, signed by himself as one of the parties; he asks a recovery according to the terms of that contract, and yet, in the same breath, is permitted by the court to contradict and vary the terms of this written contract, by proving what was stated by himself and others at and before the signing of the same. This is contrary to all precedent.

In *Smith* v. *Empire Insurance Company*,* the action was on a policy of insurance. The original application was brought by the plaintiff to one V. C., the company's agent, in an incomplete state, with the understanding that the agent was "to fill in the rest of it when he got where he could write." Pursuant thereto, the agent afterward inserted what he thought proper to make the application complete, including a statement that "there was no incumbrance except the Petrie mortgage," which was not true in fact. The application was made a part of the policy. It was held that the plaintiff constituted V. C. his agent to complete the application, and was responsible for what he in good faith inserted, and that the policy was avoided by such false statement.

In *Brown* v. *The Cattaraugus Mutual Insurance Company*,† one Ide was the company's agent, and drew up the application, making certain representations as to the distances at which the building stood from other buildings. When the application was made and signed, Ide stated to Brown (the person assured) that the application was correct, and contained all that the company required, that he, Brown, had nothing to do or say about making or preparing the application or making the measurement or survey. When the application was presented to Brown to sign, he stated to Ide that he did not know anything about the rules and regulations of the company, to which Ide replied that *he* was agent and surveyor; that the application as prepared, was all the company required; Brown then said that relying on the correctness of Ide's statements, as to the sufficiency of the

* 25 Barbour, 497. † 18 New York, 385.

application, he would sign it; and did sign it; Ide forwarded it to the company's office and the policy was issued on it, and delivered by Ide to the plaintiff. At the trial it was proved that the representations in the application were not correct. It was contended that the facts created an estoppel against the insurance company, alleging a breach of the warranty. But the court say:

"If the doctrine of estoppel could have such an application, it would entirely abrogate that established rule, that parol evidence is not admissible to contradict or vary a written contract.

"The application is the application of the plaintiff; the signature of the agent only imports that he procured the application for the company; and when the plaintiff seeks to enforce the contract of insurance, he must take it according to its terms; and submit to whatever makes against him as well as assert whatever makes in his favor."

If the position taken in the Circuit Court be affirmed, it will be as applicable to litigated cases on promissory notes, and other written contracts. In all these cases the statements—the parol agreements—of the parties will be admissible to "*estop*" each other, and hence to contradict and vary the written contract. It has ever been held that the written contract shall be an estoppel of all contemporaneous agreements. The rule is one of the highest value. This new rule is the converse of it.

Messrs. McCrary, Miller, and McCrary, contra,

On the first part of the case cited *Wilkinson* v. *Connecticut Mutual Life Insurance Company.**

On the second they relied on the fifth edition of the American Leading Cases;† as containing the latest and most complete list and review of the cases; the whole concluding with a judgment adverse to the view taken in the cases of *Smith* v. *Empire Insurance Company*, and *Brown* v. *Cattaraugus Mutual Insurance Company*, cited and relied on by the other side.

* 30 Iowa, 119. † Vol. 2, p. 917; note to Carpenter *v.* Insurance Co.

Mr. Justice MILLER delivered the opinion of the court.

On the first branch of the case the court said to the jury that, if the effects of the fall were temporary, and had entirely passed away before the application was taken, and if it did not affect Mrs. Wilkinson's health or shorten her life, then the non-disclosure of the fall was no defence to the action. On the other hand, if the effects of the fall were not temporary, and remained when the application was taken, or if the fall affected the general health, or was so serious that it might affect the health or shorten life, then the non-disclosure would defeat recovery, although the failure to mention the fall was not intentional or fraudulent.

It is insisted by counsel for the defendant that if the injury was considered serious *at the time*, it is one which must be mentioned in reply to the interrogatory, and that whether any further inquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting in personal injuries, which at the moment are considered by the parties serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of forty or fifty years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough inquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was not a true one. Is it necessary to state the injury and explain the mistake to meet the requirements of the policy?

On the other hand, when the question arises, as in this case, on a trial, the jury, and not the insurer, must decide whether the injury was serious or not. In deciding this, are they to reject the evidence of the ultimate effect of the injury on the party's health, longevity, strength, and other

similar considerations? This would be to leave out of view the essential purpose of the inquiry, and the very matters which would throw most light on the nature of the injury, with reference to its influence on the insurable character of the life proposed.

Looking, then, to the purpose for which the information is sought by the question, and to the difficulty of answering whether an injury was serious, in any other manner than by reference to its permanent or temporary influence on the health, strength, and longevity of the party, we are of opinion that the court did not err in the criterion by which it directed the jury to decide the interrogatory propounded to them.*

Passing then to the second branch of the case. The defendant excepted to the introduction of the oral testimony regarding the action of the agent, and to the instructions of the court on that subject; and assigns the ruling of the court as error on the ground that it permitted the written contract to be contradicted and varied by parol testimony.

The great value of the rule of evidence here invoked cannot be easily overestimated. As a means of protecting those who are honest, accurate, and prudent in making their contracts, against fraud and false swearing, against carelessness and inaccuracy, by furnishing evidence of what was intended by the parties, which can always be produced without fear of change or liability to misconstruction, the rule merits the eulogies it has received. But experience has shown that in reference to these very matters the rule is not perfect. The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the

* Wilkinson v. Connecticut Mutual Life Insurance Co., 30 Iowa, 119.

courts as a protection against fraud and false swearing, would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. It is upon this principle that courts of equity proceed in giving the relief just indicated; and though the courts, in a common law action, may be more circumscribed in the freedom with which they inquire into the origin of written agreements, such an inquiry is not always forbidden by the mere fact that the party's name has been signed to the writing offered in evidence against him.

In the case before us a paper is offered in evidence against the plaintiff containing a representation concerning a matter material to the contract on which the suit is brought, and it is not denied that he signed the instrument, and that the representation is untrue. But the parol testimony makes it clear beyond a question, that this party did not intend to make that representation when he signed the paper, and did not know he was doing so, and, in fact, had refused to make any statement on that subject. If the writing containing this representation had been prepared and signed by the plaintiff in his application for a policy of insurance on the life of his wife, and if the representation complained of had been inserted by himself, or by some one who was his agent alone in the matter, and forwarded to the principal office of the defendant corporation, and acted upon as true, by the officers of the company, it is easy to see that justice would authorize them to hold him to the truth of the statement, and that as they had no part in the mistake which he made, or in the making of the instrument which did not truly represent what he intended, he should not, after the event, be permitted to show his own mistake or carelessness to the prejudice of the corporation.

If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself

wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement, would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract; and that it was made by the defendant, who procured the plaintiff's signature thereto.

It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels *in pais*. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim. It has been applied to the precise class of cases of the one before us in numerous well-considered judgments by the courts of this country.* Indeed, the doctrine is so well understood and so often enforced that, if in the transaction we are now considering, Ball, the insurance agent, who made out the application, had been in fact the underwriter of the policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of

* Plumb *v.* Cattaraugus Ins. Co., 18 New York, 392; Rowley *v.* Empire Ins. Co., 36 Id. 550; Woodbury Savings Bank *v.* Charter Oak Ins. Co., 31 Connecticut, 526 · Combs *v.* The Hannibal Savings and Ins. Co., 43 Missouri, 148.

the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal.

Although the very well-considered brief of counsel for plaintiff in error takes no issue on this point, it is obvious that the soundness of the court's instructions must be tested mainly by the answer to be given to the question, "Whose agent was Ball in filling up the application?"

This question has been decided differently by courts of the highest respectability in cases precisely analogous to the present. It is not to be denied that the application, logically considered, is the work of the assured, and if left to himself or to such assistance as he might select, the person so selected would be his agent, and he alone would be responsible. On the other hand, it is well known, so well that no court would be justified in shutting its eyes to it, that insurance companies organized under the laws of one State, and having in that State their principal business office, send these agents all over the land, with directions to solicit and procure applications for policies, furnishing them with printed arguments in favor of the value and necessity of life insurance, and of the special advantages of the corporation which the agent represents. They pay these agents large commissions on the premiums thus obtained, and the policies are delivered at their hands to the assured. The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? It is quite true that the reports of judicial decisions are filled with the efforts of these companies, by their counsel, to establish the doctrine that they can do all this and yet limit their responsibility for the acts of these agents to the simple receipt of the premium and delivery of the policy, the argu-

ment being that, as to all other acts of the agent, he is the agent of the assured. This proposition is not without support in some of the earlier decisions on the subject; and, at a time when insurance companies waited for parties to come to them to seek assurance, or to forward applications on their own motion, the doctrine had a reasonable foundation to rest upon. But to apply such a doctrine, in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance corporations receive the benefits, and the parties supposing themselves insured are the victims. The tendency of the modern decisions in this country is steadily in the opposite direction. The powers of the agent are, *primâ facie*, coextensive with the business intrusted to his care, and will not be narrowed by limitations not communicated to the person with whom he deals.* An insurance company, establishing a local agency, must be held responsible to the parties with whom they transact business for the acts and declarations of the agent, within the scope of his employment, as if they proceeded from the principal.†

In the fifth edition of American Leading Cases,‡ after a full consideration of the authorities, it is said:

"By the interested or officious zeal of the agents employed by the insurance companies in the wish to outbid each other and procure customers, they not unfrequently mislead the insured, by a false or erroneous statement, of what the application should contain, or, taking the preparation of it into their own hands, procure his signature by an assurance that it is properly drawn, and will meet the requirements of the policy. The better opinion seems to be that, when this course is pursued, the description of the risk should, though nominally pro-

* Bebee *v.* Hartford Ins. Co., 25 Connecticut, 51; The Lycoming Ins. Co. *v.* Schollenberger, 8 Wright, 259; Beal *v.* The Park Ins. Co , 16 Wisconsin, 241; Davenport *v.* Peoria Ins. Co., 17 Iowa, 276.

† Savings Bank *v.* Charter Oak Ins. Co., 31 Connecticut, 517; Horwitz *v.* Equitable Ins. Co., 40 Missouri, 557; Ayres *v.* Hartford Ins. Co., 17 Iowa, 176; The Howard Ins. Co. *v.* Bruner, 11 Harris, 50.

‡ Published A.D. 1872, vol. 2, p. 917.

Statement of the case in the opinion.

ceeding from the insured, be regarded as the act of the insurers."*

The modern decisions fully sustain this proposition, and they seem to us founded in reason and justice, and meet our entire approval. This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it.

JUDGMENT AFFIRMED.

EX PARTE MCNIEL.

1. The statutes of the several States regulating the subject of pilotage are, in view of the numerous acts of Congress recognizing and adopting them, to be regarded as constitutionally made, until Congress by its own acts supersedes them. *Cooley* v. *The Board of Wardens of the City of Philadelphia* (12 Howard, 312), affirmed.
2. The sum of money given by statute as half-pilotage, to a pilot who first tenders his services to a vessel coming into port and is refused, is not a "penalty," but is a compensation under implied contract.
3. Although a State statute cannot confer jurisdiction on a Federal court, it may yet give a right, to which, other things allowing, such a court may give effect.

SUR petition for a writ of prohibition to the judge of the District Court of the United States for the Eastern District of New York.

Mr. Donohue, in support of the petition; Mr. F. A. Wilcox, contra.

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

Alexander Banter filed his libel in the District Court

* Rowley v. Empire Ins. Co., 36 New York, 550.

above named against the owners of the bark Maggie McNiel, wherein it was set forth that the libellant was a pilot of the port of New York, duly licensed under the laws of the State of New York, to pilot vessels by way of Hellgate, and that the respondents were the owners of the bark; that on the 27th day of February, 1870, the libellant, at a point on Long Island Sound, tendered his services and offered to the master of the bark to pilot her by way of Hellgate to the port of New York, and notwithstanding that the libellant was the first pilot so offering his services they were refused; that the bark was a registered vessel foreign to the port of New York, and drew more than thirteen feet of water, so that there became due to the libellant by reason of the premises the sum of twenty-three dollars; that payment has been demanded and refused, and that the premises are within the admiralty and maritime jurisdiction of the United States and of the court to which the libel was addressed.

Process was issued according to the prayer of the libel, and the respondents not being found the vessel was attached. Alexander McNiel intervened as claimant and answered the libel. The answer denies that the action is founded upon a contract civil and maritime. It admits that the bark was sailing under a register, and alleges that she was towed through Hellgate by a steam-tug, which had on board a duly licensed pilot, and that the master of the bark paid for the service. It insists that the cause of action set forth in the libel is not enforceable by the District Court and not within its jurisdiction. Testimony was taken, the cause proceeded to hearing, and the court gave judgment for the amount claimed by the libellant. The respondent applies for a writ of prohibition to restrain the District Court from enforcing the judgment.

The grounds relied upon are:

(1) That the District Court has no jurisdiction of the cause of action stated in the libel.

(2) That no lien existed on the vessel enforceable in a court of admiralty.

The statute of the State upon which the libel was founded

is entitled "An act concerning the Pilots of the Channel of the East River, commonly called Hellgate, passed April 15th, 1847, as amended March 12th, 1860, March 14th, 1865, April 16th, 1868, and April 5th, 1871." It is a carefully digested system of regulations, covering the whole subject of pilotage, and was designed to secure the appointment of qualified persons and to insure as far as possible the faithful performance of their duties. All appointments are required to be made upon the recommendation of the board of wardens of the port of New York to the governor, the nomination by him to the Senate of the State of the persons so recommended, and their confirmation by that body. Apprentices are required to serve three years, to be examined twice during the last year by the board of wardens, and to serve two years afterwards as deputies before they can be appointed pilots. The seventh section of the act provides that a pilot who shall first tender his services may demand from the master of any vessel of one hundred tons burden and upwards, navigating Hellgate, to whom the tender was made and by whom it was refused, half-pilotage, the amount to be ascertained according to the rules prescribed by the act. Certain exceptions are made which do not affect this case and which it is therefore not necessary to consider.

It is not denied that the case made by the libel is within the statute, nor that it was established by the testimony, but it is insisted that the statute is in conflict with the power of Congress to regulate commerce, and is therefore void.

It must be admitted that pilot regulations are regulations of commerce. A pilot is as much a part of the commercial marine as the hull of the ship and the helm by which it is guided; and half-pilotage, as it is called, is a necessary and usual part of every system of such provisions. Pilots are a meritorious class, and the service in which they are engaged is one of great importance to the public. It is frequently full of hardship, and sometimes of peril; night and day, in winter and summer, in tempest and calm, they must be present at their proper places and ready to perform the

duties of their vocation. They are thus shut out for the time being from more lucrative pursuits and confined to a single field of employment.

It is not complained anywhere, so far as we are advised, that the sum of what is allowed them is oppressive, or that including half-pilotage, it is more than sufficient to secure the services of persons of proper qualifications and to give them a reasonable compensation.

There is nothing new in provisions of the same character with the one here under consideration. They have obtained from an early period and are to be found in the laws of most commercial states. The obligation on the captain to take a pilot, or be responsible for the damages that might ensue, was prescribed in the Roman Law.* The Hanseatic ordinances, about 1457, required the captain to take a pilot under the penalty of a mark of gold. The maritime law of Sweden, about 1500, imposed a penalty for refusing a pilot of 150 thalers, one-third to go to the informer, one-third to the pilot who offered, and the residue to poor mariners. By the maritime code of the *Pays Bas* the captain was required to take a pilot under a penalty of 50 reals, and to be responsible for any loss to the vessel. By the maritime law of France, ordinance of Louis the XIV, 1681, corporal punishment was imposed for refusing to take a pilot, and the vessel was to pay 50 livres, to be applied to the use of the marine hospital and to repair damages from stranding. In England (3 George I, ch. 13), if a vessel were piloted by any but a licensed pilot, a penalty of £20 was to be collected for the use of superannuated pilots, or the widows of pilots. In the United States, provisions, more or less stringent, requiring the payment of a sum when no pilot is taken, are to be found in the statutes of ten of the States. The earliest of these statutes is that of Massachusetts of 1783, and the latest, to which our attention has been called, the statute of New York here under consideration.

* Digest, Book 19, tit. 2, Edict of Ulpian, I, 110; in the Laws of Oleron, I, 232; in the Consulate de Mer, II, 250; and in the Maritime Law of Denmark, III, 262 (Pardessus).

But, conceding that this provision is a regulation of commerce and within the power of Congress upon that subject, it by no means follows that it involves the constitutional conflict insisted upon by the counsel for the petitioner. In the complex system of polity which prevails in this country the powers of government may be divided into four classes.

Those which belong exclusively to the States.

Those which belong exclusively to the National government.

Those which may be exercised concurrently and independently by both.

Those which may be exercised by the States, but only until Congress shall see fit to act upon the subject. The authority of the State then retires and lies in abeyance until the occasion for its exercise shall recur.

The commercial power lodged by the Constitution in Congress is, in part, of this character. Some of the rules prescribed in the exercise of that power must, from the nature of things, be uniform throughout the country. To that extent the power itself must, necessarily, be exclusive; as much so as if it had been so declared to be, by the organic law, in express terms. Others may well vary with the varying circumstances of different localities. In the latter contingency the States may prescribe the rules to be observed until Congress shall supersede them; the Constitution and laws of the United States in such case, as in all others to which they apply, being the supreme law of the land. This subject, in some of its aspects, was fully considered in *Gilman* v. *Philadelphia*.* What is there said need not be repeated. In that case it was held that the State of Pennsylvania might competently authorize a bridge to be built across the Schuylkill River in that city, but that Congress, in the exercise of its paramount power, might require it to be removed, and prohibit and punish the erection of like structures, whenever it was deemed expedient to do so. It is the exercise, and not the existence, of the power that is effectual and exclusive.

* 3 Wallace, 713.

The Constitution took effect on the first Wednesday of March, 1789. Pilot laws existed in several of the States at that time, and were subsequently enacted in others. In all such States, it is believed, they have been changed from time to time according to the will of their respective legislatures. Suits in the State courts have been founded upon them and recoveries had, and many such cases are reported. In none of them have we found that the question was raised, or a doubt expressed, as to the validity of the laws or the authority of the States to enact them.*

The legislation of Congress upon the subject is as follows: The 4th section of the act of August 7th, 1789,† provided that pilots should be regulated by the existing laws of the States, or such as the States should thereafter enact, "until further legislative provision should be made by Congress." Whatever may be the effect of the provision looking to future State legislation, it is clear that the body which passed the section did not doubt the power of the States to legislate upon the subject. This was the first Congress which sat under the Constitution, and many of its members were members of the Convention which framed that instrument. The act of March 2d, 1837,‡ declares that a vessel, approaching or leaving a port situate upon waters which are the boundary between two States, may employ a pilot licensed by either of such States, "any law, usage, or custom to the contrary notwithstanding." The act of August 30th, 1852,§ regulates the appointment of pilots upon certain steamboats, and is a complete system as to the class of vessels to which it applies. The act of June 8th, 1864,‖ regulates the fee to be paid by a pilot for his certificate under the act of 1852. It also requires pilots of the vessels of the class named to be licensed according to the provisions of that act. The act of July 13th, 1866,¶ declares that no regulation shall be

* 4 Metcalf, 416; Smith *v.* Swift, 8 Id. 329; Martin *v.* Hilton, 9 Id. 371; Nickerson *v.* Mason, 13 Wendell, 64; Low *v.* Commissioners of Pilotage, R. M. Charlton, 307; Matthew Hunt *v.* Mickey, 12 Metcalf, 346.

† 1 Stat. at Large, 54 ‡ 5 Id. 153. § 10 Id. 63.

‖ 13 Id. 120 ¶ 14 Id. 93.

adopted by any State making a discrimination as to the rule of half-pilotage between the vessels therein described, and such existing regulations were thereby annulled. The act of February 25th, 1867,* contains a pilot regulation touching the sea-going vessels there described, with a proviso that certain State regulations should not be thereby affected. The act of July 25th, 1866,† provides for the revocation of the pilot's license for the offences specified. These several acts assert and exercise the plenary power of Congress over the subject. This early and long-continued practical construction of the Constitution by both National and State authorities, as affecting the validity of the statutory provision here in question, if a doubt could otherwise exist upon the subject, would be entitled to the gravest consideration.

The precise question we are considering came before this court in *Cooley* v. *The Board of Wardens of the City of Philadelphia*.‡ The suit was for half-pilotage under a statute of Pennsylvania, substantially the same, in this particular, with the statute of New York. The plaintiff recovered in the lower court, and the Supreme Court of the State affirmed the judgment. The case was brought here for review by a writ of error under the 25th section of the Judiciary Act, and was argued with exhaustive learning and ability. This court, after the fullest consideration of the subject, also affirmed the judgment. We are entirely satisfied with that adjudication, and reaffirm the doctrines which it lays down. It is conclusive upon this branch of the case before us.

The other objections taken to the judgment relate to the jurisdiction of the court. It is said there is no jurisdiction in admiralty to maintain a libel for a penalty. It was not a penalty that was recovered. There was a tender of services upon which the law raised an implied promise to pay the amount specified in the statute.§ Courts of admiralty have undoubted jurisdiction of all marine contracts and torts.‖

* 14 Id. 412. † Ib. 227. ‡ 12 Howard, 299.

§ Commonwealth *v.* Ricketson, 5 Metcalf, 419; Steamship Co. *v.* Joliffe, 2 Wallace, 450; Cooley *v.* The Board of Wardens, 12 Howard, 312.

‖ The Belfast, 7 Wallace, 624; Ins. Co. *v.* Dunham, 11 Id. 29.

That contracts relating to pilotage are within the sphere of the admiralty jurisdiction has not been controverted by the counsel for the petitioner. The question is not an open one in this court.*

It is urged further that a State law could not give jurisdiction to the District Court. That is true. A State law cannot give jurisdiction to any Federal court; but that is not a question in this case. A State law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper Federal tribunal whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our National jurisprudence. A party forfeits nothing by going into a Federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper State tribunal of the same locality.† In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maritime jurisdiction.‡

APPLICATION FOR WRIT DENIED AND PETITION DISMISSED.

* Hobart et al. *v.* Drogan et al., 10 Peters, 120.

† Robinson *v.* Campbell, 3 Wheaton, 223; United States *v.* Knight, 14 Peters, 315; Steamboat Orleans *v.* Phœbus, 11 Id. 184; Thompson *v.* Phillips, 1 Baldwin, 272, 204; Lorman *v.* Clarke, 2 McLean, 568; Ex parte Biddle, 2 Mason, 472; Johnston *v.* Vandyke, 6 McLean, 423; Prescott *v.* Nevers, 4 Mason, 327; Clark *v.* Sohier, 1 Woodbury & Minott, 368.

‡ The St. Lawrence, 1 Black, 522; The General Smith, 4 Wheaton, 438; Peyroux *v.* Howard, 7 Peters, 324; Rules of Practice in Admiralty, established by this court, Nos 12 and 92.

BATH COUNTY *v.* AMY.

The Circuit Courts of the United States have no power to issue writs of mandamus to State courts, by way of original proceeding, and where such writ is neither necessary nor ancillary to any jurisdiction which the court then had.

Hence such writ, on error here, was held to have been wrongly granted in favor of a holder of county bonds, to make the county levy a tax; the creditor not having obtained judgment in the Circuit Court on his claim, nor even put it into suit.

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

The 11th section of the Judiciary Act of 1789, enacts that—

"The Circuit Court shall have original cognizance concurrent with the courts of the several States, of all suits *of a civil nature at common law*, . . . between a citizen of the State where the suit was brought, and a citizen of another State."

The 14th section of the same act, referring to certain courts of the United States, including the Circuit Courts, enacts:

"That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and ALL other writs not specially provided for by statute, which *may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.*"

An act passed in 1813 by the legislature of Kentucky (which State was admitted into the Union A. D. 1792), enacts:

"SECTION 2. That it shall be lawful for the person at whose instance a mandamus may be issued, to traverse the truth of any one or more of the facts asserted in the return made to such writ, the traverser concluding the same by an appeal to the country for the trial of the contested facts upon which issue may have been taken by such traverse. A jury shall be empanelled and sworn by order of the court having jurisdiction thereof, subject to the same rules and regulations, and with power to such courts to superintend and control such jury, by

instructing them in points of law which may arise in the course of such trial, or of granting new trials in the same manner, and to be governed by the same principles which are applicable to the trial by jury in other cases at common law.

"SECTION 3. It shall be the duty of such court upon the result of any such finding as aforesaid, to pronounce judgment thereon in favor of either party according to law, and to award judgment for the costs of suing out or defending such mandamus as the case may be, in favor of the successful party, upon which execution shall and may be issued as in other cases."

And, finally, an act of Congress of May 19th, 1828, enacts:

"That the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States held in those States admitted into the Union since the 29th day of September, in the year 1789, in those of common law, shall be the same, in each of the said States respectively, as are now used in the highest court of original and general jurisdiction of the same."

With those statutes, Federal and State, in force, the legislature of Kentucky incorporated, A. D. 1852, the Lexington and Big Sandy Railroad Company. By the charter of the railroad the county courts of the different counties, through which it was to run, were authorized to subscribe to the stock of the road, and to pay their subscriptions by borrowing money; making the money borrowed payable in the way in which the county courts should deem most advisable. The interest on all such sums borrowed was to be provided for in like manner, provided that all taxes laid to pay either principal and interest, should be sacredly appropriated to such purpose and no other. A subsequent act required the county courts to issue bonds, and to proceed to levy, assess, and collect a tax to pay the interest thereon, according to the true intent and meaning of the previous act.

The county of Bath subscribed $150,000, and issued one hundred and fifty bonds of $1000 each, payable thirty years from date, with interest semiannually, for which coupons were annexed. And the company having indorsed them, sold, and put them into circulation. The county court levied

the tax and paid the interest for five years, and then stopped payment.

In this state of things one Amy, of New York, being the holder of eighty-two of the bonds, with the overdue and unpaid coupons, in November, 1866, made a written demand upon the justices, who composed the county court of Bath County, requiring the court forthwith to levy the necessary tax to pay his coupons, and notified to each of the judges that if they did not do so, he would on the second day of the next term of the Circuit Court of the United States, sitting in the District, move that court for the writ of mandamus requiring them to do it. No tax was levied; and at the next term of the Circuit Court, Amy accordingly filed an affidavit in the nature of an information, setting forth specifically his case, and concluding with a prayer for a mandamus requiring the tax to be levied. The court granted a rule against the county to show cause why the writ should not issue. The county came and craved oyer of the bonds and coupons, which was had, upon which it moved the court to discharge the rule; and also filed a response to the rule setting forth eleven points of defence. By agreement of counsel a general traverse of the facts set out in the response was entered on the record, and the law and facts submitted to the court for trial and decision. Upon the trial, the court found the issues for the plaintiff, and gave judgment awarding a peremptory writ of mandamus. To reverse this judgment the county brought the case here. The chief ground of the argument of their counsel, *Messrs. M. Blair, J. G. Carlisle, and J. B. Beck*, being that under the 14th section of the act of September 24th, 1789, the Circuit Court of the United States had no jurisdiction to issue a writ of mandamus, there having been no previous judgment of the court in favor of the party holding the obligations, and no previous attempt made by it to enforce their payment by its ordinary process.

Messrs. J. W. Stevenson, and H. Myers, contra, and in support of the ruling below:

The argument is that the Circuit Court had no jurisdiction

until the relator had reduced his demand to judgment, and had an execution returned, "no property" thereon. But in no case has this court decided that this was a prerequisite to the jurisdiction.

Mandamus is a common law action, so held by this court.* The act of 1813 of Kentucky, in which State the cause originated, makes the proceedings by mandamus there also a suit of a civil nature at common law; not a mere incident to another suit. The parties plead to issue. Issues of fact are to be tried by jury; issues of law, by the court. Judgment is to be awarded, and execution issued thereon. This act of 1813 was in force when the act of Congress of May 19th, 1828, was adopted, providing that the proceedings in suits at common law, in States admitted to the Union since 1789, shall be the same in the National courts in each of said States, as are now used in the highest courts of original and general jurisdiction of the same.

Now by the course of proceeding in Kentucky, it is not necessary that a party who has a right to have a tax levied by a county court or city council to pay his demand, should reduce the demand to judgment before applying for the writ of mandamus requiring the levy of the tax. This is settled by adjudicated cases,† and that where a party has the right to have a county court levy a tax, upon their refusal, after demand, he may proceed in the first instance for the writ.

Certainly this court, under the act of Congress of 1828, will award to the citizen of another State the same relief that the State court would give one of its own citizens in a case arising upon the statute laws of that State.

Mr. Justice STRONG delivered the opinion of the court.

It must be considered as settled that the Circuit Courts of the United States are not authorized to issue writs of mandamus, unless they are necessary to the exercise of their respective jurisdictions. Those courts are creatures of stat-

* Kendall *v.* The United States, 12 Peters, 615.

† Justices of Clarke County *v.* Turnpike Company, 11 Ben Monroe, 154; Maddox *v.* Graham, 2 Metcalfe, 56

ute, and they have only so much of the judicial power of the United States as the acts of Congress have conferred upon them. The Judiciary Act of 1789, which established them, by its 11th section, enacted that they shall have original cognizance, concurrently with the courts of the several States, of "all suits of a civil nature at common law, or in equity," between a citizen of the State in which the suit is brought and a citizen of another State, or where an alien is a party. While it may be admitted that, in some senses, the writ of mandamus may properly be denominated a suit at law, it is still material to inquire whether it was intended to be embraced in the gift of power to hear and determine all suits at common law, of a civil nature, conferred by the Judiciary Act. At the time when the act was passed it was a high prerogative writ, issuing in the king's name only from the Court of King's Bench, requiring the performance of some act or duty, the execution of which the court had previously determined to be consonant with right and justice. It was not, like ordinary proceedings at law, a writ of right, and the court had no jurisdiction to grant it in any case except those in which it was the legal judge of the duty required to be performed. Nor was it applicable, as a private remedy, to enforce simple common-law rights between individuals. Were there nothing more, then, in the Judiciary Act than the grant of general authority to take cognizance of all suits of a civil nature at common law, it might well be doubted whether it was intended to confer the extraordinary powers residing in the British Court of King's Bench to award prerogative writs. All doubts upon this subject, however, are set at rest by the 14th section of the same act, which enacted that Circuit Courts shall have "power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary to the exercise of their respective jurisdictions and agreeable to the principles and usages of law." Among those other writs, no doubt, mandamus is included; and this special provision indicates that the power to grant such writs generally was not understood to be granted by the 11th section, which con-

ferred, only to a limited extent, upon the Circuit Courts the judicial power existing in the government under the Constitution. Power to issue such writs is granted by the 14th section, but with the restriction that they shall be necessary to the exercise of the jurisdiction given. Why make this grant if it had been previously made in the 11th section? The limitation only was needed.

This subject has heretofore been under consideration in this court, and in *McIntire* v. *Wood*,* it was unanimously decided that the power of the Circuit Courts to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. The court said: "Had the 11th section of the Judiciary Act covered the whole ground of the Constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the act would sanction the issuing of the writ for such a purpose. But, although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its Circuit Courts, except in certain specified cases." And in *McClung* v. *Silliman*,† this court said, when speaking of the power to issue writs of mandamus: "The 14th section of the act under consideration (the Judiciary Act) could only have been intended to vest the power . . . in cases where the jurisdiction already exists, and not where it is to be courted or acquired by means of the writ proposed to be sued out." In other words, the writ cannot be used to confer a jurisdiction which the Circuit Court would not have without it. It is authorized only when ancillary to a jurisdiction already acquired. The doctrine asserted in both these cases was conceded to be correct by both the majority and the minority of the court in *Kendall* v. *The United States*.‡

* 7 Cranch, 504. † 6 Wheaton, 601.

‡ 12 Peters, 584; see also The Secretary *v.* McGarrahan, 9 Wallace, 511.

The power to issue a writ of mandamus as an original and independent proceeding does not, then, belong to the Circuit Courts.

It has been argued, on behalf of the defendant in error, that the writ of mandamus is a civil action in Kentucky; that the proceedings therein were regulated by an act of the legislature of that State, approved January 8th, 1813, still in force, which directed how a traverse to the return shall be tried in the State courts, and what judgment may be pronounced, and that the act of Congress of May 19th, 1828, directed that the proceedings in suits at common law in States admitted to the Union since 1789, of which Kentucky is one, shall be the same in the Federal courts as those used, when the act was passed, in the highest courts of original and general jurisdiction in those States. Hence it is inferred that the law of Kentucky respecting mandamus has been adopted as a part of the rule of practice of the United States Circuit Court for that State. The argument rests on a misapprehension of the meaning of the act of 1828. It was a process act, designed only to regulate proceedings in the Federal courts after they had obtained jurisdiction; not to enlarge their jurisdiction. The purpose was to make the forms of process and forms and modes of proceeding in those courts correspond with the forms and modes in use in the State courts. The words of the act are, "that the forms of mesne process, except the style, and the forms and modes of proceeding in suits in the courts of the United States held in those States admitted into the Union since the 29th day of September, in the year 1789, in those of common law, shall be the same, in each of the said States respectively, as are now used in the highest court of original and general jurisdiction of the same." It is quite too much to infer from this an enlargement of jurisdiction, or an adoption of all the powers which the State courts then had. There is, then, no act of Congress which has conferred upon Circuit Courts authority to issue the writ of mandamus as an original proceeding, or at all, except when necessary for the exercise of the jurisdiction conferred upon them by law.

Statement of the case.

Applying this rule to the present case it is decisive. The relator's claim for payment had not been brought to judgment in the Circuit Court, nor had it been put in suit. His application for a mandamus was, therefore, an original proceeding, neither necessary nor ancillary to any jurisdiction which the court then had. For this reason it should have been denied, and the judgment that a peremptory mandamus should issue was erroneous.

JUDGMENT REVERSED, and the cause remanded with instructions to

DISMISS THE PETITION FOR A MANDAMUS.

UNITED STATES *v.* AVERY.

1. The court cannot take cognizance of a division of opinion under the Judiciary Act of 1802, between the judges of the Circuit Court on a motion to quash an indictment, even when the motion presents the question of the jurisdiction of the Circuit Court to try the offence charged.
2. *United States* v. *Rosenburgh* (7 Wallace, 580), recognized and followed.

ON certificate of division in opinion between the judges of the Circuit Court for the District of South Carolina:

Avery and others were indicted under the act of May 31st, 1870,* known as the Enforcement Act, for conspiracy, with intent to violate the first section of that act, by unlawfully hindering, preventing, and restraining divers males, citizens of the United States, of African descent, from exercising the right of voting; and the second count of the indictment after charging this offence further charged, under the 7th section of that act, that in the act of committing the offence aforesaid, they murdered one Jim Williams, "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of South Carolina." The first count charged the conspiracy without the

* 16 Stat. at Large, 140.

murder. The fourth count charged murder in the same manner as the second count.

The defendant's counsel moved to quash so much of the second and fourth counts as charged the murder, on the ground that the Circuit Court had no jurisdiction to try an offence against the State of South Carolina; and, thereupon the following question arose upon which the opinions of the judges were opposed:

"Whether the court has jurisdiction to inquire and find whether the crime of murder has been committed, as set forth and charged, in the latter portions of the second and fourth counts of said indictment, in order to ascertain the measure of punishment to be affixed to the offences against the United States, charged in the former portions of the said second and fourth counts."

The question was accordingly certified to this court under the act of April 29th, 1802, which enacts that when a question shall occur before a Circuit Court upon which the opinions of the judges shall be opposed, the point may be certified to this court, and by it be finally decided.

Mr. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, on the case being called for argument, suggested that as the question certified arose on a motion to quash the indictment, the court could not, under the Judiciary Act of 1802, take cognizance of it, such motion being determinable by the court below as a matter of pure discretion; and cited *United States* v. *Rosenburgh*,* where it was held, according to the syllabus, that "this court cannot take cognizance under the Judiciary Act of 1802, of a division of opinion between the judges of the Circuit Court upon a motion to quash an indictment."

Messrs. Reverdy Johnson and H. Stanbery, contra:

When objection to the jurisdiction of the court to try the offence charged in an indictment is raised, it must then and

* 7 Wallace, 580.

there be passed upon, because it involves the authority of the court to proceed at all, and this principle applies as well to a motion to quash as to any other form of objection. A motion to quash is the proper mode of raising a question of jurisdiction, because if the objection be well taken, all proceedings in the case are *coram non judice*, and the objection should, therefore, be made at the earliest possible moment. And when the judges are divided in opinion upon the motion, the case cannot proceed until the question is decided, because it involves the right to proceed at all. This fact distinguishes the present case from *United States* v. *Rosenburgh*. The question there certified was whether the indictment charged an offence. The cases of *United States* v. *Wilson*,* *United States* v. *Chicago*,† and *United States* v. *Reid & Clements*,‡ all show that questions directly affecting the merits of a case may be cognizable here, although arising on motions discretionary in their character.

Reply: Unless the court overrules *United States* v. *Rosenburgh*, it must refuse to take cognizance of this question. The ground for that decision was that "the denial of the motion would not decide finally any right of the defendant." That applies equally to a question of jurisdiction. In this case there is no division of opinion except as to parts of the second and fourth counts of the indictment. The court did not doubt its jurisdiction to try the defendants for conspiracy, and the trial might have proceeded if their motion had been denied (as it would have been as matter of course, had the judges been divided in opinion upon it), and the same question been again raised upon the offer of evidence to prove the fact of murder.

The CHIEF JUSTICE, on the following day, announced that a majority of the court were of opinion that the case must be ruled by *United States* v. *Rosenburgh*, and the case be

DISMISSED FOR WANT OF JURISDICTION.

* 7 Peters, 150. † 7 Howard, 190. ‡ 12 Id. 361.

UNITED STATES *v.* WILDER.

1. When a debtor admits a certain sum to be due by him and denies that a larger sum claimed is due, a payment of the exact amount admitted cannot be converted by the creditor into a payment, on account of the larger sum denied, so as to take the claim for such larger sum out of the statute.
2. The statute of limitations is to be enforced, not explained away.

APPEAL from the Court of Claims.

On the 23d of May, 1861, Burbank & Co. contracted with Major McKinstry, a quartermaster of the United States, to furnish transportation for all public stores from St. Paul to Fort Abercrombie, at the rate of $2.90 per 100 lbs. The contract specified no period of duration, but the parties acted under and in pursuance of its terms, until the 19th of July, 1863. On that day, Captain Carling, an assistant quartermaster in charge of the department at St. Paul, being obliged, in a military exigency, to send forward quartermaster and commissary stores to Fort Abercrombie, called upon Burbank & Co. to receive and transport them under the contract referred to. But Burbank & Co. declined to receive and transport the goods under that contract, and refused to acknowledge its force and validity. Carling, being unable to obtain transportation from other parties, thereupon entered into a verbal agreement with them that if they would transport the stores they should receive for their services whatever price the transport might be reasonably worth. They carried the stores accordingly. Carling fixed the value of the carriage at $4.50 per 100 lbs. But the quartermaster's department refused to allow or pay to Burbank & Co. any greater price than $2.90 per 100 lbs.; alleging as a reason for their refusal that the obligation of the original contract had not been terminated by reasonable notice, and that the services justly and legally ought to be deemed to have been rendered under *it*, and at the rate of compensation therein agreed on.

The services were performed and completed on the 31st of July, 1863.

On the 1st of October, 1863, Burbank & Co. were paid by the quartermaster $6393.72, being a payment at the rate of $2.90 per 100 lbs., and leaving unpaid $3516.21; which "the defendants then and there refused to pay. And it still remains unpaid."

The petition was filed in the Court of Claims on the 26th of August, 1869, being more than six years from the time the services were performed, and less than six years from the time of payment.

Upon these facts the Court of Claims decided:

1st. That the claimants had a good cause of action upon the parol agreement.

2d. That they were not barred from maintaining this suit upon the facts set forth and within the meaning of the act of March 3d, 1863, reorganizing the Court of Claims, "and which declares that every claim against the United States shall be forever barred, unless the petition setting forth a statement of the claim be filed in the court . . . . *within six years after the claim first accrued.*"*

The United States appealed and alleged as error that the cause was barred by the statute of limitations, and that the Court of Claims should have so held.

Mr. C. H. Hill, for the United States; Mr. J. B. Sanborn, contra.

Mr. Justice DAVIS delivered the opinion of the court.

We think the Court of Claims erred in deciding that the claimant was not barred by the provision in the act reorganizing that court. The claim accrued on the 31st of July, 1863, because the services were rendered at that time. The petition was not filed until six years afterwards. The claim was, therefore, barred by the statute, unless, in some way, taken out of it. It is insisted that this has been done by a payment of a portion of the demand within the six years, and this presents the only question for consideration.

This court has not adopted the rule of decision made at

* 12 Stat. at Large, 765.

one time in England,* and to some extent in this country, under which, by a constructive equity, judicial refinements came near to abolish the statute altogether. On the contrary, following the decisions of the English courts,† made more immediately after the passage of the statute of James I, we have sought to give to it full effect. In 1814, Marshall, C. J., delivering the judgment of this court, declared‡ that the statute of limitations was entitled to the same respect as other statutes, and should not be explained away. The same doctrine has been asserted in subsequent decisions.§

It results from these cases that a promise to pay cannot be inferred from the mere fact of payment of part of a debt, there being nothing to raise a presumption that it was a payment on account of this debt. The principle on which part payment takes a case out of the statute is, that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment. It is too plain for controversy that the payment in question was not intended as an acknowledgment of the demand sued for. Instead of being applicable to an admitted debt, it was in denial of the right to further payment. The sum paid was the exact amount due under the written agreement, and was in discharge of the obligation imposed by it. That agreement was acknowledged, while the verbal arrangement made by the assistant quartermaster was repudiated. It is difficult to see how a payment in full of an admitted contract can be converted into an acknowledgment of one which was denied.

* See Trueman *v.* Fenton, Cowper, 548; Quantock *v.* England, 5 Burrow, 2628; Yea *v.* Fouraker, 2 Id. 1099.

† Dickson *v.* Thomson, 2 Shower, 126; Andrews *v.* Brown, Precedents in Chancery, 385; Williams *v.* Gun, Fortesque, 177; Bland *v.* Haselrig, 2 Ventris, 152; and Benyon *v.* Evelyn, A. D. 1664, Sir Orlando Bridgman's Judgments, 324; all referred to in Angell on Limitations, pp. 18, 212, fifth edition, 1869.

‡ Clementson *v.* Williams, 8 Cranch, 72.

§ Bell *v.* Morrison, 1 Peters, 351; McCluny *v.* Silliman, 3 Id. 270.

Statement of the case.

The case of the claimant is in some of its aspects worthy of consideration, but as it was not filed in the Court of Claims until barred by the statute, we are not at liberty to discuss its merits.

JUDGMENT REVERSED, and the cause remanded to the Court of Claims, with directions to

DISMISS THE PETITION.

KLINGER *v.* STATE OF MISSOURI.

Where the judgment of a State court might have been based either upon a State law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did, in fact, base it upon the latter ground, this court will not take jurisdiction of the case, even though it should think the decision of the State court erroneous; and so, also, where it does not appear on which of the two grounds the judgment was, in fact, based, if the independent ground was a good and valid one of itself to support the judgment, this court will not take jurisdiction; but if not, it will presume that the judgment was based on the State law in question, and will take jurisdiction.

By the constitution of Missouri, adopted in 1865, a test oath was prescribed to be taken by public officers, jurors, &c., which this court, in *Cummings* v. *Missouri* (4 Wallace, 277), decided to be unconstitutional. A juror, on a trial for murder in a State court, refused to take it; but on being examined as to the reason of his refusal, he alleged, not only that he had sympathized with the late rebellion, and, therefore, could not take it truthfully, but that those were his feelings still, and stronger than ever; whereupon the court discharged him. *Held*, that his avowed present disloyalty to the government was a sufficient cause in itself for his discharge, irrespective of his refusal to take the oath; and as it did not appear that he was discharged for the latter cause, the Supreme Court of the United States refused to take jurisdiction of the case.

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

By the third section of the second article of the constitution of Missouri, adopted in April, 1865, it was declared in substance that no person who had ever engaged in the rebellion, or had manifested any sympathy therefor, in any

way, should be deemed a qualified voter, or be capable of holding any office, or being a councilman, director, or trustee of any corporation, or of being a professor or teacher in any seminary of learning, or of holding property in trust for a church or congregation.

By the sixth section (one more particularly referred to in the present case), an oath was prescribed to be taken by all persons occupying, or entering upon, the positions referred to in section third, beginning as follows:

"I, A. B., do solemnly swear that I am well acquainted with the terms of the third section of the second article of the constitution of the State of Missouri, adopted in the year 1865, and have carefully considered the same; that I have never directly or indirectly done any of the acts in said section specified; that I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic, &c.

By the eleventh section it is declared "that every court in which any person shall be summoned to serve as a grand or petit juror shall require him, before he is sworn as a juror, to take the said oath in open court; and no person refusing to take the same shall serve as a juror."

By the twelfth section, "If any person shall declare that he has conscientious scruples against taking an oath, or swearing in any form, the said oath may be changed into a solemn affirmation, and be made by him in that form."

On the 25th of December, 1868, President Johnson issued his proclamation, by which he did

"Proclaim and declare, unconditionally, and without reservation, to all and to every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with *restoration* of all *rights*, *privileges*, and *immunities* under the Constitution and laws which have been made in pursuance thereof."

The constitution of Missouri, above referred to, being in force, and the said proclamation of President Johnson having issued, one Max Klinger was indicted for the murder of

Statement of the case.

Henry Werder, in the Criminal Court of the County of St. Louis, Missouri, and was convicted in October, 1869, and sentenced to be executed on the 16th of December, 1869; but having taken a bill of exceptions and a writ of error to the Supreme Court of Missouri, his sentence was respited.

The bill of exceptions taken on the trial of the case contained in its first paragraph what here follows; this paragraph being the *only* part of the bill which referred to the subject of any refusal to take the test oath:

"Be it remembered that this cause coming on to be heard and tried in said court, the marshal proceeded to call the jurors summoned in the same, and whilst empanelling the jury, it was found that one of said jurors, named Andrew Park, refused to take the oath of loyalty prescribed by the constitution of this State, whereupon the said Park was duly sworn to answer such questions as might be propounded to him, and being asked by the court why he refused to take said oath, he stated and declared that during the late rebellion he was a sympathizer with the Confederate cause, and earnestly desired its success; *that these were his opinions and sentiments then; that he thinks so stronger now than he did then; that he was born in the South; that his heart was with the Southern cause, and that for these reasons he could not conscientiously take the proffered oath;* thereupon the court of its own motion discharged the said juror, against the consent and objection of the defendant, to which action of the court the defendant excepted."

Among the errors assigned before the Supreme Court of Missouri, of which there were ten, was this one (the only one cognizable here):

"That the court erred in excluding and discharging from the jury, the said Andrew Park, against the objections and consent of the defendant, *for no other reason* than that the said Andrew Park declined to take the oath prescribed in the sixth section of the second article of the constitution of the State of Missouri."

The case is reported in the 43d volume of the Missouri Reports;* but it does not appear by the report there that this

* The State of Missouri *v.* Max Klinger, 43 Missouri, 127.

point was raised or passed upon by the Supreme Court of Missouri. However, the judgment of the court below was affirmed, and the case was now brought here by the prisoner under an assumption of his counsel that it was within the 25th section of the Judiciary Act; a matter to the establishing of which, as a preliminary point, the attention of counsel for the plaintiff in error was directed on the calling of the case.

Mr. W. H. Russell, for the plaintiff in error:

Has this court jurisdiction under the 25th section? We think that it has. The Constitution of the United States declares that "the trial of all crimes, except of impeachment, shall be by jury."* The sixth amendment to the Constitution, that "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where the crime shall have been committed;" and the fourteenth amendment that no "State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law."

Right to trial by jury is thus sought by our organic law to be secured in absolute fulness and perfection.

Now the Criminal Court of St. Louis excluded Park *for no other reason* than that he declined to take the oath of loyalty prescribed by the sixth section of the second article of the constitution of Missouri. But that section is repugnant to the Constitution of the United States; and has by this court been so declared.† It was an *ex post facto* law, and therefore unconstitutional. Moreover, the proclamation of amnesty issued by President Johnson, was a complete pardon for all the acts specified in the third section of the second article of the constitution of Missouri, and relieved Park from all guilt, and restored him to all his rights, privileges, and immunities as a citizen.‡

* Art. III, § 2. † Cummings *v.* State of Missouri, 4 Wallace, 277.

‡ Ex parte Garland, 4 Wallace, 333; and see *supra*, 154-6; Armstrong *v.* United States; Pargoud *v.* United States.

The decision of the Supreme Court of Missouri was in favor of the validity of the authority exercised by the Criminal Court under the constitution of Missouri, and against the right thus existing under the higher Constitution of the United States, and the President's pardon under it. Jurisdiction, therefore, exists in this court to re-examine. There has been drawn in question the validity of an authority exercised under a State, on the ground of its being repugnant to the Constitution or laws of the United States, and the decision has been in favor of such its validity.

No counsel appeared for the State of Missouri.

Mr. Justice BRADLEY delivered the opinion of the court.

Although it does not seem, from the report of this case in the Missouri Reports, that the point taken before us was raised or passed upon by the Supreme Court of that State, yet being found in the record, and arising out of the transactions at the trial, as exhibited in the bill of exceptions, it is our duty to examine it.

The oath referred to, which the juror, Park, declined to take, was what is known as the oath of loyalty, or test oath, prescribed by the sixth section of article second of the constitution of Missouri, adopted in April, 1865.

The plaintiff in error insists that this oath was unconstitutional, as declared by this court in the case of *Cummings* v. *The State of Missouri*, and that the imposition of it upon the juror, in obedience to the State constitution, against the plaintiff's protest, was an invasion of his rights as well as those of the juror; that to exclude the juror because he declined to take the oath was to decide in favor of the validity of a State law repugnant to the Constitution and laws of the United States, &c., and hence that this court has jurisdiction to review the decision of the Supreme Court of Missouri.

Conceding, for the sake of argument, all this to be true, still, before we enter upon that duty it is necessary to look carefully at the record and see whether the plaintiff's allegation is true, that the court below excluded the juror *for no*

other reason than that he declined to take the oath referred to. For we do not assume jurisdiction to review the judgment of a State court, unless it clearly appears from the record that a question has been raised and passed upon which is within the cognizance of this court, as provided for in the 25th section of the Judiciary Act, or the corresponding act passed February 5th, 1867. If such a question was really raised and passed upon in this case, it is somewhat singular that no notice is taken of it in the report of the case before referred to.

The only portion of the bill of exceptions relating to this subject is the first paragraph of the bill. Now, it does not clearly appear from the statement there made that the juror was discharged "for no other reason than that he declined to take the oath." The reasons assigned by him for not taking the oath were twofold: first, that he was a rebel in his sympathies during the war; and, secondly, that he was so still, and even stronger than ever. A man who makes such an avowal as that, thus manifesting a settled hostility to his country and its government, may well have been deemed by the court, irrespective of his refusal to take the oath, an unfit person to act as a juryman, and a participant in the administration of the laws.

Had the juror refused to take the oath simply because he had sympathized with or aided the rebellion during the war, and had he been discharged on that account, then the questions would have fairly arisen of which this court could take cognizance. The repugnancy of the test oath to President Johnson's proclamation of amnesty, and to the prohibition against *ex post facto* laws, &c., would have been fairly brought into question. But as he also refused to take it because he was still a more bitter rebel than ever, the avowal of such a feeling was inconsistent with the upright and loyal discharge of his duties, as much so as if he had expressed his disbelief in the obligation of an oath, and had declined to take it for that reason. Surely, if he had done that, there could have been no doubt that his discharge was justifiable, whatever view might be taken of the constitutionality of the test oath.

It certainly would have been in the discretion of the court, if not its duty, to discharge him. And so we think it was in this case.

The rules which govern the action of this court in cases of this sort are well settled. Where it appears by the record that the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the Federal question, this court will not take jurisdiction of the case, even though it might think the position of the State court an unsound one. But where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction.*

In this case it appears that the court below had a good and valid reason for discharging the juror, independent of his refusal to take the test oath; and it does not appear but that he was discharged for that ground. It cannot, therefore, with certainty, be said that the Supreme Court of Missouri did decide in favor of the validity of the said clause of the State constitution, which requires a juror to take the test oath.

WRIT OF ERROR DISMISSED.

* Maguire *v.* Tyler, 8 Wallace, 650; Neilson *v.* Lagow, 12 Howard, 110; Railroad Company *v.* Rock, 4 Wallace, 177; Railroad Company *v.* McClure, 10 Id. 511; Insurance Company *v.* Treasurer, 11 Id. 204; Crowell *v.* Randell, 10 Peters, 368; Suydam *v.* Williamson, 20 Howard, 427; Williams *v.* Oliver, 12 Id. 123.

WILMINGTON RAILROAD *v.* REID, SHERIFF.

1. A statute exempting all the property of a railroad corporation from taxation, exempts not only the rolling stock and real estate owned by it and required by the company for the successful prosecution of its business, but its franchise also.
2. A charter to a railroad company containing such an exemption, is a contract; and a law subsequently passed, laying a tax on the company's franchise, rolling stock, or real property, violates the obligation of the contract, and is void.

ERROR to the Supreme Court of North Carolina; the case being thus:

In 1853 the legislature of North Carolina chartered the Wilmington and Raleigh Railroad Company. One section of the charter ran thus:

"It shall be lawful for the president and directors to purchase with the funds of the company, and place on the said railroad, all machines, wagons, vehicles, carriages, and teams of any description whatsoever which may be deemed necessary for the purposes of transportation; and all the property purchased by the said president and directors, and that which may be given to the company, and the works constructed under the authority of this act, and all profits accruing on the said works and the said property shall be vested in the respective shareholders of the company and their successors and assigns forever, in proportion to their respective shares; and the shares shall be deemed personal property; *and the property of said company and the shares thereon shall be exempt from any public charge or tax whatsoever.*"

With this charter in force, the franchise and rolling stock of the company were assessed, under a subsequent law and pursuant to it, for taxation by the State of North Carolina and the county of Halifax, in two parts—one, the apportioned share for the county of Halifax, assessed in each case upon the entire franchise and rolling stock jointly, and the other a tax assessed upon certain lots of land in Halifax County, appurtenant to and forming a part of the property of the company, and necessary to its business.

Argument in favor of the right to tax.

On application for injunction against one Reid, sheriff, who was going to seize the company's property for non-payment of the tax—the application for the injunction being made on the ground that the subsequent law impaired the obligation of a contract—the Supreme Court of the State adjudged that the law did not do this, and that the tax was valid. The case was accordingly now brought here by the company to review that judgment.

It may be here added that provisions exempting the property of companies chartered by it, exist in the cases of numerous companies incorporated by the legislature of North Carolina; beginning with the charter to the Dismal Swamp Canal Company, A. D. 1790. In some cases the provision exempted the company from all taxes forever; in others but for a limited time. In some, all dividends were exempted; in others, dividends when not exceeding a certain rate per cent. Such exemptions are more observable in earlier times than in later ones.

Mr. W. H. Battle, in support of the ruling below:

In the *Binghamton Bridge Case*,* it is said by this court "that all rights which are asserted against the State must be clearly defined, and not raised by inference or presumption; and if the charter is silent about a power, it does not exist." The reason for such a doctrine is obvious. It is that the taxing power is one of the highest and most important attributes of sovereignty; essential to the establishment and continued existence of the government. No government can divest itself altogether of such a power. Concede, that it may, by a contract for an adequate consideration, bind itself for a longer or a shorter period, not to exercise its taxing power at all, or not beyond a certain extent, upon certain persons or things. Still this is a dangerous restriction upon its power, because the necessities of the government cannot always be foreseen. In the changes and chances of things, those who have charge of the administration may

* 3 Wallace, 75.

have need of all the possible resources of the country to save it from great disaster, if not from ruin.*

Now the *franchise* of the corporation is something distinct from its *property*, and the distinction is recognized in adjudged cases.† In this case the tax is upon the *franchise*. The exemption of the charter extends only to the property, leaving the franchise or body politic itself liable to be taxed; just as an individual might have his property exempt while the State might tax his poll *ad libitum*.‡ In view of the great explicitness of language required to divest a State of so necessary an attribute of sovereignty, we think that nothing less than the exemption in terms of the franchise as well as of the property of a corporation from taxation, can or ought to relieve it from the burden of contributing its just proportion towards the support of the government §

Messrs. Carlisle, McPherson, and B. F. Moore, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It has been so often decided by this court that a charter of incorporation granted by a State creates a contract between the State and the corporators, which the State cannot violate, that it would be a work of supererogation to repeat the reasons on which the argument is founded. It is true that when a corporation claims an exemption from taxation, it must show that the power to tax has been clearly relinquished by the State, and if there be a reasonable doubt about this having been done, that doubt must be solved in

* State *v.* Petway, 2 Jones's N. C. Equity, 396; Bank of Pennsylvania *v.* Commonwealth, 19 Pennsylvania State, 144; Lord Middleton *v.* Lambert, 1 Adolphus & Ellis, 401; Christ Church *v.* County of Philadelphia, 24 Howard, 300.

† State *v.* Rives, 5 Iredell, 297—Revised Code of 1856, ch. 26, §§ 5 to 10; State *v.* Petway, 2 Jones's N. C. Equity, 396; Attorney-General *v.* Bank of Charlotte, 4 Id. 287.

‡ Union Bank of Tennessee *v.* State, 9 Yerger, 490.

§ Home of the Friendless *v.* Rouse, 8 Wallace, 430; The Washington University *v.* Rouse, Ib. 439.

favor of the State. If, however, the contract is plain and unambiguous, and the meaning of the parties to it can be clearly ascertained, it is the duty of the court to give effect to it, the same as if it were a contract between private persons, without regard to its supposed injurious effects upon the public interests.

It may be conceded that it were better for the interest of the State, that the taxing power, which is one of the highest and most important attributes of sovereignty, should on no occasion be surrendered. In the nature of things the necessities of the government cannot always be foreseen, and in the changes of time, the ability to raise revenue from every species of property may be of vital importance to the State, but the courts of the country are not the proper tribunals to apply the corrective to improvident legislation of this character. If there be no constitutional restraint on the action of the legislature on this subject, there is no remedy, except through the influence of a wise public sentiment, reaching and controlling the conduct of the law-making power.

There is no difficulty whatever in this case. The General Assembly of North Carolina told the Wilmington and Weldon Railroad Company, in language which no one can misunderstand, that if they would complete the work of internal improvement for which they were incorporated, their property and the shares of their stockholders should be forever exempt from taxation. This is not denied, but it is contended that the subsequent legislation does not impair the obligation of the contract, and this presents the only question in the case. The taxes imposed are upon the franchise and rolling stock of the company, and upon lots of land appurtenant to and forming part of the property of the company, and necessary to be used in the successful operation of its business. It certainly requires no argument to show that a railroad corporation cannot perform the functions for which it was created without owning rolling stock, and a limited quantity of real estate, and that these are embraced in the general term property. Property is a word of large

import, and in its application to this company included all the real and personal estate required by it for the successful prosecution of its business. If it had appeared that the company had acquired either real or personal estate beyond its legitimate wants, it is very clear that such acquisitions would not be within the protection of the contract. But no such case has arisen, and we are only called upon to decide upon the case made by the record, which shows plainly enough that the company has not undertaken to abuse the favor of the legislature.

It is insisted, however, that the tax on the franchise is something entirely distinct from the property of the corporation, and that the legislature, therefore, was not inhibited from taxing it. This position is equally unsound with the others taken in this case. Nothing is better settled than that the franchise of a private corporation—which in its application to a railroad is the privilege of running it and taking fare and freight—is property, and of the most valuable kind, as it cannot be taken for public use even without compensation.* It is true it is not the same sort of property as the rolling stock, road-bed, and depot grounds, but it is equally with them covered by the general term "the property of the company," and, therefore, equally within the protection of the charter.

It is needless to argue the point further. It is clear that the legislation in controversy did impair the obligation of the contract, which the General Assembly of North Carolina made with the plaintiff in error, and it follows that the judgment of the Supreme Court must be REVERSED, and the cause remanded for further proceedings

IN CONFORMITY WITH THIS OPINION.

* Redfield on Railways, 129, § 70.

NOTE.

AT the same time with the preceding case was adjudged another, from the same court, the two cases being of kindred character, and alike in their essential features, the difference between the two consisting chiefly in the extent of the exemption It was the case of

THE RALEIGH AND GASTON RAILROAD CO. *v.* REID, SHERIFF.

The principle of the preceding case affirmed in a case where the exemption from taxation was limited to a term of years, and where the dividends did not exceed a certain sum.

In the case just above adjudged and reported, the property of the railroad company could not by its charter be taxed under any circumstances. In the case of the charter of the railroad company now under consideration the exemption was limited to a term of fifteen years. After this limitation expired the legislature was at liberty to tax the individual shares of the stockholders whenever their annual profits exceeded 8 per cent., provided that the tax did not exceed twenty-five cents a share per annum. The pleadings in the case showed that the annual profits on the shares never reached 8 per cent.

Messrs. Carlisle, McPherson, and B. F. Moore, for the plaintiff in error:

It is laid down in Lord Hobart's Reports* that affirmatives in statutes that introduce a new rule imply a negative of all else. Father Plowden† equally declares that when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode.

The tax is in violation of rules thus anciently and authoritatively laid down; rules conformed to obvious sense and justice.

Mr. W. H. Battle, contra, argued that such exemptions were so grossly impolitic that they could not be considered as legitimate exercise of legislative power.

* Slade *v.* Drake, 298.

† Stradling *v.* Morgan, 206 *b.*

Mr. Justice DAVIS delivered the opinion of the court.

The only way in which the property of this company could be reached for taxation at all was after the limitation of the fifteen years had expired. The legislature was then at liberty to tax the individual shares of the stockholders, whenever their annual profits exceeded 8 per cent. When a statute limits a thing to be done in a particular mode, it includes a negative of any other mode. It was the manifest object of the legislation which incorporated this company to invite the investment of capital in the enterprise of building this road; and no means better adapted for the purpose could have been devised, short of total immunity from taxation. As long as the capital was unproductive it contributed nothing to the support of the government, and even after it became remunerative, its contribution was fixed by the terms of the charter, and could not, in any event, exceed twenty-five cents on the share of stock. The impolicy of this legislation is apparent, but there is no relief to the State, for the rights secured by the contract are protected from invasion by the Constitution of the United States.

As the pleadings show that the annual profits on the shares of stock have never reached 8 per cent., it follows that they were not subject to any public charge or tax.

JUDGMENT REVERSED, and the cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

RAILWAY COMPANY *v.* WHITTON'S ADMINISTRATOR.

1. Although a corporation, being an artificial body created by legislative power, is not a citizen, within several provisions of the Constitution; yet where rights of action are to be enforced by or against a corporation, it will be considered as a citizen of the State where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different States.
2. Where a corporation is created by the laws of a State, it is, in suits brought in a Federal court in that State, to be considered as a citizen of such State whatever its status or citizenship may be elsewhere by the legislation of other States.

Syllabus.

3. A statute of Wisconsin provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; *provided, that such action shall be brought for a death caused in this State, and in some court established by the constitution and laws of the same.*" *Held*, that the proviso requiring the action to be brought in a court of the State does not prevent a non-resident plaintiff from removing the action, under the act of Congress of March 2d, 1867, to a Federal court and maintaining it there.
4. Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to State limitation.
5. The act of March 2d, 1867, amending the act of July 27th, 1866, "for the removal of causes in certain cases from State courts," by which amendatory act it is provided that in suits then pending, or which might be subsequently brought in a State court, "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs," the suit may be removed to a Federal court upon petition of the non-resident party, whether plaintiff or defendant, at any time before final hearing or trial, upon making and filing in the State court "an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court," is constitutional and valid.
6. The judicial power of the United States extending by the Constitution to controversies between citizens of different States, as well as to cases arising under the Constitution, treaties, and laws of the United States, the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion.
7. It is not error for a court to refuse to give an extended series of instructions, though some of them may be correct in the propositions of law which they present, if the law arising upon the evidence is given by the court with such fulness as to guide correctly the jury in its findings; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms in particulars considered apart by themselves, which could not when taken with the rest of the charge have misled a jury of ordinary intelligence.
8. The respective obligations of railway companies running locomotives through cities, and of persons crossing the tracks in such places.

Statement of the case.

ERROR to the Circuit Court for the Eastern District of Wisconsin.

Henry Whitton, as administrator of the estate of his wife in Wisconsin, under letters of administration granted in that State, brought suit in 1866 in one of the *State courts of Wisconsin* to recover damages for the death of his wife; the same having been caused, as he alleged, by the carelessness and culpable mismanagement of the Chicago and Northwestern Railway Company.

The action was founded on a statute of Wisconsin, which provides that "whenever the death of a person shall be caused by a wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; provided, that such action shall be brought for a death caused in this State, and, *in some court established by the constitution and laws of the same.*"

The statute also provides that "every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her," and that "the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just, in reference to the pecuniary injury resulting from such death, to the relatives of the deceased."

Whilst the cause was pending in the State court, where it was originally brought, and after issue joined, Congress passed an act of March 2d, 1867,* amending the act of July 27th, 1866, "for the removal of causes in certain cases from State courts." By this amendatory act it is provided that in suits then pending, or which might be subsequently brought

* 14 Stat. at Large, 558.

in a State court, "in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of $500, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file in such State court an affidavit stating that he has reason to, and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before the final hearing or trial of the suit, file a petition in such State court," and have the suit removed to a Federal court.

Under this act the plaintiff, in September, 1868, petitioned the State court for the removal of the action to the Circuit Court of the United States for the District of Wisconsin, stating, in his petition, that he was at the time, and had been for the three previous years, a resident and citizen of the State of Illinois; that the defendant was a corporation organized under the laws of Wisconsin, and that the matter in dispute exceeded the sum of $500, exclusive of costs. The plaintiff also offered with his petition good and sufficient surety as required by the act of Congress, for entering in the Circuit Court at its next session, copies of all process, pleadings, depositions, testimony, and other proceedings in the action, and for doing such other appropriate acts as by the laws of the United States are required for the removal of a suit into the United States court. Accompanying this petition was the affidavit of the plaintiff that he had reasons to believe, and did believe, "that, from prejudice and also from local influence," he would not be able to obtain justice in the State court.

The petition was resisted upon affidavits that the defendant was a corporation created and existing under the laws of the States of Illinois, Wisconsin, and Michigan; that its line of railway was located and operated, in part in each of these States, and was thus located and operated at the commencement of the action; that its entire line of railway was managed and controlled by the defendant as a single corporation; that all its powers and franchises were exer-

cised and its affairs managed and controlled by one board of directors and officers; that its principal office and place of business was at the city of Chicago, in the State of Illinois, and that there was no office for the control or management of the general business and affairs of the corporation in Wisconsin.

The local State court granted the petition, and ordered the removal of the action to the Federal court, but directed a stay of proceedings upon its order to enable the defendant to appeal from it to the Supreme Court of the State, and provided that, in case such appeal should be taken, all proceedings should be stayed until its determination.

The appeal was taken, and the order of removal was reversed by the Supreme Court. The reversal, as appears from the opinion of the court, was placed on the ground that the plaintiff, having the right originally to pursue his remedy either in a Federal or State court, had made his election of the State court, and had thus waived the right to demand the judgment of the Federal court upon the matter in controversy.

The plaintiff, however, did not regard the stay of proceedings or delay his action until the disposition of the appeal, but procured copies of the papers in the cause from the State court and filed them in the Circuit Court of the United States. The latter court thereupon took jurisdiction of the case and a new declaration was filed by the plaintiff.

In the meantime the defendant, upon affidavit of the stay upon the order of removal made by the State court and of the appeal from such order, moved the Circuit Court that the cause be dismissed from its calendar and the pleadings and proceedings be stricken from its files. But this motion the court denied, and thereupon the defendant filed a plea in abatement, setting forth an objection to the jurisdiction of the Federal court, founded upon the proviso to the statute of Wisconsin requiring the action for damages resulting from the death of a party to be brought in some court established by the constitution and laws of that State. A de-

murrer to this plea being sustained, the defendant filed a plea of the general issue. Subsequently, upon the reversal of the order of removal by the Supreme Court of the State, the defendant moved the Circuit Court to remand the cause to the State court, but the Circuit Court refused to relinquish its jurisdiction, and the motion was denied.

The case having accordingly come up for trial, the facts appeared to be these: The deceased died in December, 1864, from injuries received from a locomotive of the railroad company, defendant in the case, whilst she was endeavoring to cross its railway track, in Academy Street, in Janesville, Wisconsin. This street ran nearly north and south, and was crossed by four parallel railway tracks, lying near each other and running in a direction from northeast to southwest. Two of these—those on the northerly side—belonged to the Milwaukee and Prairie du Chien Railway Company; and the other two belonged to the defendant, the Chicago and Northwestern Railway Company. One Mrs. Woodward and a Mr. Rice were standing, together with Mrs. Whitton (the deceased), just previous to the accident, upon the crosswalk on the northerly side of the tracks, waiting for a freight train of the Milwaukee and Prairie du Chien Railway, then in motion, to pass eastwards, so that they might proceed down the street and over the tracks. The weather was at the time extremely cold, and a strong wind was blowing up the tracks from the southwest, and snow was falling. As soon as the freight train had passed, Rice crossed the tracks, moving at a brisk rate. In crossing, he states that he took a look at the tracks and that he neither saw nor heard any engine on the tracks of the defendant. Almost immediately after getting across, and before he had gone many steps, he heard a scream, and on turning around saw that the women —Mrs. Whitton and Mrs. Woodward—had been knocked down by a locomotive of the defendant. This locomotive was at the time backing down in a westerly direction—opposite to that taken by the freight train which had just passed—the tender coming first, then the engine drawing a single freight car. The persons in this locomotive did not

appear to be aware of the injuries they had occasioned, and the locomotive continued on its course until their attention was called to the disaster by the efforts of Rice, when it was stopped. No person saw the locomotive strike the deceased, or noticed her conduct after Rice left her and started to cross the tracks. The injuries which both of the women received resulted in their death. Mrs. Woodward died soon afterwards, and Mrs. Whitton after lingering some weeks. There was much conflict of evidence upon the point whether the bell was rung on the locomotive as it backed down the track and approached Academy Street, so as to give warning to persons who might be on that street wishing to cross, and was kept ringing until the locomotive and tender crossed the street. Rice testified that he did not hear any bell or signal from this train, but that the bell of the freight train which had passed was ringing.

Among other witnesses, the surgeon who attended Mrs. Whitton was examined, and of him the question was asked whether she was pregnant at the time of the accident. To this question objection was taken by the defendants as improper and immaterial; but the objection was overruled and exception taken. The witness answered that she was. The evidence being closed, the defendant asked nineteen different instructions, which the court refused to give, except in so far as they were contained in the instructions whose substance is hereinafter mentioned and given of its own accord. Among the nineteen were these two:

"Under ordinary circumstances a person possessing the use of those faculties should use both eyes and ears to avoid injury in crossing a railway track; and if in this case the wind and noise of the freight train tended to prevent Mrs. Whitton from hearing the approach of defendant's engine, she was under the greater obligation to use her eyes. It was her duty to look carefully along the tracks of defendant's railway, both northwardly and southwardly, before attempting to cross them, and it was not sufficient excuse for failing to do so that the day was cold and windy, or that one train had just passed on the track nearer to her.

Statement of the case.

"It was the duty of Mrs. Whitton to look carefully along the tracks of defendant's railway to the north before putting herself in the way of danger, and in time to see and avoid any engine or train approaching from that direction. If necessary, in order to do this, it was her duty to pause before starting to cross until the freight train had so far passed as to give a sufficient view to determine whether she could safely cross; and if she failed to look carefully along these tracks to the north, after the freight train had so far passed as to give her such a view, and in time to have seen and avoided defendant's engine, the plaintiff cannot recover."

The plaintiff asked three instructions, which were refused in the same way.

The questions submitted to the jury were:

"1. Whether Mrs. Whitton's death was caused by the negligence of those who had the management of the train; and,

"2. Was Mrs. Whitton herself guilty of any fault or negligence which contributed to that result."

As to the negligence of the defendant, the court, in substance, instructed the jury that it was the duty of those having the management of the train to cause the bell of the engine to be rung a sufficient time, before crossing Academy Street, to give warning to any passengers on that street desirous of crossing, and to keep it ringing till the tender had crossed the street; and also that it was the duty of those having the management of the train to keep a proper and a vigilant lookout in the direction the train was moving, particularly under the circumstances of the case—a freight train going up one of the tracks in an opposite direction, the train in question just approaching a much frequented street, and a violent southwest wind blowing at the time, and that there was a peculiar vigilance incumbent on those who had the management of the train, to ring their bell and keep a proper lookout, because it was natural, if there were any persons standing at that crossing (a freight train passing along at the time), that they would seek to cross the track after the freight train had gone over the street.

As to the negligence of Mrs. Whitton, the court, in sub-

stance, instructed the jury that she was required to exercise that degree of prudence, care, and caution incumbent on a person possessing ordinary reason and intelligence, under the special circumstances of the case, having regard to the fact of its being a railroad crossing, and another train crossing the street, for which she had to wait in company with Mrs. Woodward, and that she must have used ordinary care, prudence, and caution.

The court declined to say to the jury how she must dispose of her limbs, her eyes, or her ears, but left it to the jury to find whether she had been guilty of any fault or negligence which contributed to her death; and instructed them that if she had, that the plaintiff could not recover, even if the defendant had been guilty of negligence.

The court also told the jury, before they could find a verdict against the defendant, they must be satisfied its employees were guilty of negligence, and that such negligence caused her death.

As to the damages, the court said:

"Those damages have been specified by the statute, but in very general terms:

"'The jury may give such damages, not exceeding $5000, as they shall deem fair and just, in reference to the pecuniary injury resulting from such death, to the relatives of the deceased specified in this section.'

"As we understand, that means that if the plaintiff is entitled to recover at all in this case, he is entitled to recover for damages for such pecuniary injury as has resulted to him from the death of his wife. It is confined by the language of the statute to pecuniary loss, not the loss arising from grief or wounded feelings, or sufferings of any kind, but such pecuniary loss as he has sustained from the death of his wife; it is from her death, not from any loss which he sustained prior to that, but for the pecuniary loss which he has sustained from her death. It is almost impossible to lay down any absolute, fixed rule upon this subject. This question has been recently discussed by the Supreme Court of the United States upon a statute which in this respect is essentially the same as the statute of this State; and the Supreme Court has said that it is a matter largely resting

with the sound reason and discretion of the jury. Taking all the facts and circumstances into consideration, you may consider the personal qualities, the ability to be useful of the party who has met with death, and, of course, also the capacity to earn money. It is not proper for the jury to look upon it simply as a question of feeling or sympathy. The statute does not permit that; all such considerations should be dismissed from your minds. It is a mere matter of dollars and cents—so regarded by the statute—pecuniary injury sustained."

The jury found $5000 for the plaintiff, and a motion for a new trial being refused, after a full consideration of the objections made by the defendants, for which refusal the court gave its reasons fully, the judgment was entered on the verdict. To reverse that judgment the defendant brought the case here.

Mr. T. A. Howe, for the plaintiff in error:

I. *This court never acquired jurisdiction of this case, because it was excluded by the character of the parties.* The suit must be regarded as between a citizen of Illinois, as plaintiff, and citizens of that State and of the State of Wisconsin joined as defendants. Now, in *Ohio and Mississippi Railway Co.* v. *Wheeler*,* a railway company, having like charters from the States of Ohio and Indiana, sued a citizen of the latter State, and this court held that the suit must be regarded as by citizens of Ohio and Indiana against a citizen of the latter State, and hence not within the jurisdiction of the National courts. In *The County of Allegheny* v. *Railway Company*,† Allegheny County, Pennsylvania, sued a railway company which was first chartered by Ohio and afterwards by Pennsylvania. The company presented a petition, alleging itself a corporation of Ohio, and asking a removal of the suit into the United States Circuit Court. The application was denied, because a suit against such a corporation was a suit against citizens of Ohio and Pennsylvania united in business under the shadow of the corporate name, and because, therefore,

* 1 Black, 286.

† 51 Pennsylvania State, 228.

the United States courts had no jurisdiction. The disability must affect both parties alike.

II. *There is no law authorizing the maintenance of this action in any National court.* The right to sue at all in this case exists by the statute of Wisconsin only. But that right is given only on a condition precedent; the condition, namely, that the suit be brought in a Wisconsin court.

It may be argued on the other side that the legislature had no power to confer a conditional right. If this be so, it is one instance where the greater power does not include the lesser. It is a strange proposition which says to the legislatures of the States: "You have the power to confer new absolute rights of action, but when you attempt to create a limited right, to annex a condition to the gratuity you offer, your power is exceeded. The condition is void, and the conditional right becomes an absolute one." The only argument which can be made in support of such a curtailment of legislative power will have to be this: "The Constitution of the United States extends the judicial power to controversies between citizens of different States. This is such a controversy. Congress may, therefore, confer upon the National courts jurisdiction over it and authorize the plaintiff to invoke that jurisdiction, hence this clause, restricting the remedy to the State courts, is unconstitutional and void." But to make this position of value it must appear that the Constitution extends the judicial power to this controversy, or that Congress is authorized to and has extended it to *such* actions. Now the language of the Constitution is peculiar. It says:

> "The judicial power shall extend to *all* cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to *all* cases affecting ambassadors; to *all* cases of admiralty and maritime jurisdiction; . . . to controversies . . . between citizens of different States."

It is thus obvious that the Constitution does not extend the judicial power to *all* controversies between citizens of different States.

Argument for the plaintiff in error.

The condition in the Wisconsin statute is not therefore necessarily in conflict with the Constitution. If it be said that this provision commits it to the discretion of Congress, to extend the judicial power to any or all of this class of controversies, and that Congress has extended it to this controversy, the answer is that if such a discretion is vested in Congress, it is not conferred in express terms, nor does the language used justify such an implication. So to construe it, would, in effect, interpolate the word *all* where it has been intentionally omitted.

But if the clause in the Wisconsin statute be invalid, then the whole statute must fall, and of course with it the sole authority for maintaining this action. If the provisions of a statute are so mutually connected with each other as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, would not pass the residue independently, then if some parts are unconstitutional, all the provisions which are thus dependent, conditional or connected, must fall with them.

A proviso in deeds, or laws, is a limitation or exception to a grant made, or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided.*

Both the propositions thus stated are well-settled rules.

III. *The act of March 2d, 1867, by authority of which this case was removed from the State court, is unconstitutional and void.*

In *Martin* v. *Hunter*,† where the validity of the 25th section of the Judiciary Act was in question, it was argued at bar, that the right of removal before judgment was undoubted; that it subserved all the reasons suggested in support of the appellate jurisdiction over causes tried in the State courts, and hence that there was no good reason for sustaining such a jurisdiction. But in combating this position Story, J., argued in the most deliberate way that the removal of actions was an exercise of *appellate* jurisdiction; that appellate jurisdiction may be exercised either before or after judgment, and, there-

* Bouvier's Law Dictionary, title "Proviso." † 1 Wheaton, 349.

fore, that the right to remove a case for revision, and the right to remove it for original action upon the subject-matter, rested upon the same foundation, and would stand or fall together. In reasoning to this conclusion he says:

"The power of removal is certainly not in strictness of language an exercise of original jurisdiction; it presupposes jurisdiction to have elsewhere attached."

But it is a misapplication of terms to style that an exercise of appellate jurisdiction which wrenches a case from one court of original concurrent jurisdiction, and takes it into another, for original action upon the subject-matter. Nor has it ever been supposed that the Circuit Courts of the United States have any appellate jurisdiction over the proceedings of State courts. And the reason upon which the theory of Story, J., is founded is as erroneous as the theory itself. He argues that the power of removal is not an exercise of original jurisdiction, because "it presupposes an exercise of original jurisdiction to have elsewhere attached." Take, then, for illustration controversies between citizens of different States. The judicial power of the United States was extended to this class of controversies, for the supposed advantage of such citizens, and hence it is assumed that a defendant in such a controversy had the same right as a plaintiff, to insist that it be tried in the National tribunals. This being so, it follows that the jurisdiction of the State court does not fully attach, until he has waived this right. If he does not waive it, but objects to the proffered jurisdiction of the State court, it never attaches at all, and when the jurisdiction of the National court does attach, it is in strictness an original jurisdiction.

IV. *The evidence of pregnancy was immaterial, and calculated to excite the sympathy and prejudice of the jury, and should have been excluded.*

V. *The charge did not state the law rightly; but should among other things have said that the deceased was bound to use her eyes and ears in the manner stated in the request.*

Mr. J. A. Sleeper, contra.

Opinion of the court.

Mr. Justice FIELD, having stated the case, delivered the opinion of the court as follows:

The jurisdiction of the action by the Federal court is denied on three grounds: the character of the parties as supposed citizens of the same State; the limitation to the State court of the remedy given by the statute of Wisconsin; and the alleged invalidity of the act of Congress of March 2d, 1867, under which the removal from the State court was made.

First, as to the character of the parties. The plaintiff is a citizen of the State of Illinois and the defendant is a corporation created under the laws of Wisconsin. Although a corporation, being an artificial body created by legislative power is not a citizen within several provisions of the Constitution; yet it has been held, and that must now be regarded as settled law, that, where rights of action are to be enforced, it will be considered as a citizen of the State where it was created, within the clause extending the judicial power of the United States to controversies between citizens of different States.* The defendant, therefore, must be regarded for the purposes of this action as a citizen of Wisconsin. But it is said, and here the objection to the jurisdiction arises, that the defendant is also a corporation under the laws of Illinois, and, therefore, is also a citizen of the same State with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen of Wisconsin by the laws of that State. It is not *there* a corporation or a citizen of any other State. Being there sued it can only be brought into court as a citizen of that State, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *The Ohio and Mississippi Railroad Company* v. *Wheeler*.† In that case the declaration averred that the plaintiffs were a corporation created by the laws of the States of Indiana and Ohio, and that the defend-

* Paul *v.* Virginia, 8 Wallace, 177.

† 1 Black, 286.

ant was a citizen of Indiana, and the court, after referring to previous decisions, said that it must be regarded as settled that a suit by or against a corporation in its corporate name is a suit by or against citizens of the State which created it, and therefore that case must be treated as a suit in which citizens of Ohio and Indiana were joined as plaintiffs against a citizen of the latter State, and of course could not be maintained in a court of the United States where jurisdiction of the case depended upon the citizenship of the parties. The court also observed that though a corporation by the name and style of the plaintiffs in that case appeared to have been chartered by the States of Ohio and Indiana, clothed with the same capacities and powers, and intended to accomplish the same objects, and was spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States, yet it had no legal existence in either State except by the law of that State; that neither State could confer on it a corporate existence in the other nor add to or diminish the powers to be there exercised, and that though composed of and representing under the corporate name the same natural persons, its legal entity, which existed by force of law, could have no existence beyond the territory of the State or sovereignty which brought it into life and endowed it with its faculties and powers.

The correctness of this view is also confirmed by the recent decision of this court in the case of *The Railroad Company* v. *Harris*.* In that case a Maryland railroad corporation was empowered by the legislature of Virginia to construct its road through that State, and by an act of Congress to extend a lateral road into the District of Columbia. By the act of Virginia the company was granted the same rights and privileges in that State which it possessed in Maryland, and it was made subject to similar pains, penalties, and obligations. By the act of Congress the company was authorized to exercise in the District of Columbia the same powers,

* 12 Wallace, 65.

rights, and privileges in the extension and construction of the road, as in the construction and extension of any railroad in Maryland, and was granted the same rights, benefits, and immunities in the use of the road which were provided in its charter, except the right to construct from its road another lateral road. And this court held that these acts did not create a new corporation either in Virginia or the District of Columbia, but only enabled the Maryland corporation to exercise its faculties in that State and District. They did not alter the citizenship of the corporation in Maryland, but only enlarged the sphere of its operations and made it subject to suit in Virginia and in the District. The corporation, said the court, "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 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."

Second; as to the limitation to the State court of the remedy given by the statute of Wisconsin. That statute, after declaring a liability by a person or a corporation to an action for damages when death ensues from a wrongful act, neglect, or default of such person or corporation, contains a proviso "that such action shall be brought for a death caused in this State, and, in some court established by the constitution and laws of the same." This proviso is considered by the counsel of the defendant as in the nature of a condition, upon a compliance with which the remedy given by the statute can only be enforced.

It is undoubtedly true that the right of action exists only in virtue of the statute, and only in cases where the death was caused within the State. The liability of the party, whether a natural or an artificial person, extends only to cases where, from certain causes, death ensues within the

limits of the State. But when death does thus ensue from any of those causes the relatives of the deceased named in the statute can maintain an action for damages. The liability within the conditions specified extends to all parties through whose wrongful acts, neglect, or default death ensues, and the right of action for damages occasioned thereby is possessed by all persons within the description designated. In all cases, where a general right is thus conferred, it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of State legislation that it shall only be enforced in a State court. The statutes of nearly every State provide for the institution of numerous suits, such as for partition, foreclosure, and the recovery of real property in particular courts and in the counties where the land is situated, yet it never has been pretended that limitations of this character could affect, in any respect, the jurisdiction of the Federal court over such suits where the citizenship of one of the parties was otherwise sufficient. Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court, in such case, is not subject to State limitation.

This doctrine has been asserted in several cases by this court. In *Suydam* v. *Broadnax*,* an act of the legislature of Alabama provided that the estate of a deceased person, declared to be insolvent, should be distributed by the executors or administrators according to the provisions of the act, and that no suit or action should be commenced or sustained against any executor or administrator after the estate had been declared to be insolvent, except in certain cases; but this court held, in a case not thus excepted, that the insolvency of the estate, judicially declared under the act, was not sufficient in law to abate a suit instituted in the Circuit

* 14 Peters, 67.

Court of the United States by a citizen of another State against the representatives of a citizen of Alabama. "The 11th section of the act to establish the judicial courts of the United States," said the court, "carries out the constitutional right of a citizen of one State to sue a citizen of another State in the Circuit Court of the United States, and gives to the Circuit Court 'original cognizance concurrent with the courts of the several States of all suits of a civil nature at common law and in equity,' &c., &c. It was certainly intended to give to suitors, having a right to sue in the Circuit Court, remedies coextensive with these rights. These remedies would not be so if any proceedings under an act of a State legislature, to which a plaintiff was not a party, exempting a person of such State from suit, could be pleaded to abate a suit in the Circuit Court."

In *The Union Bank of Tennessee* v. *Jolly's Administrators*,* this court declared that the law of a State "limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other States from suing in the courts of the United States in that State for the recovery of any property or money there to which they may be legally or equitably entitled." The same doctrine was affirmed in *Hyde* v. *Stone*,† and in *Payne* v. *Hook*.‡

Third; as to the alleged invalidity of the act of March 2d, 1867, under which the removal from the State court was made. The counsel of the defendant, whilst confining his special objection to this act, questions the soundness of the reasoning of Mr. Justice Story, by which any legislation for the removal of causes from a State court to a Federal court is maintained. We may doubt, with counsel, whether such removal before issue or trial can properly be called an exercise of appellate jurisdiction. It may, we think, more properly be regarded as an indirect mode by which the Federal court acquires original jurisdiction of the causes.§ But it is not material whether the reasoning of the distinguished jurist in this par-

* 18 Howard, 506. † 20 Howard, 170. ‡ 7 Wallace, 425

§ Dennistoun *v.* Draper, 5 Blatchford's Cir. Ct. 340.

ticular is correct or otherwise. The validity of such legislation has been uniformly recognized by this court since the passage of the Judiciary Act of 1789.

The judicial power of the United States extends by the Constitution to controversies between citizens of different States as well as to cases arising under the Constitution, treaties, and laws of the United States, and the manner and conditions upon which that power shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion. In some cases, from their character, the judicial power is necessarily exclusive of all State authority; in other cases it may be made so at the option of Congress, or it may be exercised concurrently with that of the States. Such was the opinion of Mr. Justice Story, as expressed in *Martin* v. *Hunter's Lessee*,* and this conclusion was adopted and approved by this court in the recent case of *The Moses Taylor*.† The legislation of Congress has proceeded upon the correctness of this position in the distribution of jurisdiction to the Federal courts. The Judiciary Act of 1789, as observed in the case of *The Moses Taylor*, declares, "that in some cases from their commencement such jurisdiction shall be exclusive; in other cases it determines at what stage of procedure such jurisdiction shall attach, and how long and how far concurrent jurisdiction of the State courts shall be permitted. Thus, cases in which the United States are parties, civil causes of admiralty and maritime jurisdiction, and cases against consuls and vice-consuls, except for certain offences, are placed from their commencement exclusively under the cognizance of the Federal courts. On the other hand, some cases in which an alien or a citizen of another State is made a party may be brought either in a Federal or a State court, at the option of the plaintiff, and if brought in the State court may be prosecuted until the appearance of the defendant, and then

* 1 Wheaton, 334.

† 4 Wallace, 429, decided at the December Term, 1866.

at his option may be suffered to remain there or may be transferred to the jurisdiction of the Federal courts. Other cases, not included under these heads but involving questions under the Constitution, laws, treaties, or authority of the United States, are only drawn within the control of the Federal courts upon appeal or writ of error after final judgment. By subsequent legislation of Congress, and particularly by the legislation of the last four years, many of the cases which by the Judiciary Act could only come under the cognizance of the Federal courts after final judgment in the State courts, may be withdrawn from the concurrent jurisdiction of the latter courts at earlier stages, upon the application of the defendant. The constitutionality of these provisions cannot be seriously questioned and is of frequent recognition by both State and Federal courts."

When the jurisdiction of the Federal court depended upon the citizenship of the parties, the case could not be withdrawn from the State courts after suit commenced until the passage of the act of 1867, except upon the application of the defendant. The provision of the Constitution extending the judicial power of the United States to controversies between citizens of different States had its existence in the impression, that State attachments and State prejudices might affect injuriously the regular administration of justice in the State courts. The protection intended against these influences to non-residents of a State was originally supposed to have been sufficiently secured by giving to the plaintiff in the first instance an election of courts before suit brought; and where the suit was commenced in a State court a like election to the defendant afterwards. The time at which the non-resident party should be allowed thus to make his election was evidently a mere matter of legislative discretion, a simple question of expediency. If Congress has subsequently become satisfied, that where a plaintiff discovers, after suit brought in a State court, that the prejudice and local influence, against which the Constitution intended to guard, are such as are likely to prevent him from obtaining justice, he ought to be permitted to remove his case into a

National court, it is not perceived that any constitutional objection exists to its authorizing the removal, and, of course, to prescribing the conditions upon which the removal shall be allowed.

It follows, from the views we have expressed, that the objection to the jurisdiction of this action by the Circuit Court, upon the grounds advanced by the defendant, cannot be maintained.

It only remains to say a few words upon the refusal of the court to give the instructions prayed by the defendant, and upon its ruling in the admission of certain evidence, and its charge to the jury.

The facts of the case are very few, and with respect to most of them there was little conflict of evidence. [The learned justice here stated the facts of the case, and continued:]

Upon these facts the court gave to the jury a clear and full charge upon the duties and responsibilities of the railroad company in crossing the street of the city, with its engines and trains, and upon the care, prudence, and caution which it was incumbent upon the deceased to exercise in crossing the tracks; and as to the damages which the jury were authorized to find, in case they were satisfied that the employees of the company had been guilty of negligence, and that such negligence had caused the death of the deceased.

The counsel of the plaintiff had requested three special instructions to the jury, and the counsel of the defendant had requested nineteen special instructions. The court, however, declined to give any of them except as they were embraced in its general charge. Some of the instructions prayed by the defendant presented the law respecting the liability of the company correctly, and some of them were based upon an assumed condition of things which the evidence did not warrant. But it is not error for a court to refuse to give an extended series of instructions, even though some of them may be correct in the propositions of law

which they present, if the law arising upon the evidence is given by the court with such fulness as to guide correctly the jury in its findings, as was the case here; nor is a judgment to be set aside because the charge of the court may be open to some verbal criticisms, in particulars considered apart by themselves, which could not when taken with the rest of the charge have misled a jury of ordinary intelligence. The propriety of the rulings of the court in this case is fully vindicated in its opinion on the motion for a new trial.

The evidence of the condition of the deceased—that she was *enceinte* at the time of the accident—could not materially have affected the jury in the estimation of the damages, after the clear and explicit charge of the court, as to the character of the damages which only they were authorized to consider.

The other evidence in the case, to the admission of which objection was taken, was not material, and could not have influenced the result.

JUDGMENT AFFIRMED.

MYERS *v.* CROFT.

1. When the grantee in a deed is described in a way which is a proper enough description of an incorporated company, capable of holding land, as *ex. gr.*, "The Sulphur Springs *Land* Company," the court, in the absence of any proof whatever to the contrary, will presume that the company was capable in law to take a conveyance of real estate.
2. A grantor not having perfect title who conveys for full value is estopped, both himself and others claiming by subsequent grant from him, against denying title; a perfect title afterwards coming to him.
3. Under the 12th section of the act of September, 1841, "to appropriate the proceeds of the sales of public lands and to grant pre-emption rights"—which section, after prescribing the manner in which the proof of settlement and improvements shall be made before the land is entered, has a provision that "all assignments and transfers of the rights hereby secured, prior to the issuing of the patent, shall be null and void"—a pre-emptor who has entered the land, and who, at the time, is the owner in good faith, and has done nothing inconsistent

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with the provisions of the law on the subject, may sell even though he has not yet obtained a patent. The disability extends only to the assignment of the pre-emption right.

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

An act of Congress entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," approved September 4th, 1841, after prescribing the manner in which the proof of settlement and improvement shall be made before the land is entered, has this proviso: "and all assignments and transfers of *the right hereby secured prior to the issuing of the patent shall be null and void.*"

Under and by virtue of this act, one Fraily, on the 3d of September, 1857, entered a quarter-section of land in Nebraska, at the land office for the Omaha land district, with the register thereof.

On the same 3d of September, 1857—no letters patent having as yet issued to him—in consideration of $36,000, as appeared on the face of the deed, he conveyed by a warrantee deed the premises to "The Sulphur Springs Land Company;" the company being not otherwise described in the instrument, and there being nothing in the instrument or in other proof to show whether the said grantee was a corporation and capable of taking land or an unincorporated company.

On the 1st of May, 1860—more than two years after the date of the deed above mentioned—Fraily made another deed, for the sum, as appeared by the instrument, of $6000, to a certain Myers.

In this state of things Myers sued Croft, who was in under the company, in ejectment, to try the title to the land. And the deed to "The Sulphur Springs Land Company" being in evidence on the part of the defendant, the plaintiff moved the court to rule it from the jury, for the reasons:

1st. That he had not shown that the Sulphur Springs Land Company was an organization capable of receiving the conveyance of land; and,

2d. That under the provisions of the act of Congress, already quoted, the deed was void.

The court overruled the motion, charging contrariwise, that the deed was valid and passed the title to the premises. To this ruling and charge the plaintiff excepted, and judgment having been given for the defendant the case was now here.

Messrs. N. Cobb and L. Douglass, for the plaintiff in error:

1st. Although the Sulphur Springs Land Company, as we may here admit, was in fact incorporated, the fact nowhere appears in proof. Being a chartered company it was incumbent on the defendant to show the terms of the charter, and that by them the company could take the lands.

If not a corporation, the deed was void for want of certainty in the name of the grantee.

2d. Does the 12th section of the act of Congress of September 4th, 1841, intend to prohibit the pre-emptor from all alienation of the property which he has acquired under the pre-emption act prior to the issuing of the patent, or does it intend simply to prevent the transfer of the right to pre-empt?

The former view is the one best sustained by the statute. That is the way it reads; and when a statute is plain, it should not be frittered away by refinements. Until payment made for the land and certificate of purchase procured the pre-emptor has nothing which he can assign. If after certificate of purchase was obtained, there was intended to be no restriction on the sale of the land by the pre-emptor, why did the act use the words "prior to the issuing of the patent?"

The other view is, that the right secured is the right to pre-empt: and that this right is fully secured when the purchase is made of the United States. The right thus preferably to purchase cannot be transferred, and it is this alone (it may be argued) which is prohibited. If so, why did the statute use the words "prior to the issuing of the patent," instead of prior to the issuing of the certificate? Congress

knew the difference between a certificate of purchase and a patent. They are different instruments and subserve a different purpose. The certificate shows that the party has entered the land and is entitled to a patent at some future time; the patent transfers the title.

According to the course of business ordinarily, patents do not issue for years after the entry is made. This case proves that fact, and it is not unreasonable to suppose Congress was apprised of that fact.

The view we take of this law best accords with the policy of the pre-emption privilege. The object of the government was, in fact, to induce settlements upon the public lands, but chiefly to confer the preferable right to purchase on those persons, usually in indigent circumstances, who actually settled or improved them. It was not to aid the speculator in lands.*

Pre-emptions for purposes of speculations will be less likely to be made if the pre-emptor is obliged to wait until the patent issues before he can alienate.

There was a similar provision in the act of 29th May, 1830.† The language of the two acts is almost literally the same. By the act of January 23d, 1832,‡ the prohibition as to assignment and transfers of the right of pre-emption contained in the act of 1830 is removed, and it is provided that "all persons who have purchased lands under the act of May 29th, 1830, may assign and transfer their certificates of purchase or final receipts, and patents may issue in the name of such assignee, anything in the act aforesaid to the contrary notwithstanding." This shows that it was understood by Congress as restricting alienations by the pre-emptor, after payment and before patent issued. The effect of allowing such transfers was such that Congress, in passing the carefully-framed act of September 4th, 1841, renewed the prohibition against transfers which was contained in the act of 1830. The government had witnessed the practical effect of both policies, and the judgment of Congress as em-

* Marks *v.* Dickson, 20 Howard, 501, 505.

† 4 Stat. at Large, 420, § 3.

‡ Ib. 496.

bodied in the latter act as to which is the better policy should be respected by the courts, and the language of the statute should be allowed its fair and natural meaning.

Though the point has never been before this court, it has frequently been before the State courts, and they have with great uniformity held that the pre-emptor had no transferable interest prior to the issuing of the patent.*

Mr. Justice DAVIS delivered the opinion of the court.

In relation to the first objection—that the Sulphur Springs Land Company was not a competent grantee to receive the title—it is sufficient to say, in the absence of any proof whatever on the subject, that it will be presumed the land company was capable, in law, to take a conveyance of real estate. Besides, neither Fraily, who made the deed, nor Myers, who claims under him, is in a position to question the capacity of the company to take the title after it has paid to Fraily full value for the property.†

The other objection is of a more serious character, and depends for its solution upon the construction to be given the last clause of the 12th section of the act of Congress of September 4th, 1841. The act itself is one of a series of pre-emption laws conferring upon the actual settler upon a quarter section of public land the privilege (enjoyed by no one else) of purchasing it, on complying with certain prescribed conditions. It had been the well-defined policy of Congress, in passing these laws, not to allow their benefit to enure to the profit of land speculators, but this wise policy was often defeated. Experience had proved that designing persons, being unable to purchase valuable lands, on account of their withdrawal from sale, would procure middle men to occupy them temporarily, with indifferent improvements,

* Arbour *v.* Nettles, 12 Louisiana An. 217; Poirrier *v.* White, 2 Id. 934; Penn *v.* Ott, 12 Id. 233; Stanbrough *v.* Wilson, 13 Id. 494; Stevens *v.* Hays, 1 Indiana, 247; McElyea *v.* Hayter, 2 Porter (Ala.), 148; Cundiff *v.* Orms, 7 Id. 58; Glenn *v.* Thistle, 23 Mississippi, 42–49; Wilkerson *v.* Mayfield, 27 Id. 542; McTyer *v.* McDowell, 36 Alabama, 39; Paulding *v.* Grimsley, 10 Missouri, 210.

† Smith *v.* Sheeley, 12 Wallace, 358.

under an agreement to convey them so soon as they were entered by virtue of their pre-emption rights. When this was done, and the speculation accomplished, the lands were abandoned.

This was felt to be a serious evil, and Congress, in the law under consideration, undertook to remedy it by requiring of the applicant for a pre-emption, before he was allowed to enter the land on which he had settled, to swear that he had not contracted it away, nor settled upon it to sell it on speculation, but, in good faith, to appropriate it to his own use. In case of false swearing the pre-emptor was subject to a prosecution for perjury, and forfeited the money he had paid for the land; and any grant or conveyance made by him *before* the entry was declared null and void, with an exception in favor of *bonâ fide* purchasers for a valuable consideration. It is contended by the plaintiff in error that Congress went further in this direction, and imposed also a restriction upon the power of alienation *after* the entry, and the last clause in the 12th section of the act is cited to support the position.

This section, after prescribing the manner in which the proof of settlement and improvement shall be made before the land is entered, has this proviso: "and all assignments and transfers of the right hereby secured prior to the issuing of the patent shall be null and void."

The inquiry is, what did the legislature intend by this prohibition? Did it mean to disqualify the pre-emptor who had entered the land from selling it at all until he had obtained his patent, or did the disability extend only to the assignment of the pre-emption right? Looking at the language employed, as well as the policy of Congress on the subject, it would seem that the interdiction was intended to apply to the right secured by the act, and did not go further. This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable, and independently of the legislation of Congress assignable.*

* Thredgill *v.* Pintard, 12 Howard, 24.

Syllabus.

The object of Congress was attained when the pre-emptor went, with clean hands, to the land office and proved up his right, and paid the government for his land. Restriction upon the power of alienation after this would injure the pre-emptor, and could serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given, and equally well known that nearly all the valuable lands in the new States, admitted since 1841, have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for, and the certificate of entry received. In view of these facts we cannot suppose, in the absence of an express declaration to that effect, that Congress intended to tie up these lands in the hands of the original owners, until the government should choose to issue the patent.

If it had been the purpose of Congress to attain the object contended for, it would have declared the lands themselves unalienable until the patent was granted. Instead of this, the legislation was directed against the assignment or transfer of the right secured by the act, which was the right of pre-emption, leaving the pre-emptor free to sell his land after the entry, if at that time he was, in good faith, the owner of the land, and had done nothing inconsistent with the provisions of the law on the subject.

JUDGMENT AFFIRMED.

PENDLETON COUNTY *v.* AMY.

1. On suit upon the coupons of railroad bonds payable, both bonds and coupons, by their terms, to the bearer—the declaration alleging the plaintiff to be owner, holder, and bearer of the coupons—a plea that the plaintiff was not, either at the time when the declaration or when the plea was filed, the owner, holder, or bearer, is a traverse of a material allegation of the declaration, and though faulty as argumentative, must, on *general* demurrer, be held good.

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2. So, on like sort of demurrer, a plea, that at the times named, the bonds and coupons were all the property of one A. R., a citizen of K. (the same State of which the defendant was a citizen), and not of any other person.
3. So, on like sort of demurrer, when the declaration alleged that the coupons sued on were for interest on bonds that had been issued by a county and delivered by it to a certain railroad company in payment by the county of a subscription to stock of the road under an authority given by acts of the legislature, a plea that the county did not sign, seal, or deliver the bonds and coupons to the company as in the declaration alleged, and "*so* that the alleged acts and coupons are not its acts and deeds."
4. A county issuing bonds to a railroad company in payment of stock in the road, which subscription the county was authorized by legislative enactment to make and to pay for by the issue of the bonds, only after certain things directed had been performed, *may* be estopped against asserting that the conditions attached to a grant of the power were not fulfilled. Where the issue of the bonds without such previous fulfilment would be a misdemeanor, by the county officers, it is to be presumed, though perhaps not conclusively, that the conditions were fulfilled. And an estoppel would take place where the county had received the proper amount of stock for which the bonds were issued; had held it for seventeen years, and was actually enjoying it at the time when pleading want of authority to subscribe.

ERROR to the Circuit Court for the District of Kentucky.

Amy brought suit in April, 1869, against the county of Pendleton, in Kentucky, to recover the aggregate amount of certain coupons or interest warrants attached to fifty bonds of $1000 each. The bonds were dated October 15th, 1853, payable thirty years after date, and were alleged in the declaration to have been made and issued by the county of Pendleton in virtue of authority conferred by the legislature of the State. The declaration averred the execution of the bonds with interest warrants attached to each, payable to the bearer semiannually on the 15th days of April and October of every year, and also that they had been delivered to the Covington and Lexington Railroad Company in payment of a subscription made by the county to the capital stock of the company, under authority given by acts of the legislature. It further averred that the bonds were received by the railroad company, and *that a certificate for the shares of stock subscribed, as aforesaid, was issued to the county,*

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and was received by it, and that it was still owned by the county; and further, that the bonds were afterwards sold by the rail road company for $50,000, and delivered to the purchasers with the coupons attached; that the *plaintiff* subsequently became the *owner, holder, and bearer* of them all, and that from the 15th day of October, 1864, inclusive, until the commencement of the suit the county had neglected and refused to pay the coupons, though often requested to pay them.

To the cause of action thus set forth the defendant pleaded four pleas:

1st. That the plaintiff was not, at the time of filing his declaration, or at the time of entering the plea, the owner, holder, or bearer of the said alleged bonds and coupons, or of any or either of them, as in the declaration mentioned.

2d. That at the time of filing the declaration and plea the bonds and coupons were all the property of one Augustus Robins, a citizen of the State of Kentucky, and not then or now the property of any other person.

3d. That although the legislature, by one act, empowered the county to subscribe to the stock of the company, and to borrow money to pay the subscription, yet the authority was coupled with a proviso that the real estate holders residing in the county should so vote, by a majority, at such times as the county court might appoint, and that "the question of subscribing stock, or of borrowing money to pay the same, never was submitted to the real estate holders residing in the county of Pendleton, to be determined by vote of a majority of them, as authorized and required by the act, before any stock had been subscribed by or for said county, or any money borrowed to pay the same." The plea then averred that subsequent acts of the legislature (enacted before the subscription was made) which authorized the levy of a tax for the purpose of paying the subscriptions to the stock of the said company, also provided that before a subscription should be made and a tax levied, the question of levying the tax should be submitted to the voters of the county, and if a majority of the votes cast should be in favor of the tax, it should be levied, and the subscription should be made; and

the plea denied that the question whether the tax or the subscription authorized by these acts, or whether any tax for payment of a subscription of stock in said company should be imposed in the county, had ever been submitted to, or voted upon, by the voters of Pendleton County in conformity with said acts. The plea further averred that no other acts of the legislature authorized the county, or any one for it, to subscribe stock for it in said company, or to levy a tax for payment, or to borrow money, or to issue bonds and coupons for the payment of any subscriptions of stock therein.

4th. That the county did not sign, seal, or deliver the bonds and coupons to the railroad company, or to any person or corporation, as in the declaration alleged, nor authorize any one to do so; "and *so* the defendant says that the alleged acts and coupons are not its acts and deeds."

To all these pleas there were *general* demurrers; and these demurrers being sustained and judgment given for the plaintiff, the county brought the case here.

Mr. B. H. Bristow, for the plaintiff in error:

1. The first plea shows that Amy was not *at any time* the owner, holder, or bearer of any of the bonds or coupons. If he was not, he had no right to sue. He might have made out a *primâ facie* case by producing the bonds and coupons; but it was not impossible for the county to overturn the *primâ facie* case, and the opportunity ought to have been allowed on a trial of the issue.

2. The second plea showed that a citizen of Kentucky was the owner, which the county of Pendleton was ready to verify. This plea ought to have been denied by Amy, because, if the plea was true, he had no right to sue.

3. The third plea, though containing some formal defects, constituted nevertheless a good defence; for, admitting the facts alleged in it to be true, it showed an entire want of authority in the County Court to issue the bonds and coupons, and consequently the absence of liability to pay. The authority of the County Court to borrow money, as is ap-

parent from the matter pleaded, depended on a condition precedent, to wit, that the question of subscribing to the stock and of levying a tax had been submitted to the voters of the county for their determination. Now, the plea avers, and the demurrer admits, that the question of subscribing, &c., was never submitted to a vote. So that the fact established by the pleadings is, not the irregular execution of a power already possessed, but the non-existence of the power itself.

4. The fourth plea is a special plea amounting to the general issue, and though bad in form is good in substance.

Mr. J. W. Stevenson, contra:

1 and 2. By the first and second pleas, that which is mere matter in abatement is relied on in bar. The pleas do not dispute the making and delivery of the bonds and coupons, or that they are binding upon the county, or that they are due or unpaid, or that a cause of action exists against the county on them, but simply asserts that the action is not brought in the name of the proper party.

Both pleas tender issues upon non-issuable points. The declaration sets forth that the bonds and coupons were payable to the bearer. The pleas do not dispute this. Therefore the bearer has the right to sue. The bonds and coupons being specialties, the proper method of trying the question whether the plaintiff was the bearer or not was to crave oyer. This would have settled the question by requiring the plaintiff to produce them to the view of the court and of the defendant. If it is said no profert was made, then the proper course was to demur for want of profert.*

The second plea is bad, for the further reason that it simply sets forth that the coupons are the *property* of one Robins; whereas the undertaking as set forth in the declaration was to pay the *bearer* of the coupons, and not the person in whom the right of property might be vested. It does not deny that the plaintiff is the bearer of them, or assert that his holding is tortious.

* Stephens on Pleading, 69, 405.

3. The third plea sets forth matter that is immaterial to the case made by the declaration. The declaration sets forth that the defendant made the fifty bonds, that by the terms of each bond it agreed to pay the bearer $1000, with interest payable semiannually, for which coupons payable to bearer were attached; that it, *in fact*, subscribed $50,000 to the capital stock of this railroad company, and tendered these bonds in payment of it, and they were received in full payment of the subscription, and that the company immediately sold the bonds for $50,000, which it used in constructing the road, and that the plaintiff has since become the owner and bearer of them.

The plea does not traverse any one of the facts set out in the declaration. Nor does it set forth any case that amounts to an avoidance of them. The county admits that it made the bonds, sold them, and got the money for them. As against an innocent holder for value it is *estopped* to say that it did this without authority.*

4. The fourth plea is an awkward attempt at *non est factum*. What it sets out does not amount to the plea of *non est factum*. The gist of such a plea is the direct and positive averment that the instrument sued on is not the party's deed. And this positive and direct averment must be supported by the oath of the party. Now this plea, in order to ease the conscience of the required oath, goes on to say that the county did not do certain things, nor did the county authorize certain individuals to do those things, and then by way of argument and inference concludes, "and *so* the said defendant says that the said *alleged* acts and coupons are not its acts and deeds."

The plea is bad on other grounds. It purports to be a special plea of *non est factum*. Such a plea must traverse some fact set out in the declaration which is essential to make the instrument the deed of the defendant. The substance of the plea is that the county did not sign nor seal the instruments, nor did it authorize others to do so for it.

* Rogers *v.* Burlington, 3 Wallace, 654; Mercer *v.* Hacket, 1 Id. 83; Bronson *v.* La Crosse, 2 Id. 283.

This is pleading a mere conclusion of law. If the facts set forth in the declaration are true, these bonds and coupons were sealed and delivered by the county. The *facts*, as specifically set forth in the declaration, *are not traversed* by the plea. Admitting those facts to be true, the defendant merely puts in its conclusion that it did not execute the bonds and coupons, or authorize it to be done.

Reply: It is said that the third plea is good because it shows an estoppel. But where this doctrine has been applied in actions against municipal corporations, either the instruments imported on their face a compliance with the law conferring the power to issue them, or there appeared subsequent acts on the part of the proper authorities amounting to a ratification; and even then the estoppel has been allowed only in favor of *bonâ fide owners* for value; not in favor of mere holders.

Mr. Justice STRONG delivered the opinion of the court.

It must be admitted that the pleas interposed by the defendant in the court below were inartistically framed; that they were argumentative, and that they set up nothing which could not have been taken advantage of, for what it was worth, under the general issue. They might have been stricken from the record on motion, or, if special demurrers were allowable in that circuit, they would have been condemned, had the plaintiff so demurred. But the demurrers were general, and the question before us is whether any of the pleas set up a substantial defence to the action.

Now, in regard to the first plea, while it is true that the defence which it sets up was only inferentially an answer to the plaintiff's complaint, and while it might as well have been set up under the general issue, it was nevertheless a traverse of a material averment of the declaration. The coupons were made payable to bearer, but if the plaintiff was neither the owner, nor the holder, nor the bearer, they were not promises to pay him, and the county was not indebted to him. Hence it was material to his case to aver, as he did,

that he was the bearer, and the plea took issue with this averment. It denied the title of the plaintiff, or his right of action, and, though faulty in form, in substance it amounted to a defence. It was, therefore, error to overrule it upon a general demurrer.

Similar observations might be made respecting the demurrers to the second and fourth pleas.

The third plea was in effect a denial of any legislative authority to the county to subscribe to the stock of the railroad company, and to issue bonds for the payment of such subscription. The general demurrer to it raises the question whether it presented a substantial defence to the action.

It is to be noticed at the outset that the plea concedes legislative authority to the county to make a subscription, and to issue bonds in payment, though the exercise of the authority was required to be preceded by a popular vote. It concedes that the bonds were in fact made and issued. We say it concedes this, because such making and issue are alleged in the declaration, and the plea does not traverse the allegation. It concedes that the subscription was made; that the bonds were delivered to the company in payment; that they were sold for $50,000; that the plaintiff subsequently became the owner, and hence that he stands in the position of a purchaser for value; and it concedes that the county obtained for the bonds a certificate of stock in the railroad company, which it now holds.

Without legislative authority a municipal corporation, like a county, may not subscribe to the capital stock of a railroad company, and bind itself to pay its subscription, or issue its bonds in payment; and if it does, the purchase of such bonds is affected by the want of authority to make them. But it does not follow from this that when the legislature has given its sanction to the issue of bonds, provided that before their issue certain things shall be done by the officers, or the people of the county, the bonds can *always* be avoided in the hands of an innocent purchaser by proof that the county officers, or the people, have not done, or have insufficiently done, the things which the legislature re-

quired to be done before the authority to subscribe, or to issue bonds, should be exercised. A purchaser is not always bound to look farther than to discover that the power has been conferred, even though it be coupled with conditions precedent. If the right to subscribe be made dependent upon the result of a popular vote, the officers of the county must first determine whether the vote has been taken as directed by law and what the vote was. When, therefore, they make a subscription, and issue county bonds in payment, it may fairly be presumed, in favor of an innocent purchaser of the bonds, that the condition which the law attached to the exercise of the power has been fulfilled. To issue the bonds without the fulfilment of the precedent conditions would be a misdemeanor, and it is to be presumed that public officers act rightly. We do not say this is a conclusive presumption in all cases, but it has more than once been decided that a county may be estopped against asserting that the conditions attached to a grant of power were not fulfilled.* The estoppel in these cases was either by recitals in the bonds that the conditions precedent had been complied with, or by the fact that the county had subsequently levied taxes to pay interest on the bonds. In the present case it does not appear in the pleadings whether or not the bonds contained any such recitals, nor whether the officers of the county have levied taxes to pay interest on them, or whether any interest has been paid. These grounds of estoppel do not exist. But if such acts and such recitals are sufficient to protect *bonâ fide* purchasers against an attempt to set up noncompliance with the conditions attached to the grant of power to issue the bonds, it is not easy to see why the pleadings do not show an estoppel in this case. The county received in exchange for the bonds a certificate for the stock of the railroad company, which it held about seventeen years before the present suit was

* Commissioners of Knox County *v.* Aspinwall et al., 21 Howard, 539 Bissell *v.* City of Jeffersonville, 24 Id. 287; Moran *v.* Commissioners, 2 Black, 722; Meyer *v.* Muscatine, 1 Wallace, 384; Van Hostrup *v.* Madison City, 1 Id. 291; Supervisors *v.* Schenck, 5 Id. 772.

brought, and which it still holds. Having exchanged the bonds for the stock, can it retain the proceeds of the exchange, and assert against a purchaser of the bonds for value that though the legislature empowered it to make them, and put them upon the market, upon certain conditions, they were issued is disregard of the conditions? We think they cannot, and, therefore, that the third plea cannot be sustained.

But for the reasons given above the case must be sent back for another trial; when, doubtless, the pleadings will be changed.

JUDGMENT REVERSED, and the cause

REMITTED FOR FURTHER PROCEEDINGS.

The CHIEF JUSTICE, with MILLER and FIELD, JJ., concurred in a judgment of reversal, but said that they did not assent to all the views expressed in the preceding opinion.

WILLIAMS *v.* KIRTLAND.

1. A tax deed executed by a county auditor under a statute of Minnesota of 1866, declaring that where lands sold for taxes were not redeemed within the time allowed by law, such deed should be *primâ facie* evidence of a good and valid title in the grantee, his heirs, and assigns, did not dispense with the performance of all the requirements prescribed by law for the sale of the land. It only shifted the burden of proof of such performance from the party claiming under the deed to the party attacking it.
2. The construction of a State law upon a question affecting the titles to real property in the State by its highest court, is binding upon the Federal courts.

ERROR to the Circuit Court for the District of Minnesota.

This was an action of ejectment for the possession of certain real property, situated in the city of St. Paul, in the State of Minnesota. The declaration was in the form usual

Statement of the case.

in Minnesota. The plea was the general issue; and by consent of parties a jury was waived and the cause tried by the court. The plaintiff claimed the premises under a deed executed in 1864, by the auditor of Ramsey County of that State upon a sale for unpaid taxes.

The statute of Minnesota of March 11th, 1862, under which the sale was made, provided that certain lands sold for taxes of the year 1859, and *of previous years*, and lands upon which delinquent taxes were due on the passage of the act to any city, or to the State, might be redeemed by payment of the amount of the taxes, with interest and costs, on or before November 1st, 1862; that if any such lands remained unredeemed, or such delinquent taxes on lands remained unpaid at that time, the lands should become forfeited to the State, and that thereupon it should be the duty of the county auditor to advertise the property for sale, stating that such lands would be sold as forfeited to the State under the provisions of the act, and the time and place of sale, *which time should be the second Monday in January*, 1863.

The statute also contained provisions requiring publication of notices of the sale, prescribing the manner in which the sale should be conducted, for the issue of certificates of sale to the purchaser, and, upon the return of the certificates, for the execution and delivery to him, or his assignee, of a deed in fee simple for the premises, which should recite the sale and the fact that the property was unredeemed. And the statute declared that the deed thus executed should vest in the grantee an absolute title, both at law and in equity, except where the tax returned delinquent was actually paid; and "that any person or persons having or claiming any right, title, or interest in or to any land or premises after a sale under the provisions of this act, adverse to the title or claim of the purchaser at any such tax sale, his heirs or assigns shall within one year from the time of the recording of the tax deed for such premises commence an action for the purpose of testing the validity of such sale, or be forever barred in tne premises."

A statute of the State, passed in 1866, provides that where

lands sold for taxes were not redeemed within the time allowed by law, the deed executed by the county auditor should be *primâ facie* evidence of a good and valid title in the grantee, his heirs, and assigns.

The deed recited that the sale was made on the 11th of February, 1863, and did not recite any cause for disregarding the day designated for the sale in the statute, namely, the second Monday in January, 1863. The deed also recited that the sale was "for the sum of $337.80; being the amount of taxes for the years 1853, 1854, 1855, 1856, 1857, 1859, 1860, 1861, with interests and costs chargeable on said tract of land."

After the deed was received in evidence, the defendant, to maintain the issue on his part, produced as a witness the treasurer of Ramsey County at the time of the sale mentioned in the deed, and offered *to prove that the notice of the sale was insufficient;* but the plaintiff objected to the proof on the ground that it was *incompetent and immaterial*, and the objection was sustained by the court. The defendant excepted. The court thereupon found that the plaintiff was entitled to judgment for the possession of the premises in controversy, by virtue of the tax deed, and rendered judgment accordingly; and the defendant brought the case here on writ of error.

Messrs. J. B. Brisbin and E. C. Palmer, for the plaintiff in error; Mr. I. D. Warren, contra.

Mr. Justice FIELD delivered the opinion of the court.

We agree with counsel that the provision in the statute of March 11th, 1862, that the tax deed executed by the county auditor should vest in the grantee an absolute title, both at law and in equity, except where the tax returned delinquent was actually paid, only declared the effect of a deed such as the statute contemplated, and did not dispense with proof of compliance with the preliminary requirements of the act. The officer, in making the sale and executing the deed, acted under a special power, and, as in all such

cases, was bound to keep strictly within the limits of his authority. No attempt was made by the plaintiff to show the levy of any tax upon the property, or its non-payment, or that any sale was ever had. He relied, to supply the want of such proof, upon a provision of the statute of 1866, declaring that where lands sold for taxes were not redeemed within the time allowed by law, the deed executed by the county auditor should be *primâ facie* evidence of a good and valid title in the grantee, his heirs, and assigns.*

It is admitted that a deed executed under these circumstances would, if valid on its face, have dispensed, in the first instance, with proof of the previous proceedings, upon the performance of which a sale only could be made. But it is contended that it was essential to the admission of a tax deed, having of itself such effect as evidence, that it should appear that the lands sold for taxes had not been redeemed when the deed was executed and delivered. And it is stated that this has been expressly adjudged by the Supreme Court of Minnesota upon the construction of the provision of the statute of 1866 cited by the plaintiff.† Such is undoubtedly the case, and, had the objection been taken when the deed was offered, the deed would not have been admissible, in the absence of such proof, to establish a title in the plaintiff. But the plaintiff is precluded from availing himself of the objection here, as it was not urged in the court below, and is not covered by any of the several objections presented by him.

It may admit of much doubt, as also contended by counsel, whether the deed was not invalid on its face. The act of 1862 declares that notice of the sale should be given for the second Monday of January, 1863. The deed shows that the sale took place on the 11th of February following, and contains no recitals explaining the disregard of the day designated by the statute and the selection of a different day.

The act of 1862 also provides for sale of certain lands upon which the taxes of 1859 and of preceding years were

* General Statutes of Minnesota of 1866, chap. 11, §§ 139, 140.

† Greve *v.* Coffin, 14 Minnesota, 355.

unpaid. The deed shows that the sale was made for delinquent taxes not only of these years, but also of the subsequent years of 1860 and 1861; and counsel have not called our attention to any statute of Minnesota which authorizes a sale for the taxes of these years added to the taxes of the previous years.

But it is not necessary to express any opinion upon these objections until we have the entire statutes of the State on the subject of these tax sales before us. There is one error in the ruling of the court below which will require a reversal of the judgment. Giving to the deed full effect as *primâ facie* evidence of title, its validity was open to question by the defendant. The statute does not dispense with the performance of all the requirements of the law prescribed for the sale of the land. It only shifts the burden of proof of such compliance from the party claiming under the deed to the party attacking it. The deed itself, when admitted, creates under the statute a presumption that all essential preliminary steps in the assessment and levy of the tax and sale of the property have been complied with. This presumption the defendant desired to rebut. He offered to prove that the notice of the sale was insufficient, but the offer was rejected under the objection that the proof was incompetent and immaterial. In this the court below erred.

Some criticism was made upon the form of the offer, that it was not to prove any particular fact, but a conclusion of law. It would undoubtedly have been better for counsel to have stated the facts he desired to establish, but no objection was taken to the form of the offer; the objection was only to the competency and materiality of the proof; and it would be unjust to the defendant to deprive him in this court of the benefit of his offer on grounds not presented in the court below. That court evidently considered the right of the defendant to question the validity of the deed as lost by the operation of the 7th section of the act of 1862, which declared: "That any person or persons having or claiming any right, title, or interest in or to any land or premises after a sale under the provisions of this act, adverse to the title or

claim of the purchaser at any such tax sale, his heirs or assigns shall within one year from the time of the recording of the tax deed for such premises commence an action for the purpose of testing the validity of such sale, or be forever barred in the premises."

It is a sufficient answer to this view of the operation of this statute, that the Supreme Court of Minnesota has adjudged that the statute does not apply to cases where the owner of the property defends against a tax deed in an action of ejectment; and if it were susceptible of such application that the statute itself would be in conflict with the constitution of the State.* This construction of a State law upon a question affecting the titles to real property in the State by its highest court, is binding upon the Federal courts.

JUDGMENT REVERSED, and the cause

REMANDED FOR A NEW TRIAL.

CANAL COMPANY *v.* CLARK.

1. To entitle a name to equitable protection as a trade-mark, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it. And this is so although the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product. Purchasers though mistaken, are not in such a case deceived by false representations, and equity will not enjoin against telling the truth.
2. Hence no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation.
3. Accordingly, where the coal of one person who early and long mined coal in a valley of Pennsylvania known as the Lackawanna Valley had been designated and become known as "Lackawanna coal," *Held*, that miners who came in afterwards and mined in another part of the same

* Baker *v.* Kelley, 11 Minnesota, 480.

valley, could not be enjoined against calling their coal "Lackawanna coal," it being in fact and in its generic character properly so designated, although more properly described when specifically spoken of as "Scranton coal" or "Pittston coal," and when specifically spoken of usually so called.

APPEAL from the Circuit Court for the Southern District of New York; the case, which arose on a bill to enjoin the use of an alleged trade-mark, being thus:

In the northeastern section of Pennsylvania there exists a place or region to which from early times the name of Lorckaworna, or Lackawanna, seems, on the few occasions when the place is mentioned, to have been given. As early as 1793, the diary of William Colbert, a pioneer preacher of the Methodists, makes record of his meeting a person who lived at "Lackawanna," and of his crossing a mountain and getting there himself. A deed, dated in 1774, speaks of a river running through that valley or region as "the Lackaworna," and another deed dated in 1796 conveyed "lands lying and being in Upper Settlement, so-called, and abutting on each side of the Lackawanna." The region, however, in those early times was uncultivated and little known to people generally in any way, and the name was unheard of and unnoted except by those who were dwelling in the very district.

The discovery and use of coal in Pennsylvania, soon after the year 1820, wrought an immense change in the whole northeastern part of the State. It brought this valley and others, as, for example, the Wyoming, Lehigh, and Schuylkill, into very prominent position and interest; and the "Lackawanna Valley" soon became a well-known and sufficiently defined region; one of large dimensions, extending along what had become known as the Lackawanna River to its junction with the Susquehanna.* In 1825 the Delaware and Hudson Canal Company purchased coal lands in this

* The name, Lackawanna, it is said, is a corruption of the Indian words Laha-whanna; the two words signifying the meeting of two streams. See Hollister's History of the Lackawanna Valley, published by W. H. Tinson, New York, 1857, p. 10.

region, and in order to mine and bring the coal there to market, constructed at great expense a canal from Rondout, on the Hudson, to Honesdale, in Pennsylvania, a distance of one hundred and eight miles, and a railroad thence to their coal mines, which they had since maintained, for the purpose of bringing their coal to market. This transport they began to make in 1828, and had ever since been engaged in taking out coal and in carrying it to the Hudson River and to the markets of the country; gradually increasing their annual productions. In the first year they produced 720 tons, in the second year 43,000 tons, and in 1866 1,300,000 tons.

The coal coming from the Lackawanna Valley, and it being impossible for ordinary persons by mere inspection to distinguish it from that mined elsewhere, it naturally got, or artificially had given to it, at the commencement of the company's business, the name "Lackawanna coal;" and by this name it had been generally afterwards known and called in the market.

Although this coal came from a section of country called both by geologists and the public the Lackawanna region, still the company were, without doubt, the first and for more than twenty years the only producers of coal from that region, and during all this time their coal had become favorably known in market by the name already mentioned.

In 1850, another company, the Pennsylvania Coal Company, began to mine coal from *their* mines situated in the same general region of country, and for the first two years the coal which they mined was partially prepared and brought to market by the Delaware and Hudson Canal Company, already named as the original operators, and sold under contract in common with their own; but, about 1852, when the Pennsylvania company began itself to bring its coal to market and to sell it, it got or had given to it the name of "Pittston coal," by which it was frequently or generally known and called, especially when specifically spoken of.

Afterwards, about 1856, a third company—the Delaware,

Lackawanna, and Western Railroad Company—began to mine coal from mines which they owned, situated in other parts of the same section of country, and to distinguish it from that of other producers, their coal got or had given to it the name of "Scranton coal," by which it had since been frequently or generally known and called, especially when meant to be particularly referred to.

Coals from other parts of the same region got or had given to them distinctive names; such as Lehigh coal, Hazelton coal, Spring Mountain coal, Sugarloaf coal, &c., and in like manner coals from the Schuylkill region acquired or had given to them distinctive names by which the same were known more particularly in the market.

With all this, however, all the varieties coming, as in effect they did, from the same great veins or strata, were not unfrequently of later times spoken of by the trade, when speaking generally, as being Lackawanna coal; and under the general heading of statistics relating to coal would be spoken of in like generic terms.

The original Lackawanna was asserted by those interested in its sale to be better prepared than either of the others. From this circumstance or from some other it was esteemed and commanded, with a class of purchasers, a higher price than either the Scranton or Pittston.

The canal company had a market for their Lackawanna coal in the City and State of New York, and also in the cities and towns of the Eastern States, and, amongst others, at Providence, R. I., where they had for many years sold annually large quantities by the name of "Lackawanna coal," by which it had been favorably known.

In this state of things, one Clark, a dealer in coals, at Providence, advertised in the newspapers published in that city and otherwise, that he kept on hand, for sale cheap, large quantities of "Lackawanna coal," and in this way, *and by that name* had sold many tons of the Pittston and Scranton coals annually. It was admitted that he did not have any of the canal company's coal—that is to say, the original Lackawanna—for sale.

Statement of the case.

Hereupon the Delaware and Hudson Canal Company filed their bill against Clark, to enjoin his calling the coal which he sold "Lackawanna coal." The bill averred that about the time the canal company commenced their operations, they sought out, devised, and adopted the name "Lackawanna coal" as a special, particular, and distinctive name or trade-mark, by which their coal might be introduced to dealers as the product of their mines in distinction from the coal of other producers, and that prior to their adoption of the word Lackawanna it had never been adopted or used in combination with the word "coal" as a name or trade-mark for any kind of coal. Their bill also averred that ever since their adoption of the name their coal has been called and known in the market as "Lackawanna coal," and by no other name.

The defendant, it was admitted, had none of the complainant's "Lackawanna coal" for sale, but dealt in coals from another part of the Valley; sorts which when specifically distinguished, as they constantly were, were distinguished by the name of "Scranton coal," and "Pittston coal;" coals having the same general appearance as the complainant's "Lackawanna coal," and which the bill alleged could not be easily distinguished therefrom by inspection.

The answer denied that the name "Lackawanna coal" was, or ever had been, the peculiar property and trade-mark of the complainants, or of benefit to them as establishing the identity of the coal. It admitted that the defendant kept coal for sale, and that he did not purchase or keep for sale any of the company's Lackawanna coal, and that he dealt almost exclusively in coal mentioned in the bill as Scranton and Pittston coal, and that the two varieties were of the same general appearance as the coal of the complainants. It denied, however, that those varieties of coal were known by the names just mentioned, exclusively, or were of a less good quality than the coal of the complainants, and averred the contrary; affirming that they were equally Lackawanna

coal, and known by that name, as the evidence tended to show that generically they were.

The court below dismissed the bill, and from that decree the Delaware and Hudson Canal Company appealed. The leading question presented by the appeal being whether the complainants had an exclusive right to the use of the words "Lackawanna coal," as a distinctive name or trade-mark for the coal mined by them, and transported over their railroad and canal to market; there being also some other points not necessary to be here stated.

The case was fully and remarkably well argued on both sides, and with a nice analysis of authorities.

Messrs. E. H. Owen and S. P. Nash, for the plaintiffs in error:

It cannot be doubted as a fact that the defendant advertises his coal as "Lackawanna coal," for the purpose of inducing the public to believe that it is in fact the coal produced and sold by the canal company, and with the intention of supplanting the company in the good will of its trade. This is a fraud upon the public, and a fraud also upon the company suing; depriving them of the benefit of any right they have in the word Lackawanna, as a *trade-mark.*

Now, the canal company has a valid title to the use of the word Lackawanna as a trade-mark. They were the first to adopt and impose upon it the office of becoming and being thereafter the name for their coal; so adopting and appropriating it as early as 1828, at the commencement of their business. The first coal which they brought to market was called and sold by the name of Lackawanna coal, and all the coal which they have hitherto brought to market has been sold and dealt in by that name and by none other. By such original appropriation of the word "Lackawanna," they acquired a title thereto, and the right to its exclusive use in combination with the word "coal," and thereupon and thereafter, by the continued use thereof, the new compound word

Argument in support of the trade-mark.

"Lackawanna coal" became, and was, and is, the name and *trade-mark* for their coal, not limited by territorial bounds.*

It is not necessary that a word which may be adopted as a name and trade-mark should be a new creation never before known or used, to entitle it to be so adopted. Any word in common use may be taken, if its application be original, and so far peculiar as to be capable, when known to the public, of distinguishing the property of the party so adopting it, and to which it may be attached, from that of other parties. In such case the right of the public to use the word is not abridged. It can be used as originally and in any and every other way imaginable, except in its peculiar combination with the word "coal."

The exceptions to the right to appropriate a *word* for a trade-mark are, that it cannot be done when the word adopted is merely used as descriptive of *quality*, as in the case of *Stokes* v. *Landgraff*,† or of *Corwin* v. *Daly*,‡ or of *Amoskeag Manufacturing Company* v. *Spear*;§ or where it is the proper name for the article, as in the case of the "Schnapps," the subject of controversy in *Wolfe* v. *Goulard*; or where it has by general use become the appropriate name of an article, which all persons manufacturing the same may use, as in the case of "Dr. Johnson's Yellow Ointment,"¶ or that of "The Essence of Anchovies."**

The word Lackawanna, as used by the company, does not come within these exceptions. It is not the naturally appropriate name for coal. In its original sense it did not mean coal, nor had it become by previous use the name of coal, nor does it imply, nor was it intended to indicate the quality of coal, but it was adopted for and became, and was, and still is, the specific name thereof, indicating its origin and ownership, and by which it could be bought and sold in market.

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* Derringer *v.* Plate, 29 California, 292.
† 17 Barbour, 608.
‡ 7 Bosworth, 222.
§ 2 Sanford's Supreme Court, 599.
‖ 18 Howard's Practice, 64.
¶ Singleton *v.* Bolton, 3 Douglas, 293.
** Burgess *v.* Burgess, 17 English Law and Equity, 257.

The defendant does not pretend that he originated the name, or that any other company or person adopted or used it as a specific name for coal prior to the time when the canal company adopted it. Nor has he any color of right to sell his coal by the name of "Lackawanna coal," from the mere fact that it comes from what is commonly known as the Lackawanna region; more especially since it does not come from the company's mines, nor through them as producers, and is not, in fact, the coal known in market as Lackawanna coal. That the different varieties, Pittston, Scranton, and Lackawanna, may be occasionally grouped together in loose parlance, or in the ultimate head of a statistical exhibit, under the general name of Lackawanna coal, proves nothing. Different varieties of Lehigh and Schuylkill coal are grouped under those two general names. So different varieties of German wines are, and called Rhine wines, but this would give no right to any one to use the peculiar and specific name of one kind of coal or wine as and for the name of another produced by a different person.

Various authorities support our view. To three as particularly doing so we refer the court.

The first is *Newman* v. *Alvord.** There the plaintiffs manufactured water-lime from beds near Akron, Erie County, New York, which they called "Akron Cement, Akron Water-lime," and the defendant manufactured a similar article from his beds near Syracuse, Onondaga County, and called his "Onondaga Akron Cement and Water-lime," and it was held that the word Akron, as used by the plaintiffs, was their trade-mark, and that they were entitled to be protected by injunction in its use.

The next case is *McAndrews* v. *Bassett.*† There it appeared that the plaintiff had first adopted and used the word "Anatolia," as a name for his liquorice, and the defendant insisted upon his right to use that word also as the name of his liquorice, because it was the name of a country, the use of which, as he alleged, was common to all, and therefore

* 49 Barbour, 588.

† 10 Jurist, new series, 550.

the plaintiff had no exclusive right to its use; but the court pronounced the argument a "fallacy," and stated that although property in a word cannot exist for *all* purposes, yet it will exist when applied by way of stamp upon a stick of liquorice, the moment the article thus stamped goes into market. In the case at bar, although the coal cannot be stamped, yet the moment it is produced in market the name Lackawanna becomes united to it as fully as if it had been stamped thereon. There is no difference in principle between the two cases.

The third case is *Seixo* v. *Provezende*,* where it appeared that the plaintiff, Baron de Seixo, was the proprietor of an estate called the Quinta de Seixo, which was celebrated for the port wine produced from it, and which he consigned to London for sale, placing upon the heads of the casks various marks, and at the bung a crown with the word, "Seixo," and so his wine became known as "Crown Seixo." The defendant being the lessee of an adjoining estate known, also, as the Quinta de Seixo, sent his wine to London with certain marks on the head of the casks, and at the bung thereof a crown and the words, "Seixo de Cima" (Upper Seixo), and he claimed the right so to use the name Seixo, on the ground that he was owner or lessee of a vineyard adjoining the plaintiff's, also of several small vineyards on the opposite side of the river, parts of which were known by the name of "Seixo," meaning *stony* or *pebbly*. The court held, that even conceding that, it did not justify the defendant in adopting a device or brand, the probable effect of which was to lead the public to suppose when purchasing his wine, that they were purchasing the wine produced from the plaintiff's vineyard.

Our whole case is summed up in Lord Langdale's language in *Croft* v. *Day*.† His lordship there says:

"No man has a right to sell his own goods as the goods of another. You may express the same principle in different form, and say that no man has a right to dress himself in colors, or

* Law Reports, 1 Chancery Appeals, 192. † 7 Beavan, 84.

adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person for the purpose of inducing the public to suppose either that he is that other person, or that he is connected with, or selling the manufacture of such other person, while he is really selling his own. It is perfectly manifest that to do these things is to commit a fraud, and a very gross fraud."

But to establish the defendant's fraud and deceit, it is not even necessary to show that he sells his coal *as and for* that of the appellants. It is sufficient that he intentionally sells it by the *name* which he knows the appellants had previously adopted as the name of their coal.

Mr. H. E. Knox, contra, with a brief of Messrs. Fullerton, Knox, and Rudd, relied on the following general propositions of law established by principle or by authorities, which he cited.

1. That to constitute a trade-mark in a name, the name must be either (1) an *invented* one, or (2) one which identifies the maker with the article by indicating the *person* by whom made, or the *place* at which made, in other words, the name must be either a *merely fancy name* or a name indicating *ownership* or *origin*.

2. That a person has no right to appropriate a name which others may apply with equal truth, and have an equal right to employ for the same purpose, such as a geographical name, as in this case.

3. That the basis of the action of a court of equity to restrain the infringement of the right to a trade-mark is *fraud* or *imposition* on the part of the defendant, fraud as against the plaintiff, or imposition on the public.

4. That the name must be used *distinctively* and *exclusively* in order to give a title to it.

Mr. Justice STRONG delivered the opinion of the court.

The first and leading question presented by this case is whether the complainants have an exclusive right to the use of the words "Lackawanna coal," as a distinctive name

or trade-mark for the coal mined by them and transported over their railroad and canal to market.

The averments of the bill* are supported by no inconsiderable evidence. The complainants were undoubtedly, if not the first, among the first producers of coal from the Lackawanna Valley, and the coal sent to market by them has been generally known and designated as Lackawanna coal. Whether the name "Lackawanna coal" was devised or adopted by them as a trade-mark before it came into common use is not so clearly established. On the contrary the evidence shows that long before the complainants commenced their operations, and long before they had any existence as a corporation, the region of country in which their mines were situated was called "The Lackawanna Valley;" that it is a region of large dimensions, extending along the Lackawanna River to its junction with the Susquehanna, embracing within its limits great bodies of coal lands, upon a portion of which are the mines of the complainants, and upon other portions of which are the mines of The Pennsylvania Coal Company, those of The Delaware, Lackawanna, and Western Railroad Company, and those of other smaller operators. The word "Lackawanna," then, was not devised by the complainants. They found it a settled and known appellative of the district in which their coal deposits and those of others were situated. At the time when they began to use it, it was a recognized description of the region, and of course of the earths and minerals in the region.

The bill alleges, however, not only that the complainants devised, adopted, and appropriated the word, as a name or trade-mark for their coal, but that it had never before been used, or applied in combination with the word "coal," as a name or trade-mark for any kind of coal, and it is the combination of the word Lackawanna with the word coal that constitutes the trade-mark to the exclusive use of which they assert a right.

* Quoted *supra*, p. 315.

It may be observed there is no averment that the other coal of the Lackawanna Valley differs at all in character or quality from that mined on the complainants' lands. On the contrary, the bill alleges that it cannot easily be distinguished therefrom by inspection. The bill is therefore an attempt to secure to the complainants the exclusive use of the name "Lackawanna coal," as applied, not to any manufacture of theirs, but to that portion of the coal of the Lackawanna Valley which they mine and send to market, differing neither in nature or quality from all other coal of the same region.

Undoubtedly words or devices may be adopted as trade marks which are not original inventions of him who adopts them, and courts of equity will protect him against any fraudulent appropriation or imitation of them by others. Property in a trade-mark, or rather in the use of a trade-mark or name, has very little analogy to that which exists in copyrights, or in patents for inventions. Words in common use, with some exceptions, may be adopted, if, at the time of their adoption, they were not employed to designate the same, or like articles of production. The office of a trade-mark is to point out distinctively the origin, or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. This may, in many cases, be done by a name, a mark, or a device well known, but not previously applied to the same article.

But though it is not necessary that the word adopted as a trade-name should be a new creation, never before known or used, there are some limits to the right of selection. This will be manifest when it is considered that in all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all

the authorities.* Hence the trade-mark must either by itself, or by association, point distinctively to the origin or ownership of the article to which it is applied. The reason of this is that unless it does, neither can he who first adopted it be injured by any appropriation or imitation of it by others, nor can the public be deceived. The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the productions of the latter are those of the former. Thus the custom and advantages to which the enterprise and skill of the first appropriator had given him a just right are abstracted for another's use, and this is done by deceiving the public, by inducing the public to purchase the goods and manufactures of one person supposing them to be those of another. The trade-mark must therefore be distinctive in its original signification, pointing to the origin of the article, or it must have become such by association. And there are two rules which are not to be overlooked. No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed. Nor can a generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, be employed as a trade-mark and the exclusive use of it be entitled to legal protection. As we said in the well-considered case of *The Amoskeag Manufacturing Company* v. *Spear*,† "the owner of an original trade-mark has an undoubted right to be protected in the

* Amoskeag Manufacturing Co. *v.* Spear, 2 Sandford's Supreme Court, 599; Boardman *v.* Meriden Britannia Company, 35 Connecticut, 402; Farina *v.* Silverlock, 39 English Law and Equity, 514.

† 2 Sandford's Supreme Court, 599, quoted *supra*, in the note just preceding.

exclusive use of all the marks, forms, or symbols, that were appropriated as designating the true origin or ownership of the article or fabric to which they are affixed; but he has no right to the exclusive use of any words, letters, figures, or symbols, which have no relation to the origin or ownership of the goods, but are only meant to indicate their names or quality. He has no right to appropriate a sign or a symbol, which, from the nature of the fact it is used to signify, others may employ with equal truth, and therefore have an equal right to employ for the same purpose."*

And it is obvious that the same reasons which forbid the exclusive appropriation of generic names or of those merely descriptive of the article manufactured and which can be employed with truth by other manufacturers, apply with equal force to the appropriation of geographical names, designating districts of country. Their nature is such that they cannot point to the origin (personal origin) or ownership of the articles of trade to which they may be applied. They point only at the place of production, not to the producer, and could they be appropriated exclusively, the appropriation would result in mischievous monopolies. Could such phrases, as "Pennsylvania wheat," "Kentucky hemp," "Virginia tobacco," or "Sea Island cotton," be protected as trade-marks; could any one prevent all others from using them, or from selling articles produced in the districts they describe under those appellations, it would greatly embarrass trade, and secure exclusive rights to individuals in that which is the common right of many. It can be permitted only when the reasons that lie at the foundation of the protection given to trade-marks are entirely overlooked. It cannot be said that there is any attempt to deceive the public when one sells as Kentucky hemp, or as Lehigh coal, that which in truth is such, or that there is any attempt to appropriate the enter-

* Vide Wolfe v. Goulard, 18 Howard's Practice Reports, 64; Fetridge v. Wells, 4 Abbott's Practice Reports, 144; Town v. Stetson, 5 Id. N. S. 218; Phalon v. Wright, 5 Phillips, 464; Singleton v. Bolton, 3 Douglas, 293; Perry v. Truefitt, 6 Beavan, 66; Canham v. Jones, 2 Vesey & Beames, 218; Millington v. Fox, 3 Milne & Craig, 338.

prise or business reputation of another who may have previously sold his goods with the same description. It is not selling one man's goods as and for those of another. Nothing is more common than that a manufacturer sends his products to market, designating them by the name of the place where they were made. But we think no case can be found in which other producers of similar products in the same place, have been restrained from the use of the same name in describing their goods. It is true that in the case of *Brooklyn White Lead Company* v. *Masury*,* where it appeared that the defendant (at first selling his product under the name "Brooklyn white lead"), had added to the name the word "Company" or "Co.," which made it an imitation of the plaintiff's trade-mark, though he was not a company, he was enjoined against the use of the added word. It was a case of fraud. He had assumed a false name in imitation of a prior true one, and with the obvious design of leading the public to think his manufacture was that of the plaintiff. But the court said, as both the plaintiff and defendant dealt in the same article, and both manufactured it at Brooklyn, each had the same right to describe it as Brooklyn white lead.

We have been referred by the plaintiffs to three decisions which are supposed to justify the adoption of the name simply of a district or town, as a trade-mark.

One of these is *Alvord* v. *Newman*. There it appeared that the complainants had been manufacturers of cement or water-lime at Akron, from beds in the neighborhood of that place, for about thirteen years, and that they had always designated and sold their products as "Akron cement," and "Akron water-lime." The defendants commenced a similar business twelve years later, and manufactured cement from quarries situated near Syracuse, in Onondaga County, and called their product "Onondaga *Akron* cement, or water-lime." It was not in fact Akron cement (for Akron and Syracuse were a long distance from each other), and the

* 25 Barbour, 416.

purpose of calling it such was evidently to induce the public to believe that it was the article made by the plaintiffs. The act of the defendants was therefore an attempted fraud, and they were restrained from applying the word Akron to their manufacture. But the case does not rule that any other manufacturer at Akron might not have called his product "Akron cement," or "Akron water-lime." On the contrary, it substantially concedes that the plaintiffs by their prior appropriation of the name of the town in connection with the words cement and lime acquired no exclusive right to its use, as against any one who could use it with truth.

McAndrews v. *Bassett* is another case cited by the complainants. The plaintiffs in that case were manufacturers of liquorice made from roots and juice imported from Anatolia and Spain, and they sent their goods to market *stamped* "Anatolia." Soon afterwards the defendants made to order from a sample of the plaintiff's liquorice, other liquorice which they also stamped "Anatolia." It was a clear case of an attempt to imitate the mark previously existing, and to put upon the market the new manufacture as that of the first manufacturers. It does not appear, from the report of the case, that the juice or roots from which the defendants' article was made came from Anatolia. If not their mark was false. Of course the Lord Chancellor enjoined them. In answer to the argument that the word Anatolia was in fact the geographical designation of a whole country, a word common to all, and that therefore there could be no property in it, he said, "Property in the word for all purposes cannot exist; but property in that word as applied by way of stamp upon a stick of liquorice does exist the moment a stick of liquorice goes into the market so stamped and obtains acceptance and reputation in the market." It was not merely the use of the word, but its application by way of stamp upon each stick of liquorice that was protected. Nothing in this case determines that a right to use the name of a region of country as a trade-mark for an article may be acquired, to the exclusion of others who produce or sell a similar article coming from the same region.

Nor is such a doctrine to be found in *Seixo* v. *Provezende*, the remaining case cited by the complainants. The case turned upon an imitation of the plaintiff's device, which was the figure of a coronet combined with the word Seixo, a word which can hardly be said to have been the name of a district of country. It means stony, and though applied to two estates, it was also the name of the plaintiff. Yet nothing in the decision warrants the inference that the word Seixo could alone become a trade-mark for any article, much less that it could be protected as a trade-mark for any article to the exclusion of its use in describing other articles coming from the same estate.

It must then be considered as sound doctrine that no one can apply the name of a district of country to a well-known article of commerce, and obtain thereby such an exclusive right to the application as to prevent others inhabiting the district or dealing in similar articles coming from the district, from truthfully using the same designation. It is only when the adoption or imitation of what is claimed to be a trade-mark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth.

These principles, founded alike on reason and authority, are decisive of the present case, and they relieve us from the consideration of much that was pressed upon us in the argument. The defendant has advertised for sale and he is selling coal not obtained from the plaintiffs, not mined or brought to market by them, but coal which he purchased

from the Pennsylvania Coal Company, or from the Delaware, Lackawanna, and Western Railroad Company. He has advertised and sold it as Lackawanna coal. It is in fact coal from the Lackawanna region. It is of the same quality and of the same general appearance as that mined by the complainants. It is taken from the same veins or strata. It is truly described by the term Lackawanna coal, as is the coal of plaintiffs. The description does not point to its origin or ownership, nor indicate in the slightest degree the person, natural or artificial, who mined the coal or brought it to market. All the coal taken from that region is known and has been known for years by the trade, and rated in public statistics as Lackawanna coal. True the Delaware, Lackawanna, and Western Railroad Company have sometimes called their coal Scranton coal, and sometimes Scranton coal from the Lackawanna, and the Pennsylvania Coal Company have called theirs Pittston coal, thus referring to the parts of the region in which they mine. But the generic name, the comprehensive name for it all is Lackawanna coal. In all the coal regions there are numerous collieries, owned and operated by different proprietors, yet the product is truly and rightfully described as Schuylkill, Lehigh, or Lackawanna coal, according to the region from which it comes. We are therefore of opinion that the defendant has invaded no right to which the plaintiffs can maintain a claim. By advertising and selling coal brought from the Lackawanna Valley as Lackawanna coal, he has made no false representation, and we see no evidence that he has attempted to sell his coal as and for the coal of the plaintiffs. If the public are led into mistake, it is by the truth, not by any false pretence. If the complainants' sales are diminished, it is because they are not the only producers of Lackawanna coal, and not because of any fraud of the defendant. The decree of the Circuit Court dismissing the bill must, therefore, be

AFFIRMED.

Statement of the case.

THE PATAPSCO.

Supplies furnished to a ship in a foreign port and necessary to enable her to complete her voyage, and actually so used by her, constitute a lien, unless it can be inferred that the master had funds or the owners had credit; a presumption difficult to make when the owner is greatly embarrassed, and is raising money in the port where the vessel is, by mortgage of other vessels owned by him. The lien is of a high character, and when once to be inferred is removed only by proof which actually displaces it. Entries in a journal, and in a ledger, charging apparently the owners rather than the vessel—proof of the form of entry in the day-book not appearing, owing to its being dispensed with by the material-man—*held* not sufficient to displace the lien.

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

Boyce, a coal dealer in Baltimore, filed a libel against the steamer Patapsco, in the District Court at New York, to recover a demand for six separate supplies of coal furnished between the 3d of February and the 26th of March, 1866, to the steamer. One Borland intervened as claimant. The question was whether the coal had been furnished on the credit of the vessel or on that of her owners only.

The facts, as the court assumed them from the weight of the evidence, itself somewhat inconsistent, were thus:

The Commercial Steamboat Company, a corporation of Rhode Island, owned and chartered certain steamers, the Kingfisher, &c., and used them as a line of steamers from New York to Baltimore. The Patapsco was chartered by the company to run on the line, and registered at New York in the individual name of one Bacon, president of the company; though the company controlled her. The company had an agent at Baltimore, and the course of dealing was as follows:

When the steamers would arrive at Baltimore, their engineers would inform this agent of the amount of coal they needed for their different vessels. Thereupon the agent would fill up a printed circular directed to Boyce, requesting him to furnish "with invoice," *to that steamer, by name*

(in this case the Patapsco), so many tons of coal; saying nothing about charging anybody. Boyce would then fill up a printed order to his clerk, directing him to furnish the coal *to the steamer named.* On receipt of this latter order, the coal would be delivered on board the steamer. At the end of a month a bill would be made of all the deliverances to all the boats. The object of making out a general bill at the end of each month, it appeared, was to avoid a multiplication of bills, and for the sake of convenience.

The entries in the libellant's *journal* were thus—one example showing all:

BALTIMORE, March, 1866.

COMMERCIAL ST'B'T CO.:

80 tons Geo. C'k, st'r Kingfisher,	$7, ...	$560
25 " " " " Patapsco,	7, ...	175
80 " " " " Kingfisher,	7, ...	560
42 " " " " Patapsco,	7, ...	294
		$1,589

And in his *ledger* they were thus:

COMMERCIAL ST'B'T CO. DR.

1866.		
Jan'y 30th.	To coal ac., ...	$2,896 36
" "	" bituminous ac., ...	2,963 60
Feb. "	" coal ac, ...	790
Feb.	" bituminous ac., ...	2,416 10
Mar.	" coal ac., ...	1,550
"	" bituminous ac., ...	1,589
April	" coal ac., ...	1,462 50
"	" bituminous ac., ...	65
May 16.	" cash, ...	39 10
		$13,761 66

CR.

Feb. 5th.	By cash, ...	$3,000
" 9th.	" "	1,000
" 15th.	" "	1,849 96
Mar. 30th.	" coal ac., ...	73 50
May 5th.	" cash, ...	136
June 30th	" "	3,008 41
" "	" balance, ...	4,693 79
		$13,761 66

DR.

To balance, ...	$4,693 79

Statement of the case.

The form of entries in the libellant's *day-book* did not appear; the claimant waiving the production of *it*, and the bills rendered to the company were not produced.

The coal was sold at the lowest price, and it was necessary for the Patapsco to make her trips and was used by her in making them. The agent of the steamship company stated that "the coal bought for the Patapsco was ordered for this steamer expressly, but on account of the Commercial Steamship Company, the same as all coal was ordered and bought for the several steamers constituting the line." "*The owners or charterers*," he added, "*were not known in the transaction*, but the steamer was supposed to belong to the Commercial Steamboat Company by the parties who furnished the coal."

During the whole time that this coal was furnished, the steamboat company was in an embarrassed state. And on the 3d of February, on which day the *first* item of the coal for which the steamer was libelled, was furnished, the steamship company executed six promissory notes for $7500 each —$45,000 in all—to the Baltimore and Ohio Railroad Company; following them immediately, and by the 6th, by mortgages on three of their steamers to secure payment. And it owed a balance of $25,800 to the Neptune Steamboat Company on the 1st February, 1866, so much remaining due for money laid out, paid, or advanced in the preceding year.

On the 2d of April, 1866, nine days after the last item of coal furnished to the Patapsco, the registered owner, Bacon, executed a bill of sale of her to Borland, already mentioned as the claimant in the case, to secure to him a debt of $10,500. And on the 10th following, the company failed entirely; the failure being followed by attachments to a very large amount, much of it like the $25,800 already mentioned for money lent or debts due prior to the 3d February, 1866; and the result being a general break up of the company in which the creditors got but a small portion of their claims from the whole effects of the corporation.

It was in virtue of his bill of sale above mentioned that Borland contested the libellant's claim.

The District Court dismissed the libel; holding that there was no credit to the vessel. The Circuit Court, on appeal, held that there was, and reversed the decree. From this reversal Borland appealed to this court.

Mr. C. Donohue, for the appellant:

When material-men mean to charge a vessel specifically, they have, as is perfectly well known, a mode of making their entry which shows that they *do* charge it. The vessel is charged by name. In this case the charge would have been thus:

THE STEAMER PATAPSCO, DR.

Or,

THE STEAMER PATAPSCO (Commercial Steamboat Company owners), DR.

Now the charge here, in the only books produced, is not in this form, but in another and a different form; one showing that the reliance was on the company navigating the vessel and ordering the coal; and on it alone. The fact that the particular vessel to which the coal was furnished is mentioned in the charge against the company does not prove an intent to charge the vessel, but only that the material-man was careful to identify the transaction.

The only possible answer to our view is, that the company was so embarrassed that it cannot be presumed that *it* was looked to. But this is no answer at all, unless you show that Boyce knew of the embarrassment, or at least suspected it. There is no proof that he did either. All presumptions are the other way. The vessels were pursuing their regular trips. To the world everything appeared as usual. Boyce had been furnishing coal before, and had been paid, without question and without any recourse against the vessels. The vessels of the company were registered in places far away from Baltimore, and a hundred mortgages might have been executed in those places and Boyce never hear of one. The company did not proclaim that it had borrowed $45,000 of the Baltimore and Ohio Railroad. Even if Boyce knew that

it did so borrow, the case is not altered, for the fact of the loan did not prove that the coal would not be paid for. Contrariwise, it showed that the steamboat company was in possession of ready money. The presumption would be that it meant to take up small and floating debts by a large and more permanent loan. A company might occasionally borrow in this way and yet be doing a most successful business.

This court has already gone very far in sustaining secret liens on vessels. To go further will seriously embarrass the transfer of this sort of property.

Mr. D. McMahon, contra.

Mr. Justice DAVIS delivered the opinion of the court.

Whether the coal was furnished on the credit of the vessel, or of the owners, is the only point of inquiry in this case. The case itself is not without its embarrassments, for the evidence, in some of its aspects, is not consistent with either theory, but the weight of it, in our opinion, enables us to assert the lien against the ship.

It is undisputed that the Patapsco was in a foreign port, and that the coal was ordered for her, specifically by name, and delivered to the officers in charge of her. It is equally free from dispute that the supply of coal was necessary—indeed, indispensable—to enable her to make her voyage at all. In such a case the inference is, that the credit was given to the vessel, unless it can be inferred that the master had funds, or the owners had credit, and that the material-man knew of this, or knew such facts as should have put him on inquiry.* There is no reason to suppose that the master had funds, or the owners of the line credit, nor that the libellant was guilty of laches. On the contrary, it is in proof that the company which owned the line of steamships was, at the date of these transactions, hopelessly insolvent, and were borrowing large sums of money on a mortgage of their steamers, away from home, and in the very city where the libellant resided. It would be strange if the libellant

* The Lulu, 10 Wallace, 192.

did not know this condition of things, and, in the absence of proof on the subject, it is a reasonable inference that he did. If he had this knowledge it would be a violent presumption to suppose that he relied on the credit of the company at all for the supplies which he furnished. The company running the steamers was a distant corporation, of no established name, and without personal liability in case the enterprise recently undertaken should prove a failure, and it is hard to believe that a large and intelligent coal merchant in Baltimore, in dealing with this corporation, intended to renounce his claim against the steamers in case he was not paid. It is very clear that there was no credit to the company at the time of sale, because the coal was sold for cash at the lowest market price. And when the libellant waived his privilege of cash on delivery, and put the coal on board the steamship, the presumption of law would be that he thereby gave credit to the steamship, and not to the owners thereof, inasmuch as the supplies were furnished in a foreign port.

If the credit was to the vessel there is a lien, and the burden of displacing it is on the claimant. He must show, affirmatively, that the credit was given to the company to the exclusion of a credit to the vessel. This he seeks to do by the form of charge in the libellant's journal and ledger. If it be conceded that these entries tend to support this position, they are far from being conclusive evidence on the subject. Entries in books are always explainable, and the truth of the transaction can be shown independent of them. The form of charge in any book of original entries does not appear, as the day-book was not called for by the claimants, nor are the "invoices" which the libellant was directed to furnish with the coal produced. But, from the form of entry in the journal itself (where the amount furnished to each vessel is set opposite to its name), we are led to the conclusion that the day-book entries which are thus journalized were debited to each steamer by name. If this be so, the journal entries are not inconsistent with the idea of the credit being given on the security of the ship. More

especially is this apparent when it is proven that the reason why monthly accounts were made out to the steamboat company in bulk was for the sake of convenience, and to save a useless accumulation of bills. There is nothing besides this journal entry to indicate that the coal was furnished on the personal credit of the company; and, as the other facts in the case are in favor of a charge direct to the steamship, we do not think the legal inference of credit to the ship is removed.

The lien of material-men for supplies in a foreign port is of so high a character that, in the case of *The St. Jago de Cuba*,* it was protected, along with that of seamen's wages, against a forfeiture which had accrued to the United States; and the recent decisions in this court have had the effect to place this lien on a more substantial footing than some previous cases seem to have left it.†

On the whole, while we concede that the case is not free from difficulty, we are not disposed to disturb the decree of the Circuit Court, in any particular. It is accordingly

AFFIRMED.

BRADLEY *v.* FISHER.

1. An order of the Criminal Court of the District of Columbia, made in 1867, striking the name of an attorney from its roll, did not remove the attorney from the bar of the Supreme Court of the District, the Criminal Court being at that time a separate and independent court; and in an action by the attorney against the judge of the Criminal Court, that order was inadmissible to show a removal by order of the defendant, or by order of the court held by him, from the Supreme Court, notwithstanding that an act of Congress, passed in 1870, changed the independent character of the Criminal Court, and declared that its judgments, decrees, and orders should be deemed the judgments, decrees, and orders of the Supreme Court of the District. The act of Congress, in enlarging the operation of the order, did not alter its original character.

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* 9 Wheaton, 409.

† The Grapeshot, 9 Wallace, 129; The Lulu, 10 Id. 192; The Kalorama, Id. 204.

2. Judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction as to their liability made between acts done by them in excess of their jurisdiction and acts done by them in the clear absence of all jurisdiction over the subject-matter.
3. The power to remove attorneys from the bar is possessed by all courts which have authority to admit attorneys to practice; but, except where the matters constituting the grounds of its action occur in open court in the presence of its judges, the power of the court should not be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defence.
4. The obligation which attorneys assume when they are admitted to the bar is not simply to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but includes abstaining out of court from insulting language and offensive conduct towards the judges personally for their judicial acts. A threat of personal chastisement, made by an attorney to a judge out of court for his conduct during the trial of a cause pending, is good ground for striking the name of the attorney from the rolls of attorneys practicing in the court. Such an order is a judicial act for which the judge is not liable to the attorney in a civil action.

ERROR to the Supreme Court of the District of Columbia.

This was an action brought by Joseph H. Bradley, who was, in 1867, an attorney-at-law, practicing in the Supreme Court of the District of Columbia, against George P. Fisher, who was then one of the justices of that court, to recover damages alleged to have been sustained by the plaintiff, "by reason of the wilful, malicious, oppressive, and tyrannical acts and conduct" of the defendant, whereby the plaintiff was deprived of his right to practice as an attorney in that court. The case was thus:

On the 10th of June, 1867, the trial of John H. Suratt, for the murder of the late President Lincoln, was begun in the Criminal Court of the District and continued until the 10th of August, when the jury, failing to agree on a verdict, was discharged. The defendant was the presiding judge in the court during the progress of the trial, and until its ter-

mination, and the plaintiff was one of the attorneys who defended the prisoner. Immediately on the discharge of the jury, the court thus held by the defendant made the following order, which with its recitals was entered of record:

"On the 2d day of July last, during the progress of the trial of John H. Suratt for the murder of Abraham Lincoln, immediately after the court had taken a recess until the following morning, as the presiding justice was descending from the bench, Joseph H. Bradley, Esq., accosted him in a rude and insulting manner, charging the judge with having offered him (Mr. Bradley) a series of insults from the bench from the commencement of the trial. The judge disclaimed any intention of passing any insult whatever, and assured Mr. Bradley that he entertained for him no other feelings than those of respect. Mr. Bradley, so far from accepting this explanation or disclaimer, threatened the judge with personal chastisement. No court can administer justice or live if its judges are to be threatened with personal chastisement on all occasions whenever the irascibility of counsel may be excited by imaginary insult. The offence of Mr. Bradley is one which even his years will not palliate. It cannot be overlooked or go unpunished.

"It is, therefore, ordered that his name be stricken from the roll of attorneys practicing in this court.

"GEORGE P. FISHER,
"Justice of the Supreme Court, D. C."

The present suit was founded upon this order, which was treated in the declaration as an order striking the name of the plaintiff from the roll of attorneys of the *Supreme Court of the District*, and not as an order merely striking his name from the roll of attorneys practicing in the *Criminal Court of the District*. The declaration had two counts, and was entitled and filed in the Supreme Court of the District.

The *first* count alleged that the defendant caused the order (which was set out at length) to be recorded "on the minutes of the Criminal Court, *being one of the branches of the said Supreme Court;*" that the several statements contained in the order were untrue, and were specifically denied; and that the defendant "falsely, fraudulently, corruptly, and ma-

liciously intended thereby to give a color of jurisdiction" for making the order that the name of the plaintiff "*be stricken from the roll of attorneys practicing in this court*," whereby the plaintiff had been injured, and claimed damages, $20,000.

The *second* count alleged that the defendant "wantonly, corruptly, arbitrarily, and oppressively intending to remove the plaintiff" from his office as an attorney-at-law, "caused to be entered *on the records of the Supreme Court of the District of Columbia, Criminal Court*, March Term, 1867," the order in question, which was set forth at length, "*the same being an order removing the plaintiff from the office of an attorney-at-law in the said Supreme Court of the District of Columbia*," whereby he was greatly disturbed in the enjoyment of his office and prevented from having the use and benefit thereof, in so full and ample a manner as he otherwise might and would have had.

The declaration also averred that the order was made without notice of any kind to the plaintiff, and was summary, that there was no complaint made by him to the justice, and that he did not accost him while the court was in session, nor immediately on the court's taking a recess and as the presiding judge was descending from the bench, as was stated in the order, nor did he, the plaintiff, at the time and place mentioned in the order, address the justice at all after the court had taken the recess, until the judge had passed some time in a private room, and had left the same and gone out of the court-house; and the great body of auditors, jurors, witnesses, clerks, and officers of the court, and the jury impanelled, and the prisoner on trial had left the court-house; and so the declaration proceeded to say, "the said judge *wilfully, maliciously, corruptly, and unlawfully fabricated the said order to give color and pretence to his jurisdiction in the premises.*"

By reason of which unlawful, wrongful, unjust, and oppressive acts of the defendant, the plaintiff alleged that he had been deprived of emoluments, and had lost sums of money which would otherwise have accrued to him from

the enjoyment of his office and from his practice as an attorney in the courts of the county and district, &c., &c., and therefore he claimed $20,000 damages.

Pleas: 1st, the general issue, "not guilty;" and 2d, a special plea, that before and at the time of the alleged commission, &c., the defendant was one of the justices of the Supreme Court of the District of Columbia, *and, as such justice, was regularly and lawfully holding, by appointment of said Supreme Court of the District of Columbia*, in general term, at the city of Washington, in said District, a court of record, to wit, the Criminal Court of said District, created by authority of the United States of America, and having general jurisdiction for the trial of crimes and offences arising within said District, and that the said supposed trespass consisted of an order and decree of said Criminal Court, made by said defendant in the lawful exercise and performance of his authority and duty, as the presiding justice of said Criminal Court, for official misconduct and misbehavior of said plaintiff (he being one of the attorneys of said Criminal Court), occurring in the presence of the said defendant as the justice of said Criminal Court holding the same as aforesaid and not otherwise; as appears from the record of said Criminal Court and the order or decree of the defendant so made as aforesaid.

Wherefore he prayed judgment, if the plaintiff ought to have or maintain his aforesaid action against him, &c.

The defendant joined issue on this plea.

On the trial the plaintiff produced the order entered by the Criminal Court, which was admitted to be in the handwriting of the defendant, and offered to read it in evidence, but upon objection of the defendant's counsel to its admissibility, it was excluded, and the plaintiff excepted. Subsequently the plaintiff read in evidence the order, as entered, from the records of the Criminal Court, and offered to show that the order was prepared, written, and published by the defendant with express malice against the plaintiff, to defame and injure him, and without the defendant having any jurisdiction to make the order; and that there was no alter-

cation on the 2d July, 1867, between him and the judge, and that no words passed between them; and that they were not near each other when the Criminal Court took its recess, until the next day or immediately thereafter, and as the presiding justice thereof was descending from the bench; but upon objection of the defendant's counsel the proof was excluded, and the plaintiff excepted.

The plaintiff also offered to prove that the only interview between him and the judge, which occurred on the 2d of July, 1867, after the Criminal Court had taken a recess, began after the court had adjourned, and the judge had left the court-room and the building and returned to the court-room, and in that interview he did not address the judge in a rude and insulting manner; that he did not charge him with having offered him, the plaintiff, a series of insults from the bench from the commencement of the trial; that the judge did not disclaim any intention of passing any insult whatever, nor assure the plaintiff that he entertained for him no other feelings but those of respect; that the plaintiff did not threaten the judge with personal chastisement, but to the contrary thereof, the said judge was from the opening of the interview violent, abusive, threatening, and quarrelsome; but upon objection the proof was excluded, and the plaintiff excepted.

The plaintiff thereupon asked a witness to state what passed between the plaintiff and defendant on the said 2d of July, 1867, the time when the parties met, and whether it was before the adjournment of the court on that day, or after it had adjourned, and how long after it had adjourned, and to state all he knew relating to that matter; the object of the evidence being to contradict the recitals in the order, and show that the justice had no jurisdiction in the premises, and had acted with malice and corruptly. But upon objection the evidence was excluded, and the plaintiff excepted. And the court ruled that, on the face of the record given in evidence, the defendant had jurisdiction and discretion to make the order, and he could not be held responsible in this private action for so doing, and instructed the jury that

the plaintiff was not entitled to recover. The jury accordingly gave a verdict for the defendant, and judgment being entered thereon, the plaintiff brought the case to this court on a writ of error.

To understand one point of the case the better, it may be mentioned that in *Ex parte Bradley*,* this court granted a peremptory mandamus to the Supreme Court of the District to restore Mr. Bradley to his office of attorney and counsellor in *that* court, from which in consequence of the matter with Judge Fisher in the Criminal Court, he had been removed; this court, that is to say the Supreme Court of the United States, holding that the Criminal Court of the District was, at the time the order in question was made, a different and separate court from the Supreme Court of the District of Columbia, as organized by the act of March 3d, 1863.

It may also be stated that on the 21st of June, 1870, after the decision just mentioned, Congress passed an act entitled, "An act relating to the Supreme Court of the District of Columbia,"† which declared "that the several general terms and special terms of the circuit courts, district courts, and criminal courts authorized by the act approved March 3d, 1863, entitled 'An act to reorganize the courts in the District of Columbia, and for other purposes,' which have been or may be held, shall be, and are declared to be severally, terms of the Supreme Court of the District of Columbia; and the judgments, decrees, sentences, orders, proceedings, and acts of said general terms, special terms, circuit courts, district courts, and criminal courts heretofore or hereafter rendered, made, or had, shall be deemed judgments, decrees, sentences, orders, proceedings, and acts of said Supreme Court."

It may be well also, as counsel in argument refer to it, to state that an act of Congress of March 2d, 1831,‡ enacted:

"That the power of the several courts of the United States to issue attachments and *inflict summary punishments for contempt of court*, shall not be construed to extend to any cases except

* 7 Wallace, 364. † 16 Stat. at Large, 160. ‡ 4 Id. 487.

the misbehavior of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice; the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts."

Messrs. J. M. Harris and R. T. Merrick, for the plaintiff in error:

1. By the act of Congress of June, 1870, the judgments, decrees, and orders of the Criminal Court of the District are to be deemed the judgments, decrees, and orders of the Supreme Court. All the effects, therefore, of the decision by this court of the case *Ex parte Bradley*, and argument that the order of the Criminal Court is not an order removing or disbarring the plaintiff from the Supreme Court, fall to the ground, in virtue of this act, and irrespectively of other reasons which might be adduced.

2. The judge relies in effect upon the order of court made by him. The plaintiff in reply alleges that the judge has himself fabricated the statement of facts set forth in that order—made it falsely and fraudulently—and by such fabrication, and by a false and fraudulent statement that certain things which never took place at all, did take place, corruptly sought to give himself jurisdiction in the case where he has acted. Now, the evidence which the plaintiff offered and which the court refused, tended directly to prove that the whole statement ordered by the judge to be put on record, was false and fabricated; and that it was made but to give color to a usurped jurisdiction; in other words, that the statement was fraudulently made. Certainly the plaintiff had a right to show *such* facts; for the judge had no power or jurisdiction to make the order complained of, if the matters recited never occurred. Under such circumstances, a judge, knowing the facts, is liable, even though he did not act corruptly;* and *à fortiori* is liable in a case where he did so act.

* Houlden *v.* Smith, 14 Queen's Bench, 841.

3. The courts of the District are, of course, courts of the United States; and whether the proceeding for which this action is brought, be regarded as a punishment for contempt, or as a punishment for alleged misbehavior in office —a matter which the form of the order leaves quite uncertain—it was in the face of the statute of March 2d, 1831. This is undoubtedly so if it was for contempt; and even if it was for misbehavior in office the statute would still seem to apply; for it prohibits a summary proceeding except in the cases which the act specifies; cases which all look to misconduct that interferes with the administration of justice. But for a man who may have been once admitted to the bar, to threaten out of court, with assault, another man who happens to be a judge, and so occasionally in court, is neither misbehavior in office nor a contempt of court.

4. But if the offence for which Mr. Bradley was disbarred was misbehavior in office, and if that be not within the statute of March 2d, 1831, still, undoubtedly, he should have had notice and an opportunity of defending himself. Admit that the court may proceed summarily, still summary jurisdiction is not arbitrary power; and a summons and opportunity of being heard is a fundamental principle of all justice.* The principle has been declared by this court in *Ex parte Garland*,† to be specifically applicable to the case of disbarring an attorney; and so declared for obvious reasons. Without then having summoned Mr. Bradley, and having given to him an opportunity to be heard, the court had no jurisdiction of Mr. Bradley's person or of any case relating to *him*. It is not enough that it have jurisdiction over the subject-matter of the complainant generally; it must have jurisdiction over the particular case, and if it have not, the judgment is void *ab initio*.‡ The whole subject is set forth in Smith's Leading Cases,§ where the authorities are col-

* Rex *v.* Chancellor of Cambridge, 2 Lord Raymond, 1348.

† 4 Wallace, 378.

‡ Mitchell *v.* Foster, 12 Adolphus & Ellis, 472; United States *v.* Arredondo, 6 Peters, 709; Walden *v.* Craig's Heirs, 14 Id. 154.

§ Vol. 1, p. 1023, edition of 1866, Crepps *v.* Durden.

lected and the principle deduced, that when the record shows that the court has proceeded without notice to the party condemned, the judgment will be void, and may be disregarded in any collateral proceeding.

Mr. A. G. Riddle and W. A. Cook, contra.

Mr. Justice FIELD delivered the opinion of the court.

In 1867, the plaintiff was a member of the bar of the Supreme Court of the District of Columbia, and the defendant was one of the justices of that court. In June, of that year, the trial of one John H. Suratt, for the murder of Abraham Lincoln, was commenced in the Criminal Court of the District, and was continued until the tenth of the following August, when the jury were discharged in consequence of their inability to agree upon a verdict. The defendant held that court, presiding at the trial of Suratt from its commencement to its close, and the plaintiff was one of the attorneys who defended the prisoner. Immediately upon the discharge of the jury, the court, thus held by the defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practicing in that court. The order was accompanied by a recital that on the second of July preceding, during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the bench, he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect, but that the plaintiff, so far from accepting this explanation, or disclaimer, had threatened the judge with personal chastisement.

The plaintiff appears to have regarded this order of the Criminal Court as an order disbarring him from the Supreme Court of the District; and the whole theory of the

present action proceeds upon that hypothesis. The declaration in one count describes the Criminal Court as one of the branches of the Supreme Court, and in the other count represents the order of the Criminal Court as an order removing the plaintiff from the office of an attorney-at-law in the Supreme Court of the District. And it is for the supposed removal from that court, and the assumed damages consequent thereon, that the action is brought.

Yet the Criminal Court of the District was at that time a separate and independent court, and as distinct from the Supreme Court of the District as the Circuit Court is distinct from the Supreme Court of the United States. Its distinct and independent character was urged by the plaintiff, and successfully urged, in this court, as ground for relief against the subsequent action of the Supreme Court of the District, based upon what had occurred in the Criminal Court. And because of its distinct and independent character, this court held that the Supreme Court of the District possessed no power to punish the plaintiff on account of contemptuous conduct and language before the Criminal Court, or in the presence of its judge. By this decision, which was rendered at the December Term of 1868,* the groundwork of the present action of the plaintiff is removed. The law which he successfully invoked, and which protected him when he complained of the action of the Supreme Court of the District, must now equally avail for the protection of the defendant, when it is attempted to give to the Criminal Court a position and power which were then denied. The order of the Criminal Court, as it was then constituted, was not an order of the Supreme Court of the District, nor of one of the branches of that court. It did not, for we know that in law it could not, remove the plaintiff from the office of an attorney of that court, nor affect his right to practice therein.

This point is distinctly raised by the special plea of the defendant, in which he sets up that at the time the order

* Ex parte Bradley, 7 Wallace, 364.

complained of was made, he was regularly and lawfully holding the Criminal Court of the District, a court of record, having general jurisdiction for the trial of crimes and offences arising within the District, and that the order complained of was an order of the Criminal Court, made by him in the lawful exercise and performance of his authority and duty as its presiding justice, for official misconduct of the plaintiff, as one of its attorneys, in his presence; and upon this plea the plaintiff joined issue.

The court below, therefore, did not err in excluding the order of removal as evidence in the cause, for the obvious reason that it did not establish, nor tend to establish, the removal of the plaintiff by any order of the defendant, or of the court held by him, from the bar of the Supreme Court of the District. And the refusal of the court below to admit evidence contradicting the recitals in that order, could not be the ground of any just exception, when the order itself was not pertinent to any issue presented. Nor is this conclusion affected by the act of Congress passed in June, 1870, nearly three years after the order of removal was made, and nearly two years after the present action was commenced, changing the independent character of the Criminal Court and declaring that its judgments, decrees, and orders should be deemed the judgments, decrees, and orders of the Supreme Court of the District.* If the order of removal acquired from this legislation a wider scope and operation than it possessed when made, the defendant is not responsible for it. The original act was not altered. It was still an order disbarring the plaintiff only from the Criminal Court, and any other consequences are attributable to the action of Congress, and not to any action of the defendant.

But this is not all. The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains, was an order of the Criminal Court, but that it was made by the defendant in the lawful exercise and performance of his authority and duty as its presiding

* 16 Stat. at Large, 160.

justice. In other words, it sets up that the order for the entry of which the suit is brought, was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act, and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility.*

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, "a deep root in the common law."†

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the case of *Floyd and Barker*, reported by Coke, in 1608,‡ where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption im-

* Justice Mayne, in Taaffe *v.* Downes, reported in a note to 3d Moore's Privy Council, 41.

† Yates *v.* Lansing, 5 Johnson, 291.

‡ 12 Coke, 25.

peaching the verity of their records, except before the king himself, and it was observed that if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere, would not be free from continual calumniations."

The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision. It is this class of cases which impose upon the judge the severest labor, and often create in his mind a painful sense of responsibility. Yet it is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision, often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action.

If upon such allegations a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show to the judge before whom he might be summoned by the losing party—and that judge perhaps one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he in his turn might also be held amenable by the losing party.

Some just observations on this head by the late Chief Justice Shaw, will be found in *Pratt* v. *Gardner*,* and the point here was adjudged in the recent case of *Fray* v. *Blackburn*,† by the Queen's Bench of England. One of the judges of that bench was sued for a judicial act, and on demurrer one of the objections taken to the declaration was, that it was bad in not alleging malice. Judgment on the demurrer having passed for the defendant, the plaintiff applied for leave to amend his declaration by introducing an allegation of malice and corruption; but Mr. Justice Compton replied: "It is a principle of our law that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly; therefore the proposed allegation would not make the declaration good. The public are deeply interested in this rule, which indeed exists for their benefit, and was established in order to secure the independence of the judges, and prevent them being harassed by vexatious actions;"—and the leave was refused.‡

* 2 Cushing, 68.

† 3 Best & Smith, 576.

‡ In Scott *v.* Stansfield (3 Law Reports, Exchequer, 220), a judge of a county court was sued for slander, and he put in a plea that the words complained of were spoken by him in his capacity as such judge, while sitting in his court, and trying a cause in which the plaintiff was defendant. To this plea a replication was filed, that the words were spoken falsely and ma-

In this country the judges of the superior courts of record are only responsible to the people, or the authorities constituted by the people, from whom they receive their commissions, for the manner in which they discharge the great trusts of their office. If in the exercise of the powers with which they are clothed as ministers of justice, they act with partiality, or maliciously, or corruptly, or arbitrarily, or oppressively, they may be called to an account by impeachment and suspended or removed from office. In some States they may be thus suspended or removed without impeachment, by a vote of the two houses of the legislature.

In the case of *Randall* v. *Brigham*,* decided by this court, at the December Term of 1868, we had occasion to consider at some length the liability of judicial officers to answer in a civil action for their judicial acts. In that case the plain-

liciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bonâ fide* in the discharge of the defendant's duty as judge, and were wholly irrelevant to the matter before him. To the replication the defendant demurred; and the Court of Exchequer held the demurrer well taken. "I am of opinion," said the Chief Baron, "that our judgment must be for the defendant. The question raised upon this record is whether an action is maintainable against the judge of a county court, which is a court of record, for words spoken by him in his judicial character, and in the exercise of his functions as judge in the court over which he presides, where such words would as against an ordinary individual constitute a cause of action, and where they are alleged to have been spoken maliciously and without probable cause, and to have been irrelevant to the matter before him. The question arises, perhaps, for the first time, with reference to a county court judge, but a series of decisions uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice. This doctrine has been applied not only to the superior courts, but to the court of a coroner, and to a court martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. *This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences.*"

* 7 Wallace, 523.

tiff had been removed by the defendant, who was one of the justices of the Superior Court of Massachusetts, from the bar of that State, and the action was brought for such removal, which was alleged in the declaration to have been made without lawful authority, and wantonly, arbitrarily, and oppressively. In considering the questions presented the court observed that it was a general principle, applicable to all judicial officers, that they were not liable to a civil action for any judicial act done by them within their jurisdiction; that with reference to judges of limited and inferior authority it had been held that they were protected only when they acted within their jurisdiction; that if this were the case with respect to them, no such limitation existed with respect to judges of superior or general authority; that they were not liable in civil actions for their judicial acts, even when such acts were in excess of their jurisdiction, "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly." The qualifying words were inserted upon the suggestion that the previous language laid down the doctrine of judicial exemption from liability to civil actions in terms broader than was necessary for the case under consideration, and that if the language remained unqualified it would require an explanation of some apparently conflicting adjudications found in the reports. They were not intended as an expression of opinion that in the cases supposed such liability would exist, but to avoid the expression of a contrary doctrine.

In the present case we have looked into the authorities and are clear, from them, as well as from the principle on which any exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over

the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offences, jurisdiction over the subject of offences being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons.

The distinction here made between acts done in excess

of jurisdiction and acts where no jurisdiction whatever over the subject-matter exists, was taken by the Court of King's Bench, in *Ackerley* v. *Parkinson*.* In that case an action was brought against the vicar-general of the Bishop of Chester and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin, the citation issued to him being void, and having been so adjudged. The question presented was, whether under these circumstances the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was a nullity, and said, that "no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine*." Mr. Justice Blanc said there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction;" and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.†

* 3 Maule & Selwyn, 411.

† Calder *v.* Halket, decided by the Judicial Committee of the Privy Council (3 Moore's Privy Council Rep. 28), goes to the extent of holding that an action will not lie even against a judge of an inferior court of limited jurisdiction, for his judicial acts, when acting without jurisdiction, unless he knew or had the means of knowing of the defect of jurisdiction, and that it lies upon the plaintiff in every such case to prove that fact.

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attend the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and if the motives could be inquired into judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had or had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action whilst exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The Criminal Court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession. And, except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defence. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as

it is when the proceeding is taken to reach his real or personal property. And even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession, it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe—such as reprimand, temporary suspension, or fine—would accomplish the end desired.

But on the other hand the obligation which attorneys impliedly assume, if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the Constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct toward the judges personally for their judicial acts. "In matters collateral to official duty," said Chief Justice Gibson in the case of *Austin and others*, "the judge is on a level with the members of the bar as he is with his fellow-citizens, his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the

consequences of beating or insulting a judge in the street for a judgment in court. No one would pretend that an attempt to control the deliberation of the bench, by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practiced but on a single judge, would be an offence as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same; and whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll."

The order of removal complained of in this case, recites that the plaintiff threatened the presiding justice of the Criminal Court, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending.

The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practicing therein. It is not necessary for us to determine in this case whether under any circumstances the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action or in any civil action against the defendant. And if the matters recited are taken as true there was ample ground for the action of the court. A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offence of such gravity would soon find himself a subject of pity rather than of respect.

The Criminal Court of the District erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated,

and affording him opportunity for explanation, or defence, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

We find no error in the rulings of the court below, and its judgment must, therefore, be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Mr. Justice DAVIS, with whom concurred Mr. Justice CLIFFORD, dissenting.

I agree that judicial officers are exempt from responsibility in a civil action for all their judicial acts in respect to matters of controversy within their jurisdiction. I agree, further, that judges of superior or general authority are equally exempt from liability, even when they have exceeded their jurisdiction, unless the acts complained of were done maliciously or corruptly. But I dissent from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present, where it is alleged not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly. If he did so, he is, in my opinion, subject to suit the same as a private person would be under like circumstances.

I also dissent from the opinion of the majority of the court for the reason that it discusses the merits of the controversy, which, in the state of the record, I do not consider open for examination.

GAY'S GOLD.

1. The treasury regulation, No. 22, forbidding all transportation of coin or bullion to any State or section declared by the President's proclamation to be in insurrection, was valid, and was authorized by the act of May 20th, 1862.
2. Gold coin in packages, and not used for travelling expenses, was merchandise in 1864, in point of fact, and was within the mischief to be remedied by the non-intercourse acts of July 13th, 1861, and May 20th, 1862.
3. The proclamation of pardon and amnesty of President Johnson, of December 25th, 1868, was limited to persons "who participated in the late insurrection or rebellion," and to the offence of "treason against the United States, or adhering to their enemies during the late civil war."
4. It did not, therefore, restore to a person not engaged in the insurrection property forfeited under the non-intercourse laws, although the property remained in court, in proceedings not concluded when the proclamation was issued.

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

By a non-intercourse act of July 13th, 1861, it was declared that "all goods, and chattels, wares, and merchandise," coming from a State proclaimed by the President in insurrection, into other parts of the United States, should be forfeited.

The 3d section of an act of May 20th, 1862,* supplementary to the act of July 13th, 1861, just mentioned, enacted as follows:

"That the Secretary of the Treasury be, and he is hereby further empowered to prohibit and prevent the transportation in any vessel, &c., within the United States, of *any goods, wares, or merchandise of whatever character*, and whatever may be the ostensible destination of the same, in all cases where there shall be satisfactory reasons to believe that such goods, wares, or merchandise are intended for any place in the possession or under the control of insurgents against the United States; . . . and he may establish all such general or special regulations as

* 12 Stat. at Large, 404.

may be necessary or proper to carry into effect the purposes of this act; and if any goods, wares, or merchandise shall be transported in violation of this act, or of any regulation of the Secretary of the Treasury, established in pursuance thereof, or if any attempt shall be made so to transport them, all goods, wares, or merchandise so transported, or attempted to be transported, shall be forfeited to the United States."

By authority of the section thus above quoted, the Secretary of the Treasury, on the 11th of September, 1863, established, with the approval of the President, certain "Trade Regulations," by the 22d of which all transportation of coin or bullion to any State or section in insurrection was absolutely prohibited, except for military purposes, and under military orders, or under the special license of the President.

On the 25th of December, 1868, President Johnson issued a proclamation granting,

"Unconditionally, and without reservation, to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution, and the laws which have been made in pursuance thereof."

With the acts and regulations already mentioned in force, one Denison, special treasury agent, seized, in March, 1864, a package of gold coin, amounting to $5000, on board a steamer then lying at New Orleans, about to go up the river, and caused the gold to be libelled in the District Court, on the ground that it was being transported into a section of the country under the control of the rebels, in violation of the acts of non-intercourse, and of the Trade Regulations already referred to.

A claim was entered for the gold, on behalf of one Gay, by a certain Edwards, who made the necessary claimant's oath, denying in general terms that the gold was forfeited.

Gay was a merchant and planter, domiciled within the

Federal lines in Louisiana. He asserted himself to be a loyal citizen, and his technical loyalty was not denied.

The evidence showed that Edwards delivered the gold on board the vessel to one Freeman, and Edwards and Freeman were the main witnesses on behalf of claimant. Edwards testified that he delivered the gold to Freeman to be carried to Gay, who resided within the Federal lines, though near to the region declared by the proclamation of the President to be in insurrection.

Freeman seemed to have been an agent of Gay for the purchase of cotton, buying without regard to its location within rebel lines, and delivering it at New Orleans to Edwards, who was Gay's broker. He denied that there was any intent to use this special package of gold for that purpose, and said that he was to deliver it to Gay as directed by Edwards. Being asked on his examination where Mr. Gay got his cotton, the counsel of the claimant objected to the question as irrelevant, and told the witness not to answer; and he accordingly refused to answer; he also refused under like instructions to answer other questions, and when asked if he, the witness, had not said—as one witness in the case, N. B. La Pointe, swore positively that he had said to him—"that he was carrying the gold into the Confederacy to buy cotton with," answered that he "could not have told such a d—d lie, as the gold did not belong to him, and only took it as matter of accommodation to Mr. Gay." Freeman was apparently a man with no fixed occupation, having a room at the corner of Circus and Gravier Streets, in New Orleans, when he was in that city.

The District Court, on the 29th of April, 1870, dismissed the libel, and ordered the gold to be restored. The Circuit Court reversed the decree and condemned it. From this latter decree the claimant appealed.

Mr. E. T. Merrick, for the appellant:

1. There is really no proof that this money was intended for any place under the control of the insurgents. La Pointe's testimony is directly contradicted by Freeman.

2. But even if the money was thus intended to be used, the case is not within either of the non-intercourse acts. Acts visiting persons with forfeiture are to be construed strictly. Now money is neither goods, wares, merchandise, or chattels.* Tomlin, citing 8th Reports,† and the old but good book *Termes de la Ley*,‡ thus says:

"Money hath been accounted not to be goods or chattels; nor are hares or hounds, such being *feræ naturæ*."

3. But if neither of the preceding positions can be sustained, still at the time of the trial, the supposed offence of the claimant had been fully obliterated by the amnesty proclamation of December 25th, 1868, and there was no ground for the confiscation of the claimant's property, at the date of the trial and final decree in 1870.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice MILLER delivered the opinion of the court.

The facts disclosed by the claimant's witness, Edwards, his manner of testifying, his relations with the forbidden traffic, and with Gay, leave little room to doubt that, whether the gold was intended to reach Gay's manual possession or not, it was destined to be used in purchasing cotton in the insurrectionary district. It is conceded that Gay was not a rebel, and was, technically at least, a loyal man. He could easily have come to New Orleans and made oath to his claim for the money, and given his own testimony as to the destination of the gold. It is probable that he, or he and Freeman, alone could have sworn knowingly on that subject, and his total silence is significant. Other testimony confirms the inference arising from these facts. We are of opinion that the Circuit Court, which heard the case on appeal, was right in holding that the gold was being transported to a place within the rebel lines.

The question is raised whether gold was within the mean-

* Law Dictionary, *verbo* "Chattels." † Page 33. ‡ Page 103.

ing of the act of Congress prohibiting the "transportation of goods, wares, or merchandise intended for any place in the possession or under the control of insurgents against the United States."

The 22d Treasury Regulation on this subject expressly forbids all transportation of coin or bullion to any State or section declared to be in insurrection, except for military purposes, under military orders, or under special license from the President; and the question is, was the regulation authorized by the statute?

The words "goods, wares, and merchandise of whatever character," used in the act of 1862, undoubtedly have the same meaning as the words "goods and chattels, wares and merchandise," in the act of 1861. The word chattel, in its ordinary signification, includes every species of property which is not real estate or freehold,* and the words goods, wares, and merchandise are undoubtedly used in this statute to express the same meaning. But if there could under ordinary circumstances be any doubt on this subject, it is a well-known fact, of which this court can surely take cognizance, that in 1864 gold coin was an article of merchandise, and as such was bought and sold at fluctuating prices, and was the object of a large and active traffic. It would be folly to say that the court could not take notice of what all the world besides knew very well; and we must, therefore, hold that gold coin in package, carried from one person to another, and not used for paying travelling expenses, when intended for an insurrectionary district, was within the prohibition of both the statutes we have cited, as it was beyond doubt within the mischief intended to be prevented.

Some suggestion is made that the final proclamation of amnesty and pardon of the President, of December 25th, 1868, restores to claimant the right of property in this gold, if it had ever been forfeited. But general as the terms of that proclamation are, it is by those terms limited to persons who "participated in the late insurrection or rebellion," and

* 2 Kent, 342.

Statement of the case.

the offences which are pardoned are declared to be "treason against the United States, or adhering to their enemies during the late civil war." As there is no pretence that Gay, the claimant, was one of the persons thus described, or was guilty of, or charged with, the offence which was pardoned, the proclamation can have no application to him or to the present case.

DECREE OF THE CIRCUIT COURT AFFIRMED.

ROBINSON *v.* UNITED STATES.

1. Where a party agreed to deliver so many bushels of "first quality clear barley," the contract not stating whether the barley was to be delivered in sacks or in bulk, *i. e.*, loose, *held* that evidence was properly received to show a usage of trade to deliver in sacks; such evidence tending not to contradict the agreement, but only to give it precision on an important point where by its terms it had been left undefined.
2. There is no rule, in the nature of a rule of law, that a usage cannot be established by a single witness.

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

In June, 1867, Robinson & Co., merchants of San Francisco, entered into a written agreement with Major T. T. Hoyt, assistant quartermaster of the United States, "to deliver," on his order, "1,000,000 bushels of first quality clear barley." The barley, according to the terms expressed in the contract, was to be delivered between the 1st of July, 1867, and the 30th June, 1868, at such times and in such quantities as might be required, for the use of the government troops, and at certain posts named; the precise points at those posts to be designated by the acting quartermasters at the posts themselves. But there was no specification in the instrument of any particular *manner* in which the barley was to be delivered, as whether in sacks or loose, and in what is known as "bulk."

Under this contract Robinson & Co. delivered, *in sacks*, all

the barley required between July 1st, 1867, and the 1st of January, 1868; how much, exactly, did not appear, but it was more than 30,000 pounds. On the 10th of January, 1868, being required to deliver 30,000 pounds more, they tendered the quantity in bulk, that is to say, loose in wagons. The officer at the post where it was tendered refused to receive it, because it was not in sacks. Thereupon the contractor refused to furnish any more, and abandoned his contract altogether.

On suit brought by the United States, the government counsel asked a witness engaged in the grain business in California in 1867 and 1868 this question:

"Do you know the usage of the trade with respect to the delivery of barley?"

The question was objected to on the ground, among others, that it was incompetent for the plaintiff to vary the terms of the contract by a usage, but the objection was overruled. The witness then testified that it was the custom in California, *as of course*, to deliver grain in sacks, and had always been the custom; that he never knew it to be delivered in any other way, unless by special agreement, the custom of the trade being to deliver by sacks altogether; that there had been a few experiments at shipping wheat in bulk, but that these were exceptional, and that the vessels plying around the bay were not constructed for thus carrying grain; that sacks cost about 17 cents apiece, and held from 100 to 112 pounds.

There was no other witness produced to show the usage set up. The court (which, by consent of the parties, had been substituted in the place of a jury) found that, at the time of this contract, it was the usage in California, and always had been prior to that time, to deliver barley in sacks, unless it was expressly stipulated otherwise in the contract, and that, therefore, a tender in bulk did not satisfy the contract.

Judgment being accordingly given for the United States, the defendant brought the case here on exceptions to the evidence and findings.

Opinion of the court.

Mr. E. L. Goold, for the plaintiff in error:

1. A usage, to amount to a custom, must be distinguished by antiquity, certainty, uniformity, and notoriety. Smith in his Leading Cases* and all the authorities thus declare. Yet these qualities are not established by the case.

2. One witness, alone, cannot prove a *custom*, or any other fact depending upon the quality of notoriety.†

Mr. G. H. Williams, Attorney-General, and Mr. B. H. Bristow, Solicitor-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

In *Barnard* v. *Kellogg*,‡ this court decided that proof of a custom or usage inconsistent with a contract and which either expressly or by necessary implication contradicts it, cannot be received in evidence to affect it; and that usage is not allowed to subvert the settled rules of law. But we stated at the same time that custom or usage was properly received to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, the meaning of which could not be ascertained without the aid of such extrinsic evidence, and that such evidence was thus used on the theory that the parties knew of the existence of the custom or usage and contracted in reference to it. This latter rule is as well settled as the former,§ and under it the evidence was rightly received.

It is obvious by the steps which the plaintiffs took to perform their contract, that there are two modes in which barley may be delivered, for they delivered part in sacks and tendered part in bulk. And it is equally obvious, on account of the additional cost, that they would not have delivered the barley in sacks for a period of six months, if the contract on its face was satisfied by a delivery in bulk.

* Vol. i, p. 842; note to Wigglesworth *v.* Dallison.

† Lee *v.* Merrick, 8 Wisconsin, 234; Halwerson *v.* Cole, 1 Spears, 321; Wood *v.* Hickok 2 Wendell, 501; Bissell *v.* Ryan, 23 Indiana, 569.

‡ 10 Wallace, 383.

§ 1 Smith's Leading Cases, p. 386, 7th edition.

The contract, by its terms, is silent as to the mode of delivery, and although there are two modes in which this can be done, yet they are essentially different, and one or the other, and not both must have been in the mind of the parties at the time the agreement was entered into. In the absence of an express direction on the subject, extrinsic evidence must of necessity be resorted to in order to find out which mode was adopted by the parties, and what extrinsic evidence is better to ascertain this than that of usage? If a person of a particular occupation in a certain place makes an agreement by virtue of which something is to be done in that place, and this is uniformly done in a certain way by persons of the same occupation in the same place, it is but reasonable to assume that the parties contracting about it, and specifying no manner of doing it different from the ordinary one, meant that the ordinary one and no other should be followed. Parties who contract on a subject-matter concerning which known usages prevail, by implication incorporate them into their agreements, if nothing is said to the contrary.

The evidence in the present case did not tend to contradict the contract, but to define its meaning, in an important point, where, by its written terms, it was left undefined. This, it is settled, may be done.

It is objected that the usage was proved by a single witness. But we cannot assert, as a rule of law governing proof of usages of trade, that if a witness have a full knowledge and a long experience on the subject about which he speaks, and testifies explicitly to the antiquity, duration, and universality of the usage and is uncontradicted, the usage cannot be regarded by the jury as established. On the contrary, the authorities are that in such a case it may be.*

JUDGMENT AFFIRMED.

* See 1 Smith's Leading Cases, 782, 7th edition; Vail *v.* Rice, 1 Selden, 156; Marston *v.* Bank of Mobile, 10th Alabama, 284; Partridge *v.* Forsyth, 29th Alabama, 200.

HALL & LONG *v.* THE RAILROAD COMPANIES.

An insurer of goods, consumed and totally destroyed by accidental fire in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid, by suit in the name of the assured against the carrier. It is not necessary, in order to sustain such a suit, to show any positive wrongful act by the carrier.

ERROR to the Circuit Court for the Middle District of Tennessee.

Hall & Long allowed this suit in their names, *for the use of certain insurance companies*, against the Nashville and Chattanooga Railroad Company, to recover the value of cotton shipped by them on the road of the defendant as a common carrier, which was accidentally consumed by fire, while being transported, and "became and was a total loss." The cotton had been insured by Hall & Long against loss by fire, in the companies for whose use the suit was brought, and these companies had paid the amount insured by them, respectively. On demurrer the question was whether the underwriter who insures personal property against loss by fire, and pays the insurance upon a *total loss* by accidental burning, while in transition, can bring an action in the name of the owner, for his use against the common carrier, based upon the common-law liability of such common carrier. The court below adjudged that he could not, and the plaintiffs brought the case here on error.

Mr. Henry Cooper, in support of the judgment below:

The case is not one where the defendant has been guilty of any positive, wrongful act, resulting in loss to the owner. The defendant's liability, if it exist at all, grows out of the rigid rules of the common law, that a common carrier is liable for accidents, and against all acts but the acts of God and the public enemy.

In marine insurance, by a supposed analogy to suits in which this action has probably been brought, whenever a

demand is made for payment under a policy, as for a total loss, the insurance company is subrogated to all the rights of the assured to the property insured. This is brought about by what is technically called an *abandonment*, which *must*, in all cases, be made by the assured.* The insurer thus becomes subrogated to all the title of the assured, in the goods, or in what may be saved of them, and the abandonment goes so far as to include the *spes recuperandi* where there is anything to be recovered.

But the doctrine of subrogation, in marine insurance, can have no application to the case now before the court, because: (1st) there is no such thing as abandonment in fire insurance on land, and (2d) there was here a total loss, and nothing, consequently, upon which a cession could operate.

It has generally been supposed that the insurer was entitled to subrogation to the rights of the assured where the insurance was of a mortgage debt; and, until recently, the doctrine was so laid down. But this was based upon a dictum of Judge Story's, in *Carpenter* v. *Providence Washington Ins. Co.*,† and has now been overruled by courts. In *King* v. *State Mutual Fire Insurance Company*,‡ Shaw, C. J., speaking for the Supreme Court of Massachusetts, says:

"We are inclined to the opinion that when a mortgagee causes insurance to be made for his own benefit, paying the premium from his own fund, *in case a loss occurs before his debt is paid*, he has a right to *receive a total loss for his own benefit;* that he is not bound to account, to the mortgagor, for any part of the money he recovered as a part of the mortgage debt; it is not a payment in whole or in part, but he has still a right to recover his debt of the mortgagor. And so, on the other hand, when the debt is thus paid by the debtor, the money is not, *in law or equity*, the money of the insurer who has thus paid the loss, or money paid to his use. . . . What is there inequitable on the part of the mortgagee, towards either party, in holding both sums? They are both due upon valid contracts with him, made upon adequate consideration paid by himself. There is nothing inequitable to the debtor, for he pays no more than he

* Tunno *v.* Edwards, 12 East, 488. † 16 Peters, 501. ‡ 7 Cushing, 1.

originally received in money lent; nor to the underwriter, for he has only paid upon a risk voluntarily taken, for which he was paid by the mortgagee a full and satisfactory equivalent."

The same conclusion has been reached, on a mortgagee's attempt to charge the mortgagor with the premiums of insurance, by Vice-Chancellor Wigram, in England, in *Dobson* v. *Land*,* and it has been had also in American cases.†

In equity, the insurance company could have no claim to subrogation until it had fully reimbursed the merchant, not merely the actual loss, but the premiums previously paid. The truth is, there is more intrinsic equity in the railroad company's claim to the benefit of subrogation against the insurance company, which has been fully paid for the risk it has assumed, than in the claim of the latter to be subrogated to the rights of action of the assured against the railroad company, if indeed he have any.

The English case of *Mason* v. *Sainsbury and another*,‡ and one or two American authorities, based upon that decision, which might be cited for a view opposed to ours, if they can be sustained at all upon principle, rest upon the doctrine of punishing the wrong-doer. But here the defendant has been guilty of no wrongful act by which loss has accrued. The loss is purely accidental, and that loss has been paid by the real plaintiffs upon a contract based upon a sufficient consideration. To allow them to recover, in the name of the owner, would be to give them the benefit of the premium without any risk. It would be, in effect, to legalize champerty. For what they claim is the right to have a right of action assigned them. It may be that where there is an equity growing out of the facts of the case the claim might be sustained; as, for example, if the cotton had been maliciously burned by the company, or lost by wilful neglect. But there can be no equity growing out of inevitable acci-

* 8 Hare, 216.

† White *v.* Brown, 2 Cushing, 412; Carter *v.* Rockett, 8 Paige, 437; and see Insurance Company *v.* Updegraff, 21 Pennsylvania State, 519.

‡ 3 Douglas, 61.

dent, and that accident expressly insured against for a valuable consideration. The railroad company and the insurance company, for whose use this suit is brought, were, so to speak, both insurers of the property lost against the risk which occurred. They both became liable by independent contracts upon independent considerations. Both are liable to the shipper, and he may recover at his election from either. But there is no equity in the premises, and each must abide by his contract with the shipper, and stand where he chooses to leave him.

Mr. W. Atwood, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability. In respect to the ownership of the goods, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from the carrier for a breach of his contract or for non-performance of his legal duty. Standing thus, as the insurer does, practically, in the position of a surety, stipulating that the goods shall not be lost or injured in consequence of the peril insured against, whenever he has indemnified the owner for the loss, he is entitled to all the means of indemnity which the satisfied owner held against the party primarily liable. His right rests upon familiar principles of equity. It is the doctrine of subrogation, dependent not at all upon privity of contract, but worked out through the right of the creditor or owner. Hence it has often been ruled that an insurer, who has paid a loss, may use the name of the assured in an action to obtain redress from the carrier whose failure of duty caused the loss. It is conceded that this doctrine pre-

vails in cases of marine insurance, but it is denied that it is applicable to cases of fire insurance upon land, and the reason for the supposed difference is said to be that the insurer in a marine policy becomes the owner of the lost or injured property by abandonment of the assured, while in land policies there can be no abandonment. But it is a mistake to assert that the right of insurers in marine policies to proceed against a carrier of the goods, after they have paid a total loss, grows wholly, or even principally, out of any abandonment. There can be no abandonment where there has been total destruction. There is nothing upon which it can operate, and an insured party may recover for a total loss without it. It is laid down in Phillips on Insurance, sec. 1723, that "a mere payment of a loss, whether partial or total, gives the insurers an equitable title to what may afterwards be recovered from other parties on account of the loss," and that "the effect of a payment of a loss is equivalent in this respect to that of abandonment." There is, then, no reason for the subrogation of insurers by marine policies to the rights of the assured against a carrier by sea which does not exist in support of a like subrogation in case of an insurance against fire on land. Nor do the authorities make any distinction between the cases, though a carrier may, by stipulation with the owner of the goods, obtain the benefit of insurance.

In *Gales* v. *Hailman*,* it was ruled that a shipper, who had received from his insurer the part of the loss insured against, might sue the carrier on the contract of bailment, in his own right, not only for the unpaid balance due to himself, but as trustee for what had been paid by the insurer in aid of the carrier, and that the court would restrain the carrier from setting up the insurer's payment of his part of the loss as partial satisfaction. So in *Hart et al.* v. *The Western Railroad Company*,† it was held that where underwriters had paid a loss by fire caused by a locomotive of a railroad corporation, the owner might recover also from the corporation for the use of the underwriters, and that he could not release

* 11 Pennsylvania State, 515.

† 13 Metcalf, 99.

the action brought by them in his name. There is also a large class of cases in which attempts have been made by insurers who had paid a loss to recover from the party in fault for it, by suit in their own right, and not in the right of the assured. Such attempts have failed, but in all the cases it has been conceded that suits might have been maintained in the name of the insured party for the use of the insurers.* And such is the English doctrine settled at an early period.†

It has been argued, however, that these decisions rest upon the doctrine that a wrong-doer is to be punished; that the defendants against whom such actions have been maintained were wrong-doers; but that, in the present case, the fire by which the insured goods were destroyed was accidental, without fault of the defendants, and therefore that they stood, in relation to the owner, at most in the position of double insurers. The argument will not bear examination. A carrier is not an insurer, though often loosely so called. The extent of his responsibility may be equal to that of an insurer, and even greater, but its nature is not the same. His contract is not one for indemnity, independent of the care and custody of the goods. He is not entitled to a cession of the remains of the property, or to have the loss adjusted on principles peculiar to the contract of insurance: and when a loss occurs, unless caused by the act of God, or of a public enemy, he is always in fault. The law raises against him a conclusive presumption of misconduct, or breach of duty, in relation to every loss not caused by excepted perils. Even if innocent, in fact, he has consented by his contract to be dealt with as if he were not so. He does not stand, therefore, on the same footing with that of an insurer, who may have entered into his contract of in-

* Rockingham Mutual Fire Insurance Company *v.* Bosher, 39 Maine, 253; Peoria Ins. Co. *v.* Frost, 37 Illinois, 333; Connecticut Mutual Life Ins. Co. *v.* New York and New Haven Railroad Co., 25 Connecticut, 265.

† Mason *v.* Sainsbury, 3 Douglas, 60; Yates *v.* Whyte, 4 Bingham, New Cases, 272; Clark *v.* Blything, 2 Barnewall & Cresswell, 254; Randal *v.* Cockran, 1 Vesey, Sr., 98.

demnity, relying upon the carrier's vigilance and responsibility. In all cases, when liable at all, it is because he is proved, or presumed to be, the author of the loss. There is nothing, then, to take the case in hand out of the general rule that an underwriter, who has paid a loss, is entitled to recover what he has paid by a suit in the name of the assured against a carrier who caused the loss.

JUDGMENT REVERSED, and the cause

REMANDED FOR FURTHER PROCEEDINGS.

SALT COMPANY *v.* EAST SAGINAW.

1. A law offering to all persons and to corporations to be formed for the purpose, a bounty of 10 cents for every bushel of salt manufactured in a State from water obtained by boring in the State, and exemption from taxation of the property used for the purpose, is not a contract in such a sense that it cannot be repealed.
2. Such a law is nothing but a bounty law, and in its nature a general law, regulative of the internal economy of the State, dependent for its continuance upon the dictates of public policy, and the voluntary good faith of the legislature.
3. General encouragements held out to all persons indiscriminately to engage in a particular trade or manufacture, whether in the shape of bounties, drawbacks, or other advantage, are always under the legislative control, and may at any time be discontinued.

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

The East Saginaw Salt Manufacturing Company filed a bill in the court below against the city of East Saginaw, in Michigan, to restrain the city from levying and enforcing any tax on certain real estate owned in the said city by it, and for a decree establishing the exemption claimed. The company founded its exemption on an act passed by the legislature of Michigan, on the 15th of February, 1859, for encouraging the manufacture of salt. The act was as follows:

"SECTION 1. The people of the State of Michigan enact, that

all companies or corporations formed or that may be formed for the purpose of boring for and manufacturing salt in this State, and any and all individuals engaged or to be engaged in such manufacture, shall be entitled to the benefits of the provisions of this act.

"SECTION 2. All property, real and personal, used for the purpose mentioned in the first section of this act, shall be exempt from taxation for any purpose.

"SECTION 3. There shall be paid from the treasury of this State, as a bounty, to any individual, or company, or corporation, the sum of 10 cents for each and every bushel of salt manufactured by such individual, company, or corporation, from water obtained by boring in this State: *Provided*, That no such bounty shall be paid until such individual, company, or corporation shall have at least 5000 bushels of salt manufactured."

The bill alleged that in April, 1859, after the passage of the above act, the salt company was organized as a corporation under the general laws of Michigan, for the purpose of manufacturing salt from salt water to be obtained in the State of Michigan; that prior to the act the State had been engaged in experiments, and had spent large sums of money to ascertain whether salt could be manufactured as aforesaid, but without any satisfactory results, and that the act was passed to encourage private parties to engage in the same experiments.

The bill proceeded:

"Your orator further shows that the persons associating, as hereinbefore stated, to form the East Saginaw Salt Manufacturing Company, were solely induced thereto, as your orator believes, by the encouragement held out in said act; and had not said last mentioned act been passed no such corporation would have been formed, nor any experiment made to determine whether salt could be profitably made in Michigan. Your orator further shows that after spending some time in erecting the necessary buildings, and in procuring the requisite machinery therefor, a well was commenced by the said association near the Saginaw River, in the county of Saginaw, *in June*, 1859, and that drilling continued almost constantly from that time until early in the year 1860; at which time a depth of 669 feet was

reached, where brine was found of sufficient strength and purity to warrant the company in proceeding to the manufacture of salt.

"That, relying in good faith upon the benefits promised in said act of the legislature of 1859, the said company proceeded at once to erect works for the manufacture of salt from the brine found in said well, such manufacture commencing the last of June, or the first part of July, 1860, and from that date to 9th March, 1861, there was actually manufactured by said corporation, from salt water obtained in the State of Michigan 6348 barrels of salt, each containing five bushels. Your orator claims and avers the fact to be, that in consequence of the facts hereinbefore stated, the property of your orator used for the purpose of boring for and manufacturing salt in this State is exempt from taxation; and that the right to such exemption from taxation became and was a vested right, which it is not competent for the legislature to take away without your orator's consent.

"Your orator further shows that your orator is still engaged in the manufacture of salt, and has purchased and is using all its property for that purpose; said manufacture continuing at the place where it was first commenced by your orator."

The bill then gave a description of the land owned by the complainant in East Saginaw, declaring that it had been in use by it for the purpose aforesaid, and stated the assessment thereof for taxes by the city authorities, and the threatened collection of the same, and prayed for an injunction and decree as before stated.

To this bill a demurrer was filed.

The court below overruled the demurrer, and sustained the prayer of the bill; but the Supreme Court of Michigan reversed this decree, and dismissed the bill. This decree of the Supreme Court was based upon an act of the legislature of Michigan, passed on the 15th of March, 1861, by which the act of 1859 was amended as follows: the first section, by adding a proviso limiting its benefits to those who should be actually engaged in the manufacture of salt prior to 1st of August, 1861; the second section, by limiting the exemption from taxation to five years from the organization of the company or corporation; and the third section (which

granted a bounty of 10 cents per bushel), by limiting the bounty moneys that should be paid to any one individual, company, or corporation, to the sum of $5000. The Supreme Court of Michigan stated that it regarded the statute set up for a contract as a bounty law, and nothing more. From this decree the case was now here on error.

Mr. M. H. Carpenter, for the plaintiff in error, contended that the amendatory act, as applied to the salt company, was unconstitutional and void by reason of its impairing the validity of a contract; that the act of 1859 held out an inducement or offer to private parties to embark in the business of manufacturing salt in Michigan, and that when such parties did subsequently engage in that business, and actually produced and manufactured more than 5000 bushels of salt within the State, the act became a contract between the State and such parties, which the legislature could not constitutionally revoke or repeal.

Mr. B. J. Brown, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

It is unnecessary at this time to discuss the question of power on the part of a State legislature to make a contract exempting certain property from taxation. Such a power has been frequently asserted and sustained by the decisions of this court.*

The question in this case is, whether any contract was made at all; and, if there was, whether it was a contract determinable at will, or of perpetual obligation?

Had the plaintiff in error been incorporated by a special charter, and had that charter contained the provision, that all its lands and property used in the manufacture of salt

* New Jersey *v.* Wilson, 7 Cranch, 164; Gordon *v.* Appeal Tax Court, 3 Howard, 133; Piqua Bank *v.* Knoop, 16 Id. 369; Ohio Life and Trust Co. *v.* Debolt, Ib. 416; Dodge *v.* Woolsey, 18 Id. 331; Jefferson Bank *v.* Skelly, 1 Black, 436; McGee *v.* Mathis, 4 Wallace, 143; Home of the Friendless *v.* Rouse, 8 Id. 430; Wilmington Railroad *v.* Reid, *supra*, 264.

should forever, or during the continuance of its charter, be exempt from taxation, and had that charter been accepted and acted on, it would have constituted a contract. But the case before us is not of that kind. It declares, in purport and effect, that *all* corporations and individuals who shall manufacture salt in Michigan from water obtained by boring in that State, shall be exempt from taxation as to all property used for that purpose, and, after they shall have manufactured 5000 bushels of salt, they shall receive a bounty of 10 cents per bushel. That is the whole of it. As the Supreme Court of Michigan says, it is a bounty law, and nothing more; a law dictated by public policy and the general good, like a law offering a bounty of fifty cents for the killing of every wolf or other destructive animal. Such a law is not a contract except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed. There is no pledge that it shall not be repealed at any time. As long as it remains a law every inhabitant of the State, every corporation having the requisite power, is at liberty to avail himself, or itself, of its advantages, at will, by complying with its terms, and doing the things which it promises to reward, but is also at liberty, at any time, to abandon such a course. There is no obligation on any person to comply with the conditions of the law. It is a matter purely voluntary; and, as it is purely voluntary on the one part, so it is purely voluntary on the other part; that is, on the part of the legislature, to continue, or not to continue, the law. The law in question says to all: You shall have a bounty of 10 cents per bushel for all salt manufactured, and the property used shall be free from taxes. But it does not say how long this shall continue; nor do the parties who enter upon the business promise how long they will continue the manufacture. It is an arrangement determinable at the will of either of the parties, as much so as the hiring of a laboring man by the day.

If it be objected that such a view of the case exposes parties to hardship and injustice, the answer is ready at hand, and is this: It will not be presumed that the legislature of

a sovereign State will do acts that inflict hardship and injustice.

The case differs entirely from those laws and charters which have been adjudged to be irrevocable contracts.

Charters granted to private corporations are held to be contracts. Powers and privileges are conferred by the State, and corresponding duties and obligations are assumed by the corporation. And if no right to alter or repeal is reserved, stipulations as to taxation, or as to any other matter within the power of the legislature, are binding on both parties; and, so corporations formed under general laws in place of special charters, like the Ohio banks under the general banking law of that State, are entitled to the benefit of specific provisions and exemptions contained in those laws, which are regarded in the same light as if inserted in special charters. "The act is as special to each bank," says Justice McLean, delivering the opinion of this court, "as if no other institution were incorporated under it."* In such cases the scope of the act takes in the whole period for which the corporation is formed. The language means that, during the existence of any corporation formed under the act, the stipulation or exemption specified in it is to operate.

The act under consideration cannot be interpreted on this principle. It applies to individuals as well as corporations, and to all corporations having power to manufacture salt. Now, in the case of individuals, must it be construed to mean that, as long as the individual lives and manufactures salt, the State will pay him the bounty of ten cents on the bushel, and exempt his property from taxation? Can the law never be repealed as to those who have once commenced the manufacture? Such a construction could never have been intended. In its nature it is a general law, regulative of the internal economy of the State, and as much subject to repeal and alteration as a law forbidding the killing of game in certain seasons of the year. Its continuance is a matter of public policy only; and those who rely on it must

* Piqua Bank *v.* Knoop, 16 Howard, 380.

base their reliance on the free and voluntary good faith of the legislature. For the benefit of sheep-growers in some States dogs are subjected to a severe tax. Could not the legislature repeal such a law? If Congress establishes a tariff for the protection of certain manufactures, does that amount to a contract not to change it?

In short, the law does not, in our judgment, belong to that class of laws which can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipulation, express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time.

JUDGMENT AFFIRMED.

SLAUGHTER'S ADMINISTRATOR *v.* GERSON.

1. The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must relate to a material matter constituting an inducement to the contract, and respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury.
2. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say, in impeachment of the contract of sale, that he was deceived by the vendor's misrepresentations.

APPEAL from the Circuit Court for the District of Maryland.

This was a suit in equity to enforce the lien of two mortgages upon two steamers. The case was thus:

On the 12th of July, 1864, one Slaughter, since deceased, purchased of the complainant, Gerson, a steamboat named

the George Law, for the consideration of $40,000. Of this sum he paid $15,000 in cash, and for the balance gave to Gerson his bond, conditioned to pay the same in two instalments of $12,500 each in three and six months thereafter. To secure the payment of these sums he at the same time executed to Gerson two mortgages, one upon the steamboat which he purchased, and the other upon a steamboat named the Chester, which he formerly owned. The first instalment on the boat not being paid at its maturity, the present bill was filed to enforce the mortgages by a sale of the steamboats, and the application of the proceeds to the demand of the complainant.

The answer of the defendant admitted the execution of the bond and mortgages, but set up, as a defence to their enforcement, that they were obtained from him by misrepresentation and fraud, and set forth the particulars in which such alleged misrepresentation and fraud consisted.

The substantial averments in this respect were these: That the defendant had established a line of steamboats from Baltimore to various landings on Chester River, on the Eastern Shore of Maryland, and landings on tributaries to that river; that the most important of these landings was at Queenstown; that no boat drawing more than 3½ feet of water could reach the wharf at this place except in case of an extraordinary high tide; that he purchased the George Law of the complainant for this route, upon a representation that it drew only this number of feet when fully laden; that this representation was false and fraudulent, and that the steamer, when placed on the route, grounded upon her first trip in 5 feet of water; and that, so soon as precise information was obtained of this fact, the defendant called upon the complainant to cancel the contract, offering at the same time to return the steamboat purchased, but that the complainant refused to comply with this proposition.

A great deal of evidence was taken in the case bearing upon these allegations of misrepresentation and fraud. This was in many particulars conflicting. Some of it tended to show that when the negotiation was first entered upon,

Slaughter did particularly state that it was indispensable to his purpose that the boat should not draw more than $3\frac{1}{2}$ feet water; that upon Gerson's saying that the boat was cheap at the price proposed for her, Slaughter said that he did not want her at any price if she drew more than $3\frac{1}{2}$ feet; that Gerson repeatedly said that she did not draw more; and that if she did, Slaughter should have her for nothing. On the other hand there was evidence which—if any conversation with Gerson, himself, had taken place at all—went to show that he never stated more than that *according to the representation of the captain* of the boat, she drew no more than the desired depth of water; and that it was plain that Gerson spoke only on the strength of what thus came to him.

But whatever did or did not thus take place in the origin of matters, it appeared that before the contract for the sale was executed, and with the intention of examining the vessel, in view of a purchase, Slaughter himself went to New York from Baltimore, where he resided, taking with him two shipcarpenters and a square to measure the steamer; his son, who afterwards was captain of the boat, accompanying the party. Whilst these persons were in New York, every opportunity which they desired was given to them to examine the vessel from one end to the other; and they made an extended and careful examination accordingly. They made a trip on her to one of the ports where she was running, and measured her draft on two occasions; once amidships, and once at the stern and bow. Gerson accompanied them on board, on their arrival in New York, and told them to look for themselves, and to go anywhere they pleased about the boat; that he was not "a steamboat man," and that he got all his information from the captain of the boat, to whose statements he referred them. One of the carpenters who accompanied Slaughter made a measurement of the boat while she was lying at the dock without any load, and reported that she drew 4 feet 6 inches at midships. The other of the carpenters made a measurement forward and aft, and reported that the boat drew at both

places 3 feet 6 inches. Both of these measurements were communicated to Slaughter, and the latter was accompanied with the declaration that the boat drew too much water for his purposes. The captain of the boat also took the defendant on to the dock where she was lying, and showed him that she was coppered three feet and nine inches from the keel, and that she showed her copper three inches out of water.

The bill of sale given to Slaughter contained a detailed description of the steamer, but did not state her draught.

The Circuit Court gave a decree for the complainant, and from it the defendant appealed to this court.

Mr. William Schley, for the appellant:

All knew that Mr. Slaughter wanted a boat to ply on a specified route, drawing, when laden, *not more than* 3½ feet water. The captain, of course, knew well that the draught much exceeded this, and that the boat would not suit at all. The doctrine of *caveat emptor* ought not to be applied. Unless the sea was calm—which does not appear—it was impossible to make an accurate measurement of the draught of water. Besides this, the rule of *caveat emptor*, however potent in actions *ex contractu*, is, comparatively, of small force in an action based on fraudulent misrepresentations.

But if there was no fraud on the part of Gerson or his agent, still, it is clear, from the testimony, that Slaughter would not have purchased the boat at any price, if he had known that she would not answer the purpose for which he wished to procure a boat. Upon the hypothesis that Gerson was acting honestly, the case presented is one of mutual mistake. Coming, as he has done into a court of conscience, Gerson submits himself to its power to make him do what is right, or to be left to his remedy at law. Foreclosure of a mortgage is in the nature of a specific performance of a contract, which will be refused, where the defendant has, by mistake, not originating in mere carelessness, entered into a contract framed differently from his own intention.*

* Willard *v.* Tayloe, 8 Wallace, 564.

Mr. B. W. Huntington, contra.

Mr. Justice FIELD delivered the opinion of the court.

A large amount of evidence was taken in this case bearing upon the averments in the answer of misrepresentation and fraud on the part of the complainant; and it is, in many respects conflicting. But the rules of law applicable to cases of alleged misrepresentation by a vendor with respect to property sold are well settled, and render of easy solution the questions upon which this case must turn.

The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must not only relate to a material matter constituting an inducement to the contract, but it must relate to a matter respecting which the complaining party did not possess at hand the means of knowledge; and it must be a misrepresentation upon which he relied, and by which he was actually misled to his injury. A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them, where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another. And the same rule obtains when the complaining party does not rely upon the misrepresentations, but seeks from other quarters means of verification of the statements made, and acts upon the information thus obtained.

The facts disclosed by the uncontradicted testimony of both parties bring this case clearly within the principle here stated. Previous to the execution of the contract of purchase, and with the view of examining the steamboat, the

defendant went from Baltimore to New York, taking with him his son, who subsequently became captain of the boat, and two shipcarpenters, and a square to measure her draught of water. Whilst there every opportunity was given him to examine the boat with his carpenters, and a most thorough and careful examination was made by them. On two occasions they measured the draught of the boat, and they witnessed her speed by accompanying her on one of her trips. The owner went with them to the boat on their arrival in New York, and told them to look for themselves, and to go anywhere they pleased about her. If, under these circumstances, the defendant did not learn everything about her, and ascertain her true draught, it was his own fault, and it would be against the plainest principles of justice to allow him to set up, in impeachment of the validity of his contract, loose statements respecting the draught before its execution, even though they were false in point of fact.

In *Attwood* v. *Small*,* a case which received great consideration in the House of Lords, the defendant had sold to the complainants, constituting a company of numerous persons, certain freehold and leasehold property, including mines and ironworks, and had made certain statements respecting the capabilities of the property. The purchasers, not relying upon these statements, deputed some of their directors, together with experienced agents, to ascertain the correctness of his statements. These persons examined the property and works and the accounts kept by the defendant, receiving from him and his agents every facility and aid for that purpose, and they reported that the defendant's statements were correct. Upon a bill filed to rescind the contract, on the ground of fraud, the House of Lords decided that the contract could not be rescinded, reversing, in that respect, the decree of the Court of Exchequer, not merely because there was no proof of fraud, but because the purchasers did not rely upon the vendor's statements, but tested their accuracy; and, after having knowledge, or the means of knowl

* 6 Clark & Finnelly, 232.

edge, declared that they were satisfied of their correctness, holding that if a purchaser, choosing to judge for himself, did not avail himself of the knowledge, or means of knowledge, open to him or to his agents, he could not be heard to say he was deceived by the vendor's representations, the doctrine of *caveat emptor* applying in such case, and the knowledge of his own agents being as binding as his own knowledge.

The doctrine, substantially as we have stated it, is laid down in numerous adjudications. Where the means of information are at hand and equally open to both parties, and no concealment is made or attempted, the language of the cases is, that the misrepresentation furnishes no ground for a court of equity to refuse to enforce the contract of the parties. The neglect of the purchaser to avail himself, in all such cases, of the means of information, whether attributable to his indolence or credulity, takes from him all just claim for relief.

We have thus far assumed that the evidence in the case before us discloses false representations on the part of the vendor, but justice to him requires us to say that the evidence is insufficient to warrant this conclusion. The vendor stated to the purchaser that he was not a steamboat man, meaning evidently, from the context, that he was not familiar with the particulars in regard to which the purchaser desired information, and referred him to the statements of the captain, at the same time inviting him and his party to examine the boat in every particular. The measurement made by one of his carpenters showed that the boat drew four feet and six inches of water at midships whilst lying unloaded at the dock. The measurement by the other carpenter showed that the boat then drew, forward and aft, three feet and six inches, and both of these measurements were reported to the defendant, and the latter was accompanied by the declaration that the boat drew too much water for his purpose. The captain of the boat also took the defendant on to the dock, by which the boat was lying, and pointed out to him that she was coppered three feet and

nine inches from the keel, and that she then showed only three inches out of water, and, of course, that she then drew, forward and aft, unloaded, three feet and six inches. The purchase was thus made by the defendant, with his eyes open, after every opportunity had been afforded him for the inspection of the vessel.

DECREE AFFIRMED.

ALEXANDER *v.* ROULET.

Prefects in California, however appointed or elected, had no power, after the conquest of the country by the United States, to make grants of the common or unappropriated lands of the pueblos within their jurisdiction. And titles derived from them cannot, unless assisted by legislation, be regarded as valid.

ERROR to the Circuit Court for the District of California.

Alexander brought ejectment against Roulet and others in the court below to recover a piece of land in San Francisco, California. The title was thus: The conquest of California was complete, as decided by this court,* July 7th, 1846. On the 12th of January, 1850, Horace Hawes, at that time, by virtue of an appointment from the then military governor of the then Territory of California, and an election by the people of the district, acting as the prefect of the district embracing the then pueblo, now city of San Francisco, granted to Edward Carpenter the premises in controversy. The title of Carpenter, thus acquired, became vested in the plaintiff. The premises were within the limits of the said pueblo, now city of San Francisco.

The court gave judgment for the defendant, holding, among other things, that although each prefect of California, while the same was part of the Mexican territory, had power to make grants of the common and unappropriated lands of the pueblos within their jurisdiction, yet that

* Stearns *v.* United States, 6 Wallace, 590.

from and after the conquest and acquisition of the country by the United States they ceased to have such power, and, consequently, that the grant of Prefect Hawes was void.

On error here, among the questions raised were these:

1. Whether, while California was still part of the Mexican territory, prefects there had power to make grants of the common or unappropriated lands of pueblos within their jurisdiction.

2. Assuming that they had the power while the region was under Mexican rule, whether prefects *elected by the people* as well as appointed by military governors of the United States, after the cession and conquest, had the same power.

Messrs. W. Irvine and S. Heydenfelt, for the plaintiff in error; Mr. Hall McAllister, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It has been repeatedly decided by this court that a recovery cannot be had in an action of ejectment in the Federal courts except on a legal title, and the inquiry is, whether the plaintiff in this case is clothed with such a title.

This title rests on the authority of Horace Hawes, acting as prefect of the district, embracing the then pueblo of San Francisco, under the appointment of the military governor of California and an election by the people of the district, to grant a part of the common lands of the pueblo.

It is not necessary for the purposes of this suit to decide whether prefects of California, while the same was a part of the Mexican territory, were authorized to make grants of the common or unappropriated lands of the pueblos within their jurisdiction, because in this case the grant was after the conquest and acquisition of the country by the United States, and if the prefect had such authority before that event it clearly ceased with the changed relations of the people. By the conquest of the country, Mexican rule was displaced and with it the authority of Mexican officials to alienate the public domain, and as a necessary consequence of this conquest, the Constitution of the United States, which

gives to Congress the disposition of the public lands, was extended over the territory of California. Until Congress provided a government for the country it was in charge of military governors, who, with the aid of subordinate officers, exercised municipal authority; but the power to grant land or confirm titles was never vested in these military governors,* nor in any person appointed by them.

It is contended, however, that Hawes's election by the people of the pueblo to the office of prefect on the retirement of the Mexican officials, gave him all the power a Mexican prefect would have had if the country had not been conquered. Is this position maintainable? Pueblos or towns, by the laws of Mexico, were entitled to a certain quantity of lands adjoining them, which were held in trust for the benefit of their inhabitants. The nature and extent of these pueblo rights have been the subject of a great deal of controversy since the acquisition of California, and came before this court for consideration in the case of *Townsend* v. *Greeley*.† Mr. Justice Field, in delivering the opinion of the court in that case, says: "It may be difficult to state with precision the exact nature of the right or title which the pueblos held in these lands. It was not an indefeasible estate; ownership of the lands in the pueblos could not in strictness be affirmed. It amounted in truth to little more than a restricted or qualified right to alienate portions of the land to its inhabitants for building or cultivation and to use the remainder for commons, for pasture-lands, or as a source of revenue or for other public purposes. This right of disposition and use was in all particulars subject to the control of the government of the country." Manifestly, if this right of disposition and use were subject to Mexican control while Mexican rule prevailed, it was equally subject to the control of our government when this rule was changed. It must be conceded that these pueblos had an equitable right to have their common lands confirmed to them, but they did not hold them as a private individual

* Mumford *v.* Wardell, 6 Wallace, 435.

† 5 Wallace, 336.

does his estate, and it needed legislative action to ripen this equitable right into a legal title. Congress has acted upon this subject and confirmed the lands of the pueblo of San Francisco, including the demanded premises, and this confirmation could not enure to the benefit of any one claiming under a grant by an American prefect, unless there were an express declaration to that effect. As there is no pretence that the grant in this case was protected by legislation, it follows that the plaintiff has no title of any sort to rest upon.

JUDGMENT AFFIRMED.

THE SIREN.

1. The right of vessels of the navy of the United States to prize-money comes only in virtue of grant or permission from the United States, and if no act of Congress sanctions a claim to it, it does not exist.
2. No such act gives prize to the navy in cases of joint capture by the army and navy.
3. In cases of such capture, the capture enures exclusively to the benefit of the United States.

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

Prior, and up to the morning of the 17th of February, 1865, a naval force of the United States, composed of the Gladiolus, and twenty-six other vessels of war, were blockading the port of Charleston and assisting to reduce the city; *a force operating also by land in the same general designs.* During the night of the 16th and 17th, the rebel forces evacuated the forts about the harbor, and abandoned the city. At 9 o'clock on the morning of the 17th, an officer of the land force raised the national flag upon Forts Sumter, Ripley, and Pinckney. At 10 a military officer reached Charleston; and the city surrendered itself, and the rebel stores, arms, and property there to him. Contemporaneously with these transactions the army approached the city, and the fleet moved towards its wharves. As the latter came near

to land, a boy on shore gave information that the Siren, a blockade-runner, a vessel of force inferior to the Gladiolus, had run in during the night, and was lying in Ashley River; which makes a west entrance inland from the bay where the blockading fleet was stationed. The Gladiolus, one of the leading vessels of the fleet, dispatched a boat's crew towards the vessel. When they got there they found that her crew learning of the success of the Federal arms, and seeing the Gladiolus coming, had cut the injection-pipes of the vessel, set her on fire, and abandoned her. She was now in flames, filling with water, and surrounded by boats filled with negroes from the shore. The Gladiolus, herself, arrived at the scene soon after her boat's crew got there; and, with the people about, managed to put out the fire and tow the vessel to shallow water, where after great effort her leaks were stopped. She was then taken to Boston, and condemned as a prize of war, and sold; all questions as to the distribution of the proceeds being reserved. From the proceeds in the registry (less a certain sum, which on libel filed had been decreed to the owners of a vessel that the prize-crew of the Siren in bringing her into Boston for condemnation, had carelessly ran into and injured), the Gladiolus claimed both salvage and prize-money; claiming as the latter one-half of the proceeds. The other vessels named as part of the blockading force, set up a right to participate in the proceeds as captors with the Gladiolus.

The statute under which the claim of all the vessels was made* is in these words:

"The net proceeds of all property condemned as prize when the prize was of superior or equal force to the vessel or vessels making the capture, shall be decreed to the captors; and when of inferior force to the vessel or vessels making the capture, one-half shall be decreed to the United States and the other half to the captors."

There was no statute which provided for joint captures by the army and navy.

* Act of June 30th, 1864; 13 Stat. at Large, 306.

Opinion of the court.

The court below decreed in favor of the claim of the Gladiolus for salvage, and gave the residue of the proceeds, after paying the sum decreed as damages for the collision, to the United States alone. From this decree, depriving them of all prize-money, the present appeal was taken by certain of the blockading vessels.

Messrs. Charles Cowley, and Charles Levi Woodbury, for the appellants; Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

In the English maritime jurisprudence the jurisdiction of the admiralty court on the instance side, and the jurisdiction in prize, are entirely distinct and independent of each other. When exercising one, it is called the instance court, and the prize court when exercising the other. The rules of procedure and adjudication in the latter are said to be no more like those which prevail in the former, than they are like those of any court in Westminster Hall. But from time immemorial both jurisdictions have been exercised by the same judge. As judge of the admiralty or instance court he is appointed by a commission under the great seal. This commission specifies fully and particularly the subjects of his jurisdiction, but is wholly silent as to prize. To give that jurisdiction, and bring it into activity, a commission under the great seal, in every war, was issued to the lord high admiral, to require the judge of admiralty to take cognizance of all captures, seizures, prizes, and reprisals of all ships and goods that should be taken, and to hear and determine according to the course of the admiralty and the law of nations. A special warrant was thereupon issued by the admiral. Since the reign of Elizabeth it does not appear that any special authority has been given to the judge. He has exercised exclusive jurisdiction in prize under his commission from the king, or under the power inherent in his office, or by virtue of both.*

* Lindo *v.* Rodney, 2 Douglas, 613, note.

Prize was wholly the creature of the crown. No one could have any interest but what he took as the gift of the king. Beyond this he could claim nothing. The reasons upon which the rule was founded were: that right of making war and peace was exclusively in the sovereign; that the acquisitions of war must, therefore, belong to him, and that their disposal might be of the utmost importance for the purposes both of war and peace. It was held that it must be presumed from these considerations that the government did not intend to divest itself of this important attribute, except in so far as such a purpose was clearly and unequivocally expressed. The right is not the private property of the sovereign, but a trust confided to him for the public good. In private grants the construction is most strongly against the grantor. In all concessions touching capture the opposite rule prevails. A presumption arises against the grant, and it can only be rebutted by language so explicit as to leave no room for doubt upon the subject.*

The lord high admiral exists now only in contemplation of law. It was deemed expedient to assign to him a certain portion of the rights of the crown to maintain the dignity and splendor of his office.† Hence the doctrines of droits of the admiralty, and of captured property which belonged to the king, *virtute coronæ*. The lord high admiral is now represented by the king, who holds the office, but in a capacity distinct from his regal character, and the droits which belonged to the office, so far as they still subsist and are not otherwise disposed of, have in the progress of time become reattached to the crown.‡

To the legal scholar the subject is full of the interest of antiquarian research, but its examination is not necessary to the decision of the present case. The proper limits of this opinion forbid us to pursue the inquiry further.

While the American colonies were a part of the British empire, the English maritime law, including the law of prize,

* The Elsebe, 5 Robinson, 155. † The Maria Francoise, 6 Id. 293.

‡ The Rebeckah, 1 Id. 227; The Mercurius, Ib. 81; The Joseph, 1 Gallison, 545; 3 Reeves's History of the English Law, 197.

Recapitulation of the case in the opinion.

was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adapted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities.* In our jurisprudence there are, strictly speaking, no droits of admiralty. The United States have succeeded to the rights of the crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority enure *ipso facto* to their benefit. Whenever a claim is set up its sanction by an act of Congress must be shown. If no such act can be produced the alleged right does not exist. The United States take captured property, not as droits, but strictly and solely *jure reipublicæ*.†

During the late civil war a land and naval force of the United States were beleaguring Charleston in South Carolina. The rebel fortifications and forces kept both at bay. This had been the condition of things for a considerable period. In the night of the 17th February, 1865, the insurgent troops evacuated the neighboring forts and abandoned the city. This became known the next morning. The fleet thereupon approached the city by water and the army by land. The Gladiolus, a steam propeller of the navy, was one of the leading vessels. When she was off the Battery at Charleston, a boy from the shore gave information that a blockade-runner was lying near by in Ashley River. A boat's crew from the Gladiolus was dispatched in quest of her. They found her on fire and surrounded by boats filled with colored people from the shore. The crew of the boat and others present proceeded to put out the fire. The Gladiolus reached the scene a few minutes after the arrival of the boat. The fire was extinguished; the crew of the Gladiolus assisted in putting it out. It was found that the pipes of the vessel had been cut and that she was filling with water. The Gladiolus towed her to shallow water and her leaks were stopped,

* Thirty hogsheads of Sugar *v.* Boyle and others, 9 Cranch, 198.

† The Joseph, 1 Gallison, 555, 558; Dos Hermanos, 10 Wheaton, 310.

She was the Siren, a side-wheeled steamer of about one hundred and fifteen tons burden, and had run the blockade the night before. That morning her crew had cut her pipes, set her on fire, and abandoned her. She was sent to Boston for trial as prize of war. On her way she collided with another vessel. She was libelled by the United States in the District Court of Massachusetts. On the 7th of April, 1865, she was condemned as lawful prize and subsequently sold. All questions as to the distribution of the proceeds were left open by the decree for future adjudication. The owners of the vessel collided with, intervened and claimed damages. They were allowed by this court on appeal.* Salvage was claimed in behalf of the Gladiolus. One-half of the proceeds of the sale was also claimed for that vessel as prize money. The other appellant vessels of war claimed to participate with her. A decree of distribution was made on the 3d of July, 1869. The court allowed the claim for salvage, and ordered that the residue of the fund, less the sums decreed for damages arising from the collision, should be paid over to the United States. The appellants have brought this decree before us for review.

Four acts of Congress have been passed allowing captors to participate in the fruits of the property captured. They are the act of 1799,† that of 1800;‡ that of 1862,§ and that of 1864.‖ It is necessary in this case to consider only one clause of the 10th section of the act last mentioned, which is as follows: "The net proceeds of all property condemned as prize, when the prize was of superior or equal force to the vessel or vessels making the capture, shall be decreed to the captors. And when of inferior force, one-half shall be decreed to the United States and the other half to the captors."

No provision is found in any of these statutes touching joint captures by the army and navy. They are wholly

* The Siren, 7 Wallace, 152. † 1 Stat. at Large, 715. ‡ 2 Id. 52.
§ 12 Id. 606. ‖ 13 Id. 306.

silent as to the military arm of the service. It results from this state of things, according to the principles we have laid down, that such captures enure exclusively to the benefit of the United States. In the English law they are held not to be within the prize acts, and are provided for by statutes passed specially for that purpose. In the Genoa and its dependencies,* Lord Stowell, speaking of the word "prize," says: "It evidently means maritime capture effected by maritime force only,—ships and cargoes taken by ships." . . "What was taken by a conjunct expedition was formerly erroneously considered as vested in a certain proportion of it, in the capturing ships under the prize acts; but in a great and important case lately decided,† it was determined that the whole was entirely out of the effect of those prize acts, and in so deciding, determined by direct and included consequence, that the words 'prizes taken by any of her Majesty's ships or vessels of war,' cannot apply to any other cases than those in which captures are made by ships only."

In *Booty in the Peninsula*,‡ the same great authority, referring to "a conjunct expedition," held this language: "It may be difficult, and perhaps perilous, to define it negatively and exclusively. It is more easy and safe to define it affirmatively, that that is a conjunct expedition which is directed by competent authority, combining together the actions of two different species of force, for the attainment of some common specific purpose."

The opinion of the court below proceeded upon the ground that the present case is one of this character. Whether it was or was not is the question presented for our determination. The application of Lord Stowell's test leaves no room for doubt as to its proper solution.

We have already adverted to the ingress of the navy into the harbor of Charleston on the morning of the 17th of February. At nine o'clock that morning an officer of the land forces hoisted the national flag over the ruins of Fort

* 2 Dodson, 446.

† Hoagskarpel, Lords of Appeal, 1785.

‡ 1 Haggard, 47.

Sumter. Flags were also raised over Forts Ripley and Pinckney. At ten o'clock a military officer reached Charleston. The mayor surrendered the city to him. Four hundred and fifty pieces of artillery, military stores, and much other property were captured with it. Contemporaneously with these things was the seizure of the Siren by the Gladiolus, and the approach and arrival of the rest of the fleet.

The two forces were acting under the orders of a common government, for a common object, and for none other. They were united in their labors and their perils, and in their triumph they were not divided. They were converging streams toiling against the same dike. When it gave way both swept in without any further obstruction. The consummation of their work was the fall of the city. Either force, after the abandonment of their defences by the rebels, could have seized all that was taken by both. The meritorious service of the Gladiolus was as a salvor, and not as a captor. Precedence in the time of the arrival of the respective forces is an element of no consequence. Upon principle, reason, and authority we think the judgment of the District Court was correctly given. The decree of condemnation committed the court to nothing as to the distribution. The course pursued was eminently proper under the circumstances, and according to the course of practice in proceedings in prize.* The allowance of salvage by the court below was not objected to in the argument here.

It has been suggested that the capture was within the 7th section of the act of the 2d of July, 1864,† which declares that "no property seized or taken upon any of the inland waters of the United States by the naval forces thereof shall be regarded as maritime prize," &c. The aspect in which the case has been examined, and the conclusions reached, render it unnecessary to consider that proposition, and we express no opinion upon the subject.

DECREE AFFIRMED.

* The Maria Francoise, 6 Robinson 292.

† 13 Stat. at Large, 377.

Statement of the case.

TARBLE'S CASE.

1. The government of the United States and the government of a State are distinct and independent of each other within their respective spheres of action, although existing and exercising their powers within the same territorial limits. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. But whenever any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the national government have supremacy until the validity of the different enactments and authorities are determined by the tribunals of the United States.
2. A State judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government. If upon the application for the writ it appear that the party, alleged to be illegally restrained of his liberty, is held under the authority, or claim and color of the authority, of the United States, by an officer of that government, the writ should be refused. If this fact do not thus appear, the State judge has the right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. But after he is fully apprised by the return that the party is held by an officer of the United States, under the authority, or claim and color of the authority of the United States, he can proceed no further.
3. These principles applied to a case where a *habeas corpus* was issued by a court commissioner of one of the counties of Wisconsin to a recruiting officer of the United States, to bring before him a person who had enlisted as a soldier in the army of the United States, and whose discharge was sought on the alleged ground that he was a minor under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father. The petition for the writ alleging that the prisoner had enlisted as a soldier and been mustered into the military service of the national government, and was detained by the officer as such soldier—this court held that the court commissioner had no jurisdiction to issue the writ for the discharge of the prisoner, as it thus appeared upon the petition that the prisoner was detained under claim and color of the authority of the United States by an officer of that government; and that if he was illegally detained, it was for the courts or judicial officers of the United States and for those courts or officers alone to grant him release.

ERROR to the Supreme Court of Wisconsin.

This was a proceeding on *habeas corpus* for the discharge

of one Edward Tarble, held in the custody of a recruiting officer of the United States as an enlisted soldier, on the alleged ground that he was a minor, under the age of eighteen years at the time of his enlistment, and that he enlisted without the consent of his father.

The writ was issued on the 10th of August, 1869, by a court commissioner of Dane County, Wisconsin, an officer authorized by the laws of that State to issue the writ of *habeas corpus* upon the petition of parties imprisoned or restrained of their liberty, or of persons on their behalf. It was issued in this case upon the petition of the father of Tarble, in which he alleged that his son, who had enlisted under the name of Frank Brown, was confined and restrained of his liberty by Lieutenant Stone, of the United States army, in the city of Madison, in that State and county; that the cause of his confinement and restraint was that he had, on the 20th of the preceding July, enlisted, and been mustered into the military service of the United States; that he was under the age of eighteen years at the time of such enlistment; that the same was made without the knowledge, consent, or approval of the petitioner; and was, therefore, as the petitioner was advised and believed, illegal; and that the petitioner was lawfully entitled to the custody, care, and services of his son.

The writ was directed to the officer thus named, commanding him to have Tarble, together with the cause of his imprisonment and detention, before the commissioner, at the latter's office, in the city of Madison, immediately after the receipt of the writ.

The officer thereupon produced Tarble before the commissioner and made a return in writing to the writ, protesting that the commissioner had no jurisdiction in the premises, and stating, as the authority and cause for the detention of the prisoner, that he, the officer, was a first lieutenant in the army of the United States, and by due authority was detailed as a recruiting officer at the city of Madison, in the State of Wisconsin, and as such officer had the custody and command of all soldiers recruited for the army at that city;

that on the 27th of July preceding, the prisoner, under the name of Frank Brown, was regularly enlisted as a soldier in the army of the United States for the period of five years, unless sooner discharged by proper authority; that he then duly took the oath required in such case by law and the regulations of the army, in which oath he declared that he was of the age of twenty-one years, and thereby procured his enlistment, and was on the same day duly mustered into the service of the United States; that subsequently he deserted the service, and being retaken was then in custody and confinement under charges of desertion, awaiting trial by the proper military authorities.

To this return the petitioner filed a reply, denying, on information and belief, that the prisoner was ever duly or lawfully enlisted or mustered as a soldier into the army of the United States, or that he had declared on oath that he was of the age of twenty-one years, and alleging that the prisoner was at the time of his enlistment under the age of eighteen years, and on information and belief that he was enticed into the enlistment, which was without the knowledge, consent, or approval of the petitioner; that the only oath taken by the prisoner at the time of his enlistment was an oath of allegiance; and that the petitioner was advised and believed that the prisoner was not, and never had been, a deserter from the military service of the United States.

On the 12th of August, to which day the hearing of the petition was adjourned, the commissioner proceeded to take the testimony of different witnesses produced before him, which related principally to the enlistment of the prisoner, the declarations which he made as to his age, and the oath he took at the time, his alleged desertion, the charges against him, his actual age, and the absence of any consent to the enlistment on the part of his father.

The commissioner, after argument, held that the prisoner was illegally imprisoned and detained by Lieutenant Stone, and commanded that officer forthwith to discharge him from custody.

Afterwards, in September of the same year, that officer

applied to the Supreme Court of the State for a *certiorari*, setting forth in his application the proceedings before the commissioner and his ruling thereon. The *certiorari* was allowed, and in obedience to it the proceedings had before the commissioner were returned to the Supreme Court. These proceedings consisted of the petition for the writ, the return of the officer, the reply of the petitioner, and the testimony, documentary and parol, produced before the commissioner.

Upon these proceedings the case was duly argued before the Supreme Court, and in April, 1870, that tribunal pronounced its judgment, affirming the order of the commissioner discharging the prisoner. This judgment was now before this court for examination on writ of error prosecuted by the United States.

The opinion of the court below was sent up with the transcript of the record in the case. It went largely and elaborately into the grounds of its judgment. The sacredness of the right to personal liberty, and "the high, searching, and imperative character" of the writ of *habeas corpus* were presented and enforced. The right of any State court to liberate a party in custody under sentence of the Federal courts, when such Federal court had jurisdiction, was not, indeed, asserted, even where the Federal court might err in what it did; but, contrariwise, such right by any State court was disclaimed. But the right of the State courts to decide whether the Federal court had *jurisdiction* to pass upon the subject *at all*, was considered by the court below as perfectly within its competence to pass upon; and, if on full consideration of the case, the State court was satisfied that the Federal court had no jurisdiction at all in the matter, in such a case the court below asserted that the duty of the State court was to disregard what the Federal court had done. The court below, in illustration of its position, said:

"This court (the Supreme Court of Wisconsin), in a civil suit, recently passed on the jurisdiction of the Federal court to render a decree for the sale of a railroad on the foreclosure of a mortgage. There was no suggestion from any quarter that in

doing so it was exercising any unwarrantable or unusual power, or assuming any authority to control, revise, or annul the judgments of that court. Nor was it. It is a power constantly exercised by all courts. But it is precisely the same power that is exercised in a proceeding by *habeas corpus* when the validity of a judgment under which the party is imprisoned is drawn in question. A judgment in a civil suit disposes of the title to property. A judgment in a criminal suit disposes of the prisoner's right to liberty. A civil suit involving the title to that property is the appropriate proceeding in which the jurisdiction of the court to render the one judgment may be drawn in question collaterally. A proceeding by *habeas corpus* may appropriately have the same effect as to the other. But the right of the State court to decide on the validity of the judgment in the latter case is as clear as its right in the former. It rests upon the same principles and stands or falls by the same reasoning."

Mr. B. H. Bristow, Solicitor-General, contra, and for the United States, cited as conclusive the cases of *Ableman* v. *Booth* and *United States* v. *Booth*, in this court,* in which cases the action of the Supreme Court of Wisconsin—the same court to which the writ of error in the present case had gone—in disregarding the action of the Federal courts or their officers under the act of Congress known as the Fugitive Slave Law —because, as the Wisconsin court held, the act was unconstitutional and void, and could therefore give the Federal court no jurisdiction—was overruled, and itself held unconstitutional and void.

The present case, Mr. Bristow argued, was covered in principle by the decisions cited, and those decisions had been applied in instance by several State courts to the case of an enlisted soldier in the army of the United States.†

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

The important question is presented by this case, whether

* 21 Howard, 506.

† In re Spangler, 11 Michigan, 299; State *v.* Zulich, 5 Dutcher, 409; In re Hopson, 40 Barbour, 43; In re Jordan, 11 American Law Register, 749.

a State court commissioner has jurisdiction, upon *habeas corpus*, to inquire into the validity of the enlistment of soldiers into the military service of the United States, and to discharge them from such service when, in his judgment, their enlistment has not been made in conformity with the laws of the United States. The question presented may be more generally stated thus: Whether any judicial officer of a State has jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States, by an officer of that government. For it is evident, if such jurisdiction may be exercised by any judicial officer of a State, it may be exercised by the court commissioner within the county for which he is appointed; and if it may be exercised with reference to soldiers detained in the military service of the United States, whose enlistment is alleged to have been illegally made, it may be exercised with reference to persons employed in any other department of the public service when their illegal detention is asserted. It may be exercised in all cases where parties are held under the authority of the United States, whenever the invalidity of the exercise of that authority is affirmed. The jurisdiction, if it exist at all, can only be limited in its application by the legislative power of the State. It may even reach to parties imprisoned under sentence of the National courts, after regular indictment, trial, and conviction, for offences against the laws of the United States. As we read the opinion of the Supreme Court of Wisconsin in this case, this is the claim of authority asserted by that tribunal for itself and for the judicial officers of that State. It does, indeed, disclaim any right of either to interfere with parties in custody, under judicial sentence, when the National court pronouncing sentence had jurisdiction to try and punish the offenders, but it asserts, at the same time, for itself and for each of those officers, the right to determine, upon *habeas corpus*, in all cases, whether that court ever had such jurisdiction. In the case of Booth, which subsequently came before this court,

it not only sustained the action of one of its justices in discharging a prisoner held in custody by a marshal of the United States, under a warrant of commitment for an offence against the laws of the United States, issued by a commissioner of the United States; but it discharged the same prisoner when subsequently confined under sentence of the District Court of the United States for the same offence, after indictment, trial, and conviction, on the ground that, in its judgment, the act of Congress creating the offence was unconstitutional; and in order that its decision in that respect should be final and conclusive, directed its clerk to refuse obedience to the writ of error issued by this court, under the act of Congress, to bring up the decision for review.

It is evident, as said by this court when the case of Booth was finally brought before it, if the power asserted by that State court existed, no offence against the laws of the United States could be punished by their own tribunals, without the permission and according to the judgment of the courts of the State in which the parties happen to be imprisoned; that if that power existed in that State court, it belonged equally to every other State court in the Union where a prisoner was within its territorial limits; and, as the different State courts could not always agree, it would often happen that an act, which was admitted to be an offence and justly punishable in one State, would be regarded as innocent, and even praiseworthy in another, and no one could suppose that a government, which had hitherto lasted for seventy years, "enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found."

The decision of this court in the two cases which grew out of the arrest of Booth, that of *Ableman* v. *Booth*, and that of *The United States* v. *Booth*,* disposes alike of the claim of

* 21 Howard, 506.

jurisdiction by a State court, or by a State judge, to interfere with the authority of the United States, whether that authority be exercised by a Federal officer or be exercised by a Federal tribunal. In the first of these cases Booth had been arrested and committed to the custody of a marshal of the United States by a commissioner appointed by the District Court of the United States, upon a charge of having aided and abetted the escape of a fugitive slave. Whilst thus in custody a justice of the Supreme Court of Wisconsin issued a writ of *habeas corpus* directed to the marshal, requiring him to produce the body of Booth with the cause of his imprisonment. The marshal made a return, stating that he held the prisoner upon the warrant of the commissioner, a copy of which he annexed to and returned with the writ. To this return Booth demurred as insufficient in law to justify his detention, and, upon the hearing which followed, the justice held his detention illegal, and ordered his discharge. The marshal thereupon applied for and obtained a *certiorari*, and had the proceedings removed to the Supreme Court of the State, where, after argument, the order of the justice discharging the prisoner from custody was affirmed. The decision proceeded upon the ground that the act of Congress respecting fugitive slaves was unconstitutional and void.

In the second case, Booth had been indicted for the offence with which he was charged before the commissioner, and from which the State judge had discharged him, and had been tried and convicted in the District Court of the United States for the District of Wisconsin, and been sentenced to pay a fine of $1000, and to be imprisoned for one month. Whilst in imprisonment, in execution of this sentence, application was made by Booth to the Supreme Court of the State, for a writ of *habeas corpus*, alleging in his application that his imprisonment was illegal, by reason of the unconstitutionality of the fugitive slave law, and that the District Court had no jurisdiction to try or punish him for the matter charged against him. The court granted the application, and issued the writ, to which the sheriff, to whom the prisoner had been committed by the marshal, returned that he

held the prisoner by virtue of the proceedings and sentence of the District Court, a copy of which was annexed to his return. Upon demurrer to this return, the court adjudged the imprisonment of Booth to be illegal, and ordered him to be discharged from custody, and he was accordingly set at liberty.

For a review in this court of the judgments in both of these cases, writs of error were prosecuted. No return, however, was made to the writs, the clerk of the Supreme Court of Wisconsin having been directed by that court to refuse obedience to them; but copies of the records were filed by the Attorney-General, and it was ordered by this court that they should be received with the same effect and legal operation as if returned by the clerk. The cases were afterwards heard and considered together, and the decision of both was announced in the same opinion. In that opinion the Chief Justice details the facts of the two cases at length, and comments upon the character of the jurisdiction asserted by the State judge and the State court; by the State judge to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner committed by him for an offence against the laws of the United States; and by the State court to supervise and annul the proceedings and judgment of a District Court of the United States, and to discharge a prisoner who had been indicted, tried, and found guilty of an offence against the laws of the United States and sentenced to imprisonment by that court.

And in answer to this assumption of judicial power by the judges and by the Supreme Court of Wisconsin thus made, the Chief Justice said as follows: If they "possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent govern ment. And although the State of Wis-

consin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the General government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned."

It is in the consideration of this distinct and independent character of the government of the United States, from that of the government of the several States, that the solution of the question presented in this case, and in similar cases, must be found. There are within the territorial limits of each State two governments, restricted in their spheres of action, but independent of each other, and supreme within their respective spheres. Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The Constitution and the laws passed in pursuance of it, are declared by the Constitution itself to be the supreme law of the land, and the judges of every State are bound thereby, "anything in the constitution or laws of any State to the contrary not-

withstanding." Whenever, therefore, any conflict arises between the enactments of the two sovereignties, or in the enforcement of their asserted authorities, those of the National government must have supremacy until the validity of the different enactments and authorities can be finally determined by the tribunals of the United States. This temporary supremacy until judicial decision by the National tribunals, and the ultimate determination of the conflict by such decision, are essential to the preservation of order and peace, and the avoidance of forcible collision between the two governments. "The Constitution," as said by Mr. Chief Justice Taney, "was not framed merely to guard the States against danger from abroad, but chiefly to secure union and harmony at home; and to accomplish this end it was deemed necessary, when the Constitution was framed, that many of the rights of sovereignty which the States then possessed should be ceded to the General government; and that in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a State, or from State authorities." And the judicial power conferred extends to all cases arising under the Constitution, and thus embraces every legislative act of Congress, whether passed in pursuance of it, or in disregard of its provisions. The Constitution is under the view of the tribunals of the United States when any act of Congress is brought before them for consideration.

Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except so far as such intrusion may be necessary on the part of the National government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers,

are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Now, among the powers assigned to the National government, is the power "to raise and support armies," and the power "to provide for the government and regulation of the land and naval forces." The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any State authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, and the period for which he shall be taken, the compensation he shall be allowed, and the service to which he shall be assigned. And it can provide the rules for the government and regulation of the forces after they are raised, define what shall constitute military offences, and prescribe their punishment. No interference with the execution of this power of the National government in the formation, organization, and government of its armies by any State officials could be permitted without greatly impairing the efficiency, if it did not utterly destroy, this branch of the public service. Probably in every county and city in the several States there are one or more officers authorized by law to issue writs of *habeas corpus* on behalf of persons alleged to be illegally restrained of their liberty; and if soldiers could be taken from the army of the United States, and the validity of their enlistment inquired into by any one of these officers, such proceeding could be taken by all of them, and no movement could be made by the National troops without their commanders being subjected to constant annoyance and embarrassment from this source. The experience of the late rebellion has shown us that, in times of great popular excitement, there may be found in every State large numbers ready and anxious to embarrass the operations of the government, and easily persuaded to believe every step taken for the enforcement of its authority illegal and void. Power to issue writs of *habeas corpus* for the discharge of soldiers in the military service, in the hands of parties thus disposed, might be used, and often would be

used, to the great detriment of the public service. In many exigencies the measures of the National government might in this way be entirely bereft of their efficacy and value. An appeal in such cases to this court, to correct the erroneous action of these officers, would afford no adequate remedy. Proceedings on *habeas corpus* are summary, and the delay incident to bringing the decision of a State officer, through the highest tribunal of the State, to this court for review, would necessarily occupy years, and in the meantime, where the soldier was discharged, the mischief would be accomplished. It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times, if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

It is true similar embarrassment might sometimes be occasioned, though in a less degree, by the exercise of the authority to issue the writ possessed by judicial officers of the United States, but the ability to provide a speedy remedy for any inconvenience following from this source would always exist with the National legislature.

State judges and State courts, authorized by laws of their States to issue writs of *habeas corpus*, have undoubtedly a right to issue the writ in any case where a party is alleged to be illegally confined within their limits, unless it appear upon his application that he is confined under the authority, or claim and color of the authority, of the United States, by an officer of that government. If such fact appear upon the application the writ should be refused. If it do not appear, the judge or court issuing the writ has a right to inquire into the cause of imprisonment, and ascertain by what authority the person is held within the limits of the State; and it is the duty of the marshal, or other officer having the custody of the prisoner, to give, by a proper return, information in this respect. His return should be sufficient, in its detail of facts, to show distinctly that the imprisonment is under the authority, or claim and color of the authority, of the United States, and to exclude the suspicion of imposition

or oppression on his part. And the process or orders, under which the prisoner is held, should be produced with the return and submitted to inspection, in order that the court or judge issuing the writ may see that the prisoner is held by the officer, in good faith, under the authority, or claim and color of the authority, of the United States, and not under the mere pretence of having such authority.

This right to inquire by process of *habeas corpus*, and the duty of the officer to make a return, "grows necessarily," says Mr. Chief Justice Taney, "out of the complex character of our government and the existence of two distinct and separate sovereignties within the same territorial space, each of them restricted in its power, and each within its sphere of action, prescribed by the Constitution of the United States, independent of the other. But, after the return is made, and the State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus* nor any other process issued under State authority can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offence against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress."

Some attempt has been made in adjudications, to which our attention has been called, to limit the decision of this court in *Ableman* v. *Booth*, and *The United States* v. *Booth*, to cases where a prisoner is held in custody under undisputed lawful authority of the United States, as distinguished from his imprisonment under claim and color of such authority. But it is evident that the decision does not admit of any such limitation. It would have been unnecessary to enforce, by any extended reasoning, such as the Chief Justice uses, the position that when it appeared to the judge or officer issuing the writ, that the prisoner was held under undis-

puted lawful authority, he should proceed no further. No Federal judge even could, in such case, release the party from imprisonment, except upon bail when that was allowable. The detention being by admitted lawful authority, no judge could set the prisoner at liberty, except in that way, at any stage of the proceeding. All that is meant by the language used is, that the State judge or State court should proceed no further when it appears, from the application of the party, or the return made, that the prisoner is held by an officer of the United States under what, in truth, purports to be the authority of the United States; that is, an authority, the validity of which is to be determined by the Constitution and laws of the United States. If a party thus held be illegally imprisoned it is for the courts or judicial officers of the United States, and those courts or officers alone, to grant him release.

This limitation upon the power of State tribunals and State officers furnishes no just ground to apprehend that the liberty of the citizen will thereby be endangered. The United States are as much interested in protecting the citizen from illegal restraint under their authority, as the several States are to protect him from the like restraint under their authority, and are no more likely to tolerate any oppression. Their courts and judicial officers are clothed with the power to issue the writ of *habeas corpus* in all cases, where a party is illegally restrained of his liberty by an officer of the United States, whether such illegality consist in the character of the process, the authority of the officer, or the invalidity of the law under which he is held. And there is no just reason to believe that they will exhibit any hesitation to exert their power, when it is properly invoked. Certainly there can be no ground for supposing that their action will be less prompt and efficient in such cases than would be that of State tribunals and State officers.*

It follows, from the views we have expressed, that the court commissioner of Dane County was without jurisdiction

* In the matter of Severy, 4 Clifford. In the matter of Keeler, Hempstead, 306.

to issue the writ of *habeas corpus* for the discharge of the prisoner in this case, it appearing, upon the application presented to him for the writ, that the prisoner was held by an officer of the United States, under claim and color of the authority of the United States, as an enlisted soldier mustered into the military service of the National government; and the same information was imparted to the commissioner by the return of the officer. The commissioner was, both by the application for the writ and the return to it, apprised that the prisoner was within the dominion and jurisdiction of another government, and that no writ of *habeas corpus* issued by him could pass over the line which divided the two sovereignties.

The conclusion we have reached renders it unnecessary to consider how far the declaration of the prisoner as to his age, in the oath of enlistment, is to be deemed conclusive evidence on that point on the return to the writ.

JUDGMENT REVERSED.

The CHIEF JUSTICE, dissenting

I cannot concur in the opinion just read. I have no doubt of the right of a State court to inquire into the jurisdiction of a Federal court upon *habeas corpus*, and to discharge when satisfied that the petitioner for the writ is restrained of liberty by the sentence of a court without jurisdiction. If it errs in deciding the question of jurisdiction, the error must be corrected in the mode prescribed by the 25th section of the Judiciary Act; not by denial of the right to make inquiry.

I have still less doubt, if possible, that a writ of *habeas corpus* may issue from a State court to inquire into the validity of imprisonment or detention, without the sentence of any court whatever, by an officer of the United States. The State court may err; and if it does, the error may be corrected here The mode has been prescribed and should be followed.

To deny the right of State courts to issue the writ, or, what amounts to the same thing, to concede the right to

issue and to deny the right to adjudicate, is to deny the right to protect the citizen by *habeas corpus* against arbitrary imprisonment in a large class of cases; and, I am thoroughly persuaded, was never within the contemplation of the Convention which framed, or the people who adopted, the Constitution. That instrument expressly declares that "the privilege of the writ of *habeas corpus* shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it."

KITCHEN *v.* BEDFORD.

1. Where a person acknowledged the receipt of "the *sum* of $119,000 in *bonds*" of a railroad company, and of "50,405 *dollars* of coupons," amounting in the aggregate to "the *sum* of $169,405," "which said *sum* he promised to expend in the purchase of lands" of that same railroad company, "at or near the average price of $5 per acre;" *held*, that this was a trust to buy the lands with the bonds at or near the price of $5 an acre; and not to buy them with the proceeds of the bonds after they were sold at a nominal price.
2. Purchasers who fraudulently purchased, in breach of the trust, *held* liable in trover.
3. The statute law of Arkansas has not changed the common law rule, that a husband cannot legally make a gift to his wife during coverture.
4. Where a husband has not parted with the legal title to bonds of which he may have made an equitable gift for his wife's benefit, he can call any person to account who unlawfully converts them.

ERROR to the Circuit Court for the District of Missouri.

Kitchen, a citizen of Arkansas, brought trover in the court below against a certain Bedford and one Webber, for the conversion of one hundred and nineteen bonds of the Cairo and Fulton Railroad Company, for $1000 each, dated October 1st, 1857, and payable in New York in 1882, with semi-annual interest represented by interest warrants annexed to the bonds. The conversion was laid as on the 1st of December, 1866. Plea, "Not guilty." A jury being waived, the cause was tried by the court in May, 1870, and

judgment rendered for the defendants. A bill of exceptions was taken, however, from which it appeared that on the trial evidence was given tending to establish the following facts, to wit:

The plaintiff, on the 16th of March, 1866, being owner of the bonds described in the declaration, gave them to his wife, and put them in the hands of one W. C. Rayburn, on the terms and for the purposes set out in the following writing, which Rayburn executed under seal, to wit:

"WALCOT, ARKANSAS, March 16th, 1866.

"Received from *Martha* Kitchen, the *sum* of one hundred and nineteen thousand dollars *in bonds* of the Cairo and Fulton Railroad Company of Missouri, and I also received fifty thousand four hundred and five *dollars* of coupons or interest warrants, due and owing by said company, amounting in the aggregate to *the sum* of one hundred and sixty-nine thousand four hundred and five dollars, *which said sum* I promise to expend in the purchase of lands from John Moore, John Wilson, and Albert G. Waterman, trustees of the said railroad company of Missouri, at or near the average price of five dollars per acre, taking the deeds in my own name; and I further promise to sell all the lands purchased as aforesaid, as soon as possible, at such prices as the said Kitchen may direct, and if I should fail to sell all said lands, as soon as said Kitchen may desire, then I promise to sell the same at public auction, whenever so directed by the said Kitchen, and after deducting the expenses of stamps and necessary travelling expenses, to pay unto the said Martha Kitchen, or her legal representatives, seven-eighths of all the money that I may sell the said lands for. Given under my hand and seal the date above written.

[SEAL.] "W. C. RAYBURN."

Rayburn having received the bonds for the purpose thus indicated, in December, 1866, sold and delivered them to the defendant Bedford, for $10,000, and he sold and delivered them to defendant Webber, who afterwards sold them for $26,340, each knowing, when purchasing, the purposes for which Rayburn held them, as expressed in the writing.

A demand for the bonds and coupons, was made by the plaintiff of the defendants before the suit was brought.

The court declared that, on this evidence the plaintiff could not recover, and the plaintiff having excepted, now brought the case here accordingly

Messrs. Carlisle and McPherson, for the plaintiff in error:

The bonds were those of the Cairo and Fulton Railroad Company, and were "put in the hands" of Rayburn "to expend in the purchase of lands from the trustees of the company;" a most natural use of them; since in *so* using them, they could be used as money, and their full or best value got; the only way it is obvious in which they could be so used, or such value could be got. The case, then, is that of a delivery of a thing in trust upon an agreement to conform to the purpose of the trust. But this is the definition of a bailment, not of a sale. The transaction indeed has no aspect of a sale.

These bonds having been disposed of in a way different from the specific one for which they were given to Rayburn, there has been a conversion, and trover lies.

Mr. T. T. Gantt, contra:

1. A fair construction of the paper is, that the bonds and coupons were absolutely sold to Rayburn at *par*, and that he stipulated to invest this *par* value in lands, as prescribed in the bond. It is declared expressly that he has received two sums of money amounting to $169,405, "*which said sum*" he promises to expend in the purchase of lands, &c.; that is to say, he takes the bonds, charges himself with their par value, and agrees to invest that amount or "sum" in the purchase of lands.

The case shows nothing of the *value* of the bonds in December, 1866; nor anything to show that the price at which —as we suppose—Rayburn *took* them, was not their then true market price. It is obvious from the difference between the price at which Bedford bought them and that at which he sold them, that the bonds were bonds having what is

known as "a speculative value;" an immense class of bonds in this country. If $169,405 was a fair market value, every presumption is in favor of a sale, rather than of a bailment. If this view is right, and Rayburn has not invested—a matter not shown on the other side, nor by us admitted—then a suit for breach of covenant lies against him; but not trover against his vendees.

But certainly if there was a trust, it was a trust with a power to sell, and invest proceeds. The sale has been made, and *non constat* but that the proceeds have been invested. Embezzlement is not to be presumed; and it is not proved. Whether invested or not invested—no charge of fraud at all being made as respects *them*—suit cannot be maintained against the vendees for making a purchase under a sale authorized and obligatory. As matter of fact, there is no proof that the prices paid by both Bedford and Webber—great as the difference between them was—were not both true market prices at this time. In "fancy stocks" fluctuations are violent.

2. But Kitchen had given the bonds to his wife, and Rayburn receives them from *her*. The husband does not once appear in the history, after his gift. The wife should have been joined with the husband as plaintiff.

Reply: The husband had owned the bonds, and he it was who "put them in the hands of Rayburn." As between husband and wife, no valid gift could be made to her; and if the bonds had been delivered to her when the husband resumed possession they would become his own. The receipt is to be construed in connection with the rest of the evidence, which shows that the bonds were received from the plaintiff, and were his property, and were intended to be dedicated to his wife's use in the manner provided in the receipt. But all this is unimportant. The husband alone can bring *trover* for conversion of the wife's chattels.

Mr. Justice BRADLEY delivered the opinion of the court.

Supposing the facts upon the evidence of which the court

below declared that the plaintiff could not recover, to have been sufficiently proven, it seems to us that the court erred in taking the view of the case which it did. Rayburn had possession of the bonds for the purpose of purchasing therewith, for the benefit of Mrs. Kitchen, lands of the railroad company which had issued them, "at or near the average price of five dollars per acre." Instead of doing this, as he was bound, he sold them to Bedford for six cents on the dollar; and Bedford sold them to Webber at a hundred and fifty per cent. advance, both knowing the object for which Rayburn held the bonds. A clearer case of fraudulent breach of trust, it is difficult to conceive, and the defendants being *participes criminis*, were bound to deliver the bonds and coupons to the plaintiff when he demanded them.

It is contended that by the fair construction of the paper, Rayburn was to sell the bonds for what he could get, and invest the proceeds in lands, and *non constat* that he has not done so; or at all events, the defendants, as purchasers from Rayburn, have good title to the bonds, because he was invested with a trust to sell them. But the paper does not so read. It declares that Rayburn had received "the *sum* of one hundred and nineteen thousand dollars *in bonds* of the Cairo and Fulton Railroad Company, and fifty thousand four hundred and five *dollars* of coupons, &c., amounting in the aggregate to *the sum* of one hundred and sixty-nine thousand four hundred and five dollars, *which said sum*, I promise to expend in the purchase of lands, &c., at or near the average price of five dollars per acre." In other words, he was to purchase lands with the bonds and coupons at five dollars per acre, not with the proceeds of them, after being sold at a nominal price. He was to procure an acre for every five dollars of the bonds and coupons. That was the trust which he assumed. If he was unable to perform it, he should have returned the bonds, and not have sold them at six cents on the dollar. The defendants, when they bought them under these circumstances, did so at their peril, and were bound to restore the bonds to the plaintiff.

Having refused to do this, they were liable to him for the fair value of the bonds at the time of the demand.

Mrs. Kitchen was not a necessary party to the suit. The bonds were never hers in law. By the laws of Arkansas, a husband cannot legally make a gift to his wife during the marriage. He could not do so at the common law, and the statute of Arkansas which enables a married woman to take and hold property in her own right, expressly provides that no conveyance from a man to his wife, directly or indirectly, shall entitle her to any benefits or privileges of the act.*

Perhaps he might have made an equitable gift for her benefit. But in this case, the husband had not parted with the legal title to the bonds, and had a right to call any person to account who unlawfully converted them.

JUDGMENT REVERSED, with directions to award a *venire de novo*.

Mr. Justice STRONG stated that he was unable to construe the contract upon which the plaintiff relied, as it was construed by a majority of the court, and for that reason, among others, he dissented from the judgment.

DAVENPORT *v.* LAMB ET AL.

1. The act of Congress of 1836 authorizing the issue of patents for land in the name of deceased parties, who in their lifetime became entitled to such patents, applies to patents under the act of Congress of September 27th, 1850, called the Donation Act of Oregon; and such patents enure to the parties designated in the Donation Act, and not solely to the parties designated in the act of 1836.
2. The Donation Act declared that in case husband or wife should die before a patent issues, the survivor and children, or heirs, should be entitled to the share or interest of the deceased in equal proportions, except where the deceased should otherwise dispose of the property by will; *held* that each of the children, and the surviving husband or wife, took

* Digest of Statutes of Arkansas, p. 765, tit. Married Women.

equal shares, and that the property of the deceased was not to be divided so as to give one-half to the surviving husband or wife, and the other half to the children or heirs of the deceased.

3. A covenant to "warrant and defend" property for which a quit-claim deed is executed "against all claims, the United States excepted," only applies to claims from other sources than the United States. It does not cover any interest of the United States, nor preclude its acquisition by the covenantors or their heirs for themselves.

4. A covenant that if the grantors "obtain the fee simple" to property conveyed "from the government of the United States they will convey the same" to the grantee, his heirs, or assigns, "by deed of general warranty" only takes effect in case the grantors acquire the title directly from the United States, and does not cover the acquisition of the title of the United States from any intermediate party.

APPEAL from the Circuit Court for the District of Oregon.

Emma Lamb and Ida Squires, asserting themselves as granddaughters of one Daniel Lownsdale, to own each an undivided one-tenth of "the south half of Block G" in Portland, Oregon, filed a bill against their co-heirs and persons claiming under them for a partition; one Davenport, who set up a title adverse to them all, being made a party defendant, and the real matter in issue being the validity of the title set up by him.

The case was thus:

On the 25th of June, 1850, Daniel Lownsdale, Stephen Coffin, and W. W. Chapman, were the owners of a land claim, embracing a portion of the tract upon which the city of Portand is situated. The legal title to the property was then in the United States, but the parties, asserting their claim to the possession under the law of the provisional government of the Territory, expected that legislation would be taken at an early day by Congress for the transfer of the title to them, or some one of them. This expectation of legislation on their behalf was common with all occupants of land in Oregon, whose rights were merely possessory, the fee of the entire land in the Territory being in the United States. With this expectation these claimants, on the day named, executed a deed to Chapman, one of their own number, of numerous lots and blocks in Portland, into

which a portion of their claim had been divided, including among them the already mentioned south half of block G, the subject of the bill. The deed purported for the consideration of $60,000, to "release, confirm, and quit-claim" to Chapman, his heirs and assigns, the described property; and contained two covenants on the part of the grantors—one, to warrant and defend the property to their grantee, his heirs and assigns "*against all claims except the United States;*" and the other, "*that if they obtain the fee-simple to said property, from the government of the United States, they will convey the same*" to the grantee, his heirs or assigns, "*by deed of general warranty.*" The interest thus acquired by Chapman in the south half of block G, was afterwards assigned by various mesne conveyances to the defendant, Davenport.

At the time this deed was executed Lownsdale was a widower having three children, named James, Mary, and Sarah.* At the same time there lived in the same town a widow named Nancy Gillihan, having two children, called William and Isabella. In July, 1850, the widower and the widow intermarried, and they had, as the issue of this marriage, two children, named Millard and Ruth.

On the 27th of September, 1850, Congress passed the act, which is generally known in Oregon as the Donation Act, and under which the title to a large portion of the real property of the State is held. It is entitled "An act to create the office of surveyor-general of the public lands of Oregon, and to provide for the survey and to make donations to the settlers of the said public lands."†

By the fourth section of this act a grant of land was made to every white settler, or occupant of the public lands in Oregon, above the age of eighteen years, who was a citizen of the United States, or had made a declaration according to law of his intention to become a citizen, or should make such declaration on or before the first day of December, 1851, and who was at the time a resident of the Territory, or might become a resident on or before the 1st of December,

* Mother of the two persons complainants in the bill.

† 9 Stat. at Large, 496.

1850, and who should reside upon and cultivate the land for four consecutive years, and otherwise conform to the provisions of the act. The grant was of 320 acres of land, if the settler or occupant was a single man, but if a married man, or if he should become married within a year from the first of December, 1850, *then the grant was of* 640 *acres, one-half to himself and the other half to his wife, to be held by her in her own right.*

By the same section the surveyor-general was *required to designate of the land thus granted the part enuring to the husband, and the part enuring to the wife, and to enter the same on the records of his office;* and it was provided that in all cases where such married persons complied with the provisions of the act so as to entitle them to the grant, whether under the previous provisional government or afterwards, *and either should die before the issue of a patent,* "*the survivor and children, or heirs, of the deceased, shall be entitled to the share or interest of the deceased in equal proportions,*" except when the deceased should otherwise dispose of the same by will.

Under this act Lownsdale was a donation claimant, and dated the commencement of his settlement on the 22d of September, 1848. This settlement became complete on the 22d of September, 1852, at the expiration of the four years prescribed. The proof of the commencement of the settlement and of the continued residence and cultivation required by the act was regularly made; and of the land the east half was assigned to Lownsdale and the west half to his wife Nancy. Within the portion thus assigned to the wife the premises in controversy were included. The tract thus claimed and settled upon embraced a fraction over 178 acres, and for it, in October, 1860, a patent certificate was given to Lownsdale and wife, and in June, 1865, a patent of the United States was issued to them, giving and granting in terms to Daniel Lownsdale the east half of the property, and to his wife, Nancy Lownsdale, the west half.

Nancy died in April, 1854, before the issue of the patent, leaving the four children already mentioned—two, William and Isabella Gillihan, by her first husband, and two, Millard

and Ruth Lownsdale, by her second. These four children and her surviving husband Daniel became entitled to her interest in the tract set apart to her; though in what shares the husband took as respected the children, whether one-half or only one-fifth, was one of the questions in the case.

In January, 1860, Daniel purchased the interest of Isabella Gillihan. He himself died in May, 1862, intestate, leaving as his heirs the four children already named, that is to say, James and Mary, by his first wife, and Millard and Ruth by his second wife; and also two children (the complainants in this case) of his deceased daughter Sarah, by his first wife. The four children living, each inherited one undivided fifth of their father's estate, and the two children of the deceased daughter, each one undivided tenth.

In 1864, William Gillihan, one of the children of Nancy, brought suit in one of the courts of the State of Oregon for partition of the tract set apart to Nancy as above-mentioned—called the Nancy Lownsdale tract—making defendants the heirs of both Daniel and Nancy, and numerous other persons purchasers and claimants under Daniel. By the decree in that case it was among other things adjudged that Daniel was the owner of an undivided two-fifths of the entire Nancy Lownsdale tract, and that the said William Gillihan and Ruth and Millard Lownsdale, as heirs of Nancy Lownsdale, deceased, were each entitled to an undivided one-fifth of the whole of said tract, and certain portions of said tract were decreed and set apart to the said William, Ruth, and Millard, to be held by them in severalty, and the residue of said tract was set apart and allotted to the heirs, vendees, or claimants, under Daniel, according to their respective interests, without however determining the extent of the respective rights and interests of the heirs, and vendees or claimants between themselves, and by reason of the said partition not being equal, owelty was allowed to William, Millard, and Ruth. The portion set apart to the heirs, and vendees or claimants, under Daniel, included the south half of block G, the premises in controversy.

Two granddaughters of Lownsdale, through his daughter

Sarah, now deceased, assumed accordingly that through their mother, this Sarah, they owned, together, her undivided one-fifth of the south half of the block G; each of them of course an undivided one-tenth.

Davenport denied such their ownership, asserting that he himself owned the whole of the south half of the block; or, if not the whole, then five-eighths; and, if not five-eighths, then one-half; either one of which latter interests in himself being inconsistent, like the first, with that of one-fifth in the said two granddaughters.

I. Davenport founded his ownership apparently of the *whole* of the south half in part on the first of the covenants (quoted *supra*, p. 420) in the deed of June 25th, 1850, to Chapman, through whom he claimed; and as much or more on a matter alleged by him, to wit, that in 1860 Lownsdale offered to sell him a portion of another block in Portland (block 75), and that he, Davenport, knowing that a difficulty was likely to occur about that and other property, submitted to Lownsdale a list of all the property he believed he then rightly held, and among the rest the south half of block G, and pointed out such as he thought the title of might be defective through him, and that Lownsdale agreed verbally for $2000 to give a confirmatory title to all the property thus submitted to him, "that HE thought might require it." Davenport accordingly paid the $2000, and Lownsdale gave to him a deed for half of block 75, and also a confirmatory deed for certain other lots, but not for the south half of block G; that lot not being included among those described in the confirmatory deed; and a lot therefore to which Lownsdale, as Davenport considered, was to be held to have declared that he had no title in himself.

II. But if this was not all so, and if what was thus alleged in the nature of an estoppel *in pais* did not exist or operate, Davenport conceived that still he had five-eighths of the property; for that (explaining), he had got—

First. Four-eighths, the *true* share (as he asserted) of Daniel as survivor of his wife, inasmuch as under the statute which gave the wife's property to her surviving husband

and her children "in *equal* proportions," Daniel had got one-half or four-eighths, an equal share with the children, and not one-fifth, the same share as if he were but one of five children, regarded as a class; and that this one-half passed under the second of the two covenants of the deed of June 25th, 1850.

Second. One-eighth,—the eighth, to wit, that came from Isabella Gillihan; for, that this had been truly and literally "obtained" by Daniel "from the government of the United States," though indirectly, and came under the covenant; the fact, as he assumed, that it came through Isabella, and not directly, not affecting Lownsdale's obligation or that of his heirs to convey.

III. The final and least favorable to himself of Davenport's positions was, that if this second fraction of title—the one-eighth—Isabella's share—did not pass, still that he, Davenport, had one-half; the share of Daniel as got by survivorship, and under the statute, as already stated, from his deceased wife Nancy.

In this state of claim respectively it was that the bill in this case was filed; the complainants setting up a claim for their one-fifth, and Davenport setting up his title; the matter already mentioned as alleged by way of estoppel *in pais*, though set out and well colored in his answer to the bill, not being proved by writing or in some essential features otherwise than by his own testimony.

The court below held that Daniel Lownsdale became the owner in fee of two-fifths (undivided) of the west half of the Lownsdale donation claim (being the part allotted to Nancy), including the south half of block G; one-fifth by donation from the United States upon the death of his wife Nancy, before the issue of the patent, and the other one-fifth by purchase from Isabella Gillihan; and that the title to the one-fifth of the south half of block G acquired from the United States enured to Davenport, by virtue of the covenant in the deed of June 25th, 1850, to Chapman, Davenport deriving his interest under Chapman; and that the remaining four-fifths in the south half of that block were owned by the four

children of Lownsdale living, and the two children of his deceased daughter Sarah; and the court decreed a partition accordingly.

From this decree Davenport alone appealed to this court.

Mr. W. W. Chapman, for the appellant:

1. The decree is erroneous, in not giving to Davenport the whole of the property in controversy, instead of one-fifth of it.

2. If not thus erroneous, it is erroneous in not giving five-eighths.

3. And if not erroneous in either respect, it is erroneous in not giving to him one-half instead of one-fifth.

1. *Davenport is entitled to the whole property.* In making the decree below the first clause in the covenant is unnoticed, and the second (including the release obtained from Isabella) is held to operate only upon the same proportional interest in the block which Lownsdale obtained in the tract of 178 acres as survivor of his wife—determined by the court to be only one-fifth of it—notwithstanding the original decree in partition had allotted to the vendees and heirs of Lownsdale the entire block.

The first covenant protects the covenantee and assigns, in the possession against Lownsdale and all other persons, and against any title ingrafted upon it through his instrumentality. He filed his notification, including it, and dating his settlement and residence from the 22d September, 1848, to and including the date of the covenant. This appropriated the possession and the block to his own use, against which he had covenanted to warrant and defend. He was not obliged to do this. He could as easily have omitted it as have embraced it, and he knew when he did so that his wife would thereby become entitled to an interest in her *own right*, and deprive the covenantee of the possession and title, unless by the happening of a contingency provided for by the law (then unlikely to occur), by which the title and possession might revest in him. In the face of this covenant he took this risk. In consequence of the peculiar form of the

covenant, the covenantee might not have been able to maintain an action at law, and because the subject was, for the time, supposed to be out of reach of the arm of a court of equity. But the contingency did happen. The same possession, with a title ingrafted upon it, through his instrumentality, revested in him, and it is now within the reach of a court of equity, perfect and complete, as contemplated by the parties in the formation of the second covenant, and therefore his warranty should estop him and his heirs from asserting a right to the possession thus ripened into a title through his act.

In addition to this, the agreement between Davenport and Lownsdale operated as an estoppel *in pais*. The south one-half of block G was not put in the confirmatory deed only because Lownsdale declared he had no title to it. Having received the $2000 for confirming to Davenport all that he did claim, his descendants ought not now to be allowed to gainsay his declaration.

2. *If not entitled to all, Davenport is entitled to five-eighths.* The Donation Act gives the property to the husband, as one party, and to the children as the other, in equal proportions. Each thus takes one-half. This seems a more natural construction than to reduce the husband to the grade of a child. If this is so, Davenport has certainly one-half, equal to four-eighths.

But he has another fifth through Isabella under the second covenant.

Mr. G. H. Williams, *contra*, argued that the covenants to Chapman were joint and not several, and that being in a deed where he was himself grantor were void; that the heirs of Lownsdale were not named in it, and that it did not bind them; that the covenantors had not obtained the fee from the United States; but that it was granted to the heirs of Nancy Lownsdale, and that if the husband's share, as survivor of his wife, was within the covenant, the shares of the children assuredly were not; that these shares under the Oregon statute were four-fifths; the husband being only entitled to an equal proportion, or one-fifth, with them.

Opinion of the court.

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

Neither of the patentees were living at the time the patent for the donation claim in this case was issued, Lownsdale having died in May, 1862, and Nancy having died in April, 1854. At common law the patent would have been inoperative and void from this circumstance.* By that law the grant to a deceased party is as ineffectual to pass the title of the grantor as if made to a fictitious person; and the rule would apply equally to grants of the government as to grants of individuals, but for the act of Congress of May 20th, 1836,† which obviates this result. That act declares: "that in all cases where patents for public lands have been or may hereafter be issued, in pursuance of any law of the United States, to a person who has died, or who shall hereafter die, before the date of such patent, the title to the land designated therein, shall enure to, and become vested in, the heirs, devisees, and assigns of such deceased patentee, as if the patent had issued to the deceased person during life." This act makes the title enure in a manner different from that provided by the Donation Act upon the death of either owner before the issue of the patent, for we do not understand that the survivor of the deceased husband or wife was at the time his or her heir by any law of Oregon. If the act of 1836 can be considered as applying to patents issued under the Donation Act, where the party originally entitled to the patent has died before the patent issues—and on this point no question is made by either party—then its language must be construed in connection with, and be limited by, the provisions of the Donation Act, giving the property of a deceased husband or wife to the survivor and children, or heirs of the deceased, unless otherwise disposed of by will; and in that case the patent here must be held to enure in favor of these parties instead of the heirs solely.

* Galt *v.* Galloway, 4 Peters, 345; McDonald *v.* Smalley, 6 Id. 261; Galloway *v.* Finley, 12 Id. 298; McCracken's Heirs *v.* Beall and Bowman, 3 A. K. Marshall, 210; Thomas *v.* Wyatt, 25 Missouri, 26.

† 5 Stat. at Large, 31.

The four children of Nancy Lownsdale, the two by her first husband, Gillihan, and the two by her last husband, survived her, and these, with her surviving husband, became entitled, on her death, to her property in equal proportions, she having died intestate. This is, indeed, the express language of the statute, and in consequence each of the five persons named took an undivided fifth interest in the property. The learned counsel of the appellant, however, contends that the statute should be construed as dividing the property equally between the survivor on the one part, and the children or heirs upon the other. But the construction we give is the more natural one, and is in accordance with the uniform ruling of the courts, State and Federal, in Oregon.

In January, 1860, Lownsdale purchased the interest in this property of Isabella Gillihan (then Isabella Potter, she having intermarried with William Potter), and thus became owner of two undivided fifths. On his death these two undivided fifths passed to his heirs, he having died intestate, unless they were controlled by his covenant in the deed to Chapman.

In 1864 a suit was brought in a Circuit Court of the State of Oregon, by one of the children of Nancy by her first husband, for partition of the property which was assigned to her of the donation claim—the Nancy Lownsdale tract as it is termed. In that suit the heirs of both Daniel and Nancy, and numerous other persons, purchasers and occupants under Daniel and the appellant, Davenport, were made parties. The suit resulted in a decree setting off, so far as practicable, the two undivided interests of Daniel to his heirs and vendees in lots and blocks as they were claimed, without any determination, however, of the extent of the respective rights and interests of these heirs and vendees between themselves; and in setting apart the remaining undivided three-fifths in severalty to the children of Nancy who had retained their interests, owelty being allowed and paid for the inequalities existing in the partition. The tract set apart for the two-fifths of Lownsdale included the prem-

ises in controversy. The heirs of Lownsdale were his two children living by his first wife, two children of a deceased daughter by his first wife, named Emma S. Lamb and Ida Squires, and his two children by his second wife. Against these heirs the only claimant of the premises in controversy was the appellant, Davenport, who derived his interest by various mesne conveyances from Chapman.

The present suit is brought by the children of the deceased daughter of Lownsdale by his first wife, they having inherited her interest.

For its determination it is necessary to consider the effect upon the interest claimed by Davenport of the covenants contained in the deed of Lownsdale, Coffin, and Chapman, executed to Chapman on the 25th of June, 1850.

So far as that instrument purports to be a conveyance from Chapman to himself, it is of course ineffectual for any purpose. Its execution by him left his interest precisely as it existed previously. But this superfluous insertion of his name in the deed as a grantor, does not impair the efficacy of the instrument as a conveyance to him from Lownsdale and Coffin, nor their covenants with him and his heirs and assigns. These covenants must be treated as the joint contracts of the two actual grantors.

Whether these covenants bind the heirs of the covenantors, they not being named, may perhaps admit of question.* The court below held that to the extent that the covenants affected the land, the heirs were bound by them, and as they have not appealed from this decision, it is unnecessary for the disposition of the case that the question should be determined by us.

What, then, is the effect and operation of the covenants? The first covenant, as already stated, is "*to warrant and defend*" the property released to Chapman, his heirs and assigns "*against all claims, the United States excepted.*" At the time this covenant was executed the title to the property was in the United States, and this fact was well known to

* Rawle on Covenants of Title, 579; Lloyd *v.* Thursby, 9 Modern, 463; Morse *v.* Aldrich, 24 Pickering, 450.

the parties. Land was then occupied by settlers throughout the Territory of Oregon, under laws of the provisional government, which were generally respected and enforced. These laws could of course only confer a possessory right, and no one pretended to acquire any greater interest under them. It was against the assertion of claims from this source and any other source, except the United States, the owner of the fee, that the covenant in question was directed. By it the grantors were precluded from asserting any interest in the premises against the grantee and his heirs and assigns, unless such interest were acquired from the United States. The warranty does not cover that interest, and did not preclude its acquisition by the covenantors or either of them, or by their heirs, or its enjoyment by them or either of them when acquired.

The second covenant is that if the grantors "*obtain the fee simple*" to the property "*from the government of the United States, they will convey the same*" to the grantee, his heirs or assigns, "*by deed of general warranty.*" This covenant is special and limited. It takes effect only in case the grantors, or their heirs (if the covenant binds the heirs), acquire the title directly from the United States; it does not cover the acquisition of the title of the United States from any intermediate party, and this was evidently the intention of the parties. They expected to obtain by the legislation of Congress the title of the United States to lands in their possession, and in case their expectations in this respect were realized, they contracted to convey the same to their grantee, or to his heirs or assigns. They could not have intended, in case their expectations were disappointed, and the title passed from the United States to other parties, to render it impossible for them to acquire that title in all future time from those parties without being under obligation to instantly transfer it to the grantee or his successors in interest.* And such would be the effect of their covenant if it were given an operation beyond the precise limitation specified.

* Comstock *v.* Smith, 13 Pickering, 116.

As already stated, Lownsdale took under the Donation Act, as the survivor of his deceased wife, one undivided fifth interest in her property, and he subsequently purchased a similar interest from Isabella Gillihan, a daughter of his wife by her first husband. The interest which he thus purchased is not covered by the covenant. He did not acquire it directly from the United States. Whether the interest which he received as survivor of his deceased wife, Nancy Lownsdale, is within the covenant depends upon the question whether he took that interest by descent, as heir of Nancy, or directly as donee from the United States. The court below held that he took as donee, and not as heir, and that in consequence the interest was within the operation of the covenant, and Davenport, his assignee, was entitled to have such interest transferred to him, and that interest was accordingly set apart in severalty to him.

Whether this ruling is correct it is unnecessary for us to determine. The appellant does not of course controvert it, and the heirs of Lownsdale, who alone could in this case question its correctness, have not appealed from the decree of the court below.

The parol evidence offered of an alleged contract, in 1860, on the part of Lownsdale with Davenport, to confirm the title of the latter to the whole of block G, and of Lownsdale's declarations at that time as to the title, is entirely insufficient to create any estoppel *in pais* against the assertion of the interest claimed by his heirs to portions of that property. The alleged contract of Lownsdale was simply to confirm the title of Davenport to all lands to which he, Lownsdale, deemed the title doubtful; and the ground of complaint appears to be that he did not consider the title of Davenport to block G as doubtful, and so declared, and therefore did not include that block in the property covered by his confirmatory deed. The declarations are at best but the expression of his opinion in relation to a subject upon which Davenport was equally well informed, or possessed equally with him the means of information. If the evidence of such declarations could be received years after the death of the

party who is alleged to have made them, to control the legal title which has descended to his heirs, a new source of insecurity in the tenure of property would be created, and heirs would often hold their possessions upon the uncertain testimony of interested parties, which it would be difficult and sometimes impossible to meet or explain after an interval of years, instead of holding them upon the sure foundations of the records of the country.*

The decree of the court below must be

AFFIRMED.

WEST TENNESSEE BANK *v.* CITIZENS' BANK.

A case is not within the 25th section of the Judiciary Act when the judgment below is founded on a matter which is not within the section, even though it be founded also, for an independent base, on other matter which it is asserted is within it.

MOTION, by *Mr. Edward Janin*, to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of Louisiana, in a case wherein the Bank of West Tennessee was the plaintiff, and the Citizens' Bank of Louisiana, defendant; the case having been brought into this court by a writ of error, issued under the 25th section of the Judiciary Act.

Mr. T. J. Durant opposed the motion.

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

The plaintiff in error brought suit against the defendant in error, in the Fifth District Court of New Orleans, to recover the sum of $93,380.97, for moneys deposited by the plaintiff with the defendant, and moneys collected by the latter for the former. All the so-called moneys received by

* Biddle Boggs *v.* The Merced Mining Co., 14 California, 367.

the defendant were the notes of the rebel government. The District Court, on the 27th of March, 1867, gave judgment for the plaintiff. The case was thereupon taken by appeal to the Supreme Court of the State. That court, on the 14th of December, 1869, reversed the judgment of the court below and dismissed the case. In the opinion delivered it was said: "Under the constitution of 1868 the courts of this State cannot entertain an action based upon transactions in Confederate treasury notes. We think the evidence discloses that this case is founded upon dealings in unlawful currency, and the court has often refused to lend its aid to transactions reprobated by law." The constitution of 1868 was not in existence when the case was decided by the District Court.

The Supreme Court founded its judgment alike upon the constitutional provision and prior adjudications. Those adjudications are numerous and conclusive upon the subject.* The constitution only declared a settled pre-existing rule of jurisprudence in that State. The result in this case would have been necessarily the same if the constitution had not contained the provision in question. This brings the case within the authority of *Bethell* v. *Demaret.*† Upon such a state of facts this court cannot take jurisdiction under the section of the Judiciary Act upon which the writ of error is founded. The motion must, therefore, be sustained, and the case

DISMISSED.

* Hunley et al. *v.* Scott, 19 Louisiana Annual, 161; King *v.* Huston, Hubbell & Co., Ib. 288; McCracken *v.* Poole, Ib. 359; Norton *v.* Dawson et al., Ib. 464.

† 10 Wallace, 537.

Statement of the case.

CLINTON ET AL. v. ENGLEBRECHT.

1. The effort of a defendant to secure, so far as he can, by peremptory challenges and challenges for cause, a fair trial of his case, does not waive an inherent and fatal objection to the entire panel.
2. The fact that judges of the District and Supreme Courts of the Territories are appointed by the President, under acts of Congress, does not make the courts which they are authorized to hold "courts of the United States." Such courts are but the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States. Accordingly, jurors summoned into them under the acts of Congress, applicable only to the courts of the United States, *i. e*, courts established under the article of the Constitution which relates to the Judicial power, are wrongly summoned, and a judgment on their verdict cannot, if properly objected to, be sustained.
3. The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress.
4. This view illustrated by reference to the various acts, from the earliest dates till 1864, organizing the Territories of the United States.
5. The Utah jury law of 1859 examined and considered in the light of this view and this history, and certain objections to it declared to be without foundation.

ERROR to the Supreme Court of the Territory of Utah.

The principal question for consideration in this case was raised by the challenge of the defendants to the array of the jury in the Third District Court of the Territory of Utah.

The suit was a civil action for the recovery of a penalty for the destruction of certain property of the plaintiffs by the defendants. The plaintiffs were retail liquor dealers in the city of Salt Lake, and had refused to take out a license as required by an ordinance of the city. The defendants, acting under the same ordinance, thereupon proceeded to the store of the plaintiffs and destroyed their liquors to the value, as alleged, of more than $22,000. The statute gave an action against any person who should wilfully and maliciously injure or destroy the goods of another for a sum

equal to three times the value of the property injured or destroyed. Under this statute the plaintiffs claimed this threefold value.

The act of the Territorial legislature, passed in 1859, and in force when the jury in this cause was summoned, required that "the county court" in each county should make out from the assessment rolls, a list of fifty men qualified to serve as jurors; and that thirty days before the session of the District Court, "the clerk of said court" should issue a writ to the Territorial marshal or any of his deputies, requiring him to summon twenty-four eligible men to serve as petit jurors. These men were to be taken by lot, in the mode pointed out by the statute, from the lists previously made by the clerks of the county courts, and their names were to be returned by the marshal to the clerk of the District Court. Provision was further made for the drawing of the trial panel from this final list, and for its completion by a new drawing or summons in case of non-attendance or excuse from service upon challenge, or for other reason.

For the trial of the cause the record showed that the court originally directed a *venire* to be issued in conformity with this law, and that a *venire* was issued accordingly, but not served or returned. The record also showed that under an order subsequently made, an open *venire* was issued to the Federal marshal, which was served and returned with a panel of eighteen petit jurors annexed; the court, in making this order, acting apparently on the theory that it was a court of the United States, and to be governed in the selection of jurors by the acts of Congress. The jurors thus summoned were summoned from the body of the county at the discretion of the marshal. Twelve jurors of this panel were placed in the jury-box, and the defendants challenged the array on the ground that the jurors had not been selected or summoned in conformity with the laws of the Territory and with the original order of the court. This challenge was overruled. Exception was taken, and the cause proceeded. Both parties challenged for cause. Each of the defendants claimed six peremptory challenges. This claim was also overruled

and exception was taken. Other exceptions were also taken in the progress of the cause. Under the charge of the court a verdict was rendered for the plaintiffs, under which judgment was entered for $59,063.25, and on appeal was affirmed by the Supreme Court of the Territory. A writ of error to that court brought the cause here.

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

The District Court in disregarding, as it confessedly did, the statute of the Territory prescribing the mode of obtaining panels of jurors, acted on an assumption that the Territorial courts were "courts of the United States," such courts in the same sense as are those courts which are established under the article of the Constitution which relates to the Judicial power. This was a fundamental error. They are not such courts.* The whole assumption on which the court proceeded having been a false one, and the jury having been summoned in a way wholly wrong, there is no question but that the judgment must be reversed.

But how ought the jury to have been summoned? Plainly in the way prescribed by the Territorial law. The organic act ordains:

"*The legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act;* but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

Now, certainly the mode of procuring panels of jurors is a "rightful subject of legislation." Nothing is set forth in either the constitution or the act which would make legislation on that subject inconsistent with them. The sort of limitation on the legislative power of the Territory meant to be set up, is indicated by the unitalicized or latter part of the above-quoted paragraph. But it has no looking

* American Insurance Company v. Canter, 1 Peters, 546.

towards the matter of juries. The act is obviously a good one; securing impartiality and excluding the influence of individual prejudice.

Mr. Baskin, contra:

The question which it is supposed by opposing counsel arises, does not in fact arise, because the defendants waived their objection to the jury, by exercising their right to challenge jurors peremptorily and for cause. They should have stood by their challenge to the array, and could not by their own act change the body of the jury, and go on with the trial, and avail themselves of the chances of a verdict in their favor, without also incurring the perils of a verdict against them. *The People* v. *McKay*,* to which we refer the court, settles this point.

But passing to the question sought to be raised. Was the jury legally impanelled? The resolution of the question depends on certain sections of the organic law of the Territory, and certain acts of Congress. There is no doubt of their existence, and they constitute a part of the *case.*

The jury was undoubtedly rightly impanelled, if the District Court of the Territory is to be regarded as a District Court of the United States. Was it such a court?

The 6th section of the organic act provides:

"That the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act."

The 17th section,

"That the Constitution and laws of the United States are hereby extended over and declared to be in force in said Territory of Utah, so far as the same, or any provision thereof, may be applicable."

The 10th section, that

"There shall also be a marshal for the Territory appointed, . . . who shall execute all process issuing from said courts (the Dis-

* 18 Johnson, 212, 217.

trict and Supreme Courts of the Territory), when exercising their jurisdiction as Circuit and District Courts of the United States; he shall perform the duties, be subject to the same regulation and penalties, and be entitled to the same fees *as the marshal of the District Court of the United States for the present Territory of Oregon.*"*

The statute defining the duties of the marshal of the District Court for the Territory of Oregon refers, as in manner above, to the duties of the marshal of the District Court for the Territory of Wisconsin.† And reference is had in like manner to *the Northern District of New York*, in defining the duties of the marshal of the District Court of Wisconsin.‡ And reference from the Northern District of New York is made to the general duties of *marshals of the District Court of the United States.*§

Now what are the duties of the marshals of the United States? The Judiciary Act declares them. Its 27th section provides:

"That a marshal shall be appointed in and for each district, whose duty it shall be to attend the District and Circuit Courts when sitting therein, and also the Supreme Court in the district in which that court shall sit; and to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States."‖

It is further provided:

"That the marshals of the several districts and their deputies shall have the same powers in executing the laws of the United States as sheriffs and their deputies in the several States have by law in executing the laws of the respective States."¶

In assuming, therefore, that the courts of the Territory were courts of the United States, and in giving order to the *Federal* marshal to summon the jurors, the District Court proceeded rightly.

Again. The organic act further enacts:

"That the judicial power of the Territory shall be vested in

* 9 Stat. at Large, 456. † Ib. 327, § 10. ‡ 5 Id. 14, § 10.
§ 3 Id. 235. ‖ 1 Id. 87. ¶ Ib. 425.

a Supreme Court, District Court, probate courts, and justices of the peace."

No such court as "the county court," and no such officer as clerk of said court, can have any legal existence in Utah, because the courts in which the judicial power of the Territory is lodged are specifically named in the organic act, and the county court is not among them.

But yet further. To have proceeded under the act of the Territorial legislature would have been to proceed wrongly.

The 7th section of the organic act of Utah provides:

"That all township, district, and county officers, not herein provided for, shall be appointed or elected, as the case may be, in such manner as shall be provided by the governor and the legislative assembly of the Territory of Utah. *The governor shall nominate, and by and with the advice and consent of the legislative council appoint, all officers not herein provided for.*"

Now the Territorial marshal is neither "a township, district, or county officer." He ought, therefore, to have been nominated by the governor, and by and with the advice and consent of the legislative council appointed. Yet he was not thus nominated and appointed. He was elected in pursuance of an act of the Territorial legislature of Utah, approved March the 3d, 1852,* by which it is provided:

"*That a marshal shall be elected by a joint vote of both* houses of the legislative assembly, whose term of office shall be one year, unless sooner removed by the legislative assembly," &c.

The Territorial marshal thus created, is required to officiate in the selection and summoning the grand and petit juries for the District Courts of Utah Territory, in all cases, both where the United States is a party as well as cases between individuals, and as well in enforcing the laws of the United States as in enforcing the laws of the Territory. The language of the statute is:

"It shall be the duty of the marshal . . . . to execute all

* Revised Statutes of Utah, p. 38, § 1.

processes of the Supreme or District Courts, in all cases arising under the laws of the Territory.

"When a District Court is to be held, whether for a district or county . . . the clerk shall . . . issue a writ to the Territorial marshal."

It is further made the duty of the Territorial marshal to assist in selecting the grand and petit juries, and then summon and return the same.

That the District Courts of the Territory of Utah exercise their jurisdiction as "District Courts of the United States" is made plain by decisions of this very court. Thus by the 6th section of the Judiciary Act, this court is authorized to make rules of practice for the District and Circuit Courts of the United States. In pursuance of this authority, it did make rules of practice for the said courts, and in *Orchard* v. *Hughes*,* in a civil case between individuals, these rules were held to apply to the District Court of a Territory. If the District Courts of the Territory do not exercise their jurisdiction as District Courts of the United States in all adjudications between individuals, it follows that the decision of *Orchard* v. *Hughes* was erroneous, so it may be added was the earlier one of *Hunt* v. *Palao*.†

The CHIEF JUSTICE delivered the opinion of the court.

It is plain that the jury was not selected or summoned in pursuance of the statute of the Territory. That statute was, on the contrary, wholly and purposely disregarded, and the controlling question raised by the challenge to the array is, whether the law of the Territorial legislature, prescribing the mode of obtaining panels of grand and petit jurors, is obligatory upon the District Courts of the Territory.

It was insisted in argument that the challenge to the array was waived by the defendants through the exercise of their right to challenge peremptorily and for cause; and we were referred to the judgment of the Supreme Court of New York, in the case of *The People* v. *McKay*,‡ as an authority

* 1 Wallace, 73. † 4 Howard, 589. ‡ 18 Johnson, 217.

for this proposition. But that case appears to be an authority for the opposite conclusion. "We are not of opinion," says the court, "that the prisoner's peremptory challenge of jurors was a waiver of his right to object now to the want of a *venire*." In that case there had been no *venire*, but the jury had been summoned in a mode not warranted by law. In the case before us there was a *venire*, but if it was not authorized by law it was a nullity; and we are not prepared to say that the efforts of the defendants to secure as far as they could, by peremptory challenges and challenges for cause, a fair trial of their case, waived an inherent and fatal objection to the entire panel.

We are, therefore, obliged to consider the question whether the District Court, in the selection and summoning of jurors, was bound to conform to the law of the Territory.

The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress. As early as 1784 an ordinance was adopted by the Congress of the Confederation providing for the division of all the territory ceded or to be ceded, into States, with boundaries ascertained by the ordinance. These States were severally authorized to adopt for their temporary government the constitution and laws of any one of the States, and provision was made for their ultimate admission by delegates into the Congress of the United States. We thus find the first plan for the establishment of governments in the Territories, authorized the adoption of State governments from the start, and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the State constitution originally adopted by them.

This ordinance, applying to all Territories ceded or to be ceded, was superseded three years later by the Ordinance of 1787, restricted in its application to the territory northwest

of the river Ohio—the only territory which had then been actually ceded to the United States.

It provided for the appointment of the governor and three judges of the court, who are authorized to adopt, for the temporary government of the district, such laws of the original States as might be adapted to its circumstances. But, as soon as the number of adult male inhabitants should amount to five thousand, they were authorized to elect representatives to a house of representatives, who were required to nominate ten persons from whom Congress should select five to constitute a legislative council; and the house and the council thus selected and appointed were thenceforth to constitute the legislature of the Territory, which was authorized to elect a delegate in Congress with the right of debating, but not of voting. This legislature, subject to the negative of the governor and certain fundamental principles and provisions embodied in articles of compact, was clothed with the full power of legislation for the Territory.

The Territories south of the Ohio, in 1790;* of Mississippi, in 1798;† of Indiana, in 1800;‡ of Michigan, in 1805;§ of Illinois, in 1809;‖ were organized upon the same plan, except that the prohibition of slavery, embodied in the Ordinance of 1787, was not embraced among the fundamental provisions in the organization of the Territories south of the Ohio; and the people in the Territories of Michigan, Indiana, and Illinois were authorized to form a legislative assembly, as soon as they should see fit, without waiting for a population of five thousand adult males.

Upon the acquisition of the foreign territory of Louisiana, in 1803, the plan for the organization of the government was somewhat changed. The governor and council of the Territory of Orleans, which afterwards became the State of Louisiana, were appointed by the President, but were invested with full legislative powers, except as specially limited. A District Court of the United States distinct from

* 1 Stat. at Large, 123. † Ib. 549. ‡ 2 Id. 58.
§ Ib. 309. ‖ Ib. 514.

the courts of the Territory was instituted.* The rest of the Territory was called the District of Louisiana, and was placed under the government of the governor and judges of Indiana.†

Jurisdiction of cases in which the United States were concerned, subject to appeal to the Supreme Court of the United States, was for the first time expressly given to a Territorial court in 1805.‡ The Territory of Missouri was organized in 1812,§ and upon the same plan as the Territories acquired by cessions of the States. In the act for the government of this Territory appears for the first time a provision concerning the qualifications of jurors. The 16th section of the act provided that all free white male adults, not disqualified by any legal proceeding, should be qualified as grand and petit jurors in the courts of the Territory, and should be selected, until the General Assembly should otherwise direct, in such manner as the courts should prescribe.

The Territory of Alabama, in 1817,‖ was formed out of the Mississippi Territory, and upon the same plan. The Superior Court of the Territory was clothed with the Federal jurisdiction given by the act of 1805. The Territory of Arkansas was organized in 1819,¶ in the southern part of Missouri Territory. The powers of the government were distributed as executive, legislative, and judicial, and vested respectively in the governor, General Assembly, and the courts. The governor and judges of the Superior Court were to be appointed by the President, and the governor was to exercise the legislative powers until the organization of the General Assembly. The act for the organization of the Territorial government of Florida made the same distribution of the powers of the government as was made in the Territory of Arkansas, and contained the same provision in regard to jurors as the act for the Territorial government of Missouri.

In all the Territories full power was given to the legisla

* 2 Stat. at Large, 283. † Ib. 287. ‡ Ib. 338.
§ Ib. 743. ‖ 3 Id. 371. ¶ Ib. 493.

ture over all ordinary subjects of legislation. The terms in which it was granted were various, but the import was the same in all.

Except in the acts relating to Missouri and Arkansas, no power was given to the courts in respect to jurors, and the limitation of this power until the organization of the General Assembly indicates very clearly that, after such organization, the whole power in relation to jurors was to be exercised by that body.

In 1836 the Territory of Wisconsin was organized under an act, which seems to have received full consideration, and from which all subsequent acts for the organization of Territories have been copied, with few and inconsiderable variations. Except those in the Kansas and Nebraska acts in relation to slavery, and some others growing out of local circumstances, they all contained the same provisions in regard to the legislature and the legislative authority, and to the judiciary and the judicial authority, as the act organizing the Territory of Utah. In no one of them is there any provision in relation to jurors.

The language of the section conferring the legislative authority in each of these acts is this:

"The legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States, and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil. No tax shall be imposed upon the property of the United States, nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents."

As there is no provision relating to the selection of jurors in the constitution, or the organic act, it cannot be said that any legislation upon this subject is inconsistent with either. The method of procuring jurors for the trial of cases is therefore a rightful subject of legislation, and the whole matter of selecting, impanelling, and summoning jurors is left to the Territorial legislature.

The action of the legislatures of all the Territories has

been in conformity with this construction. In the laws of every one of them from that organized under the Ordinance of 1787 to the Territory of Montana are found acts upon this subject.* And it is worth while to remark that in three of the Territories, Nevada, New Mexico, and Idaho, the judge of the probate has been associated with other officials in the selection of the lists for the different counties.

This uniformity of construction by so many Territorial legislatures of the organic acts in relation to their legislative authority, especially when taken in connection with the fact that none of these jury laws have been disapproved by Congress, though any of them would be annulled by such disapproval, confirms the opinion, warranted by the plain language of the organic act itself, that the whole subject-matter of jurors in the Territories is committed to Territorial regulation.

If this opinion needed additional confirmation it would be found in the Judiciary Act of 1789. The regulations of that act in regard to the selection of jurors have no reference whatever to Territories. They were framed with reference to the States, and cannot, without violence to rules of construction, be made to apply to Territories of the United States. If, then, this subject were not regulated by Territorial law, it would be difficult to say that the selection of jurors had been provided for at all in the Territories.

It is insisted, however, that the jury law of Utah is defective in two material particulars: First, that it requires the jury lists to be selected by the county court, upon which the organic law did not permit authority for that purpose to be conferred: Second, that it requires the jurors to be summoned by the Territorial marshal, who was elected by the

* Wisconsin, organized April 20th, 1836, 5 Stat. at Large, 10; Iowa, June 12th, 1838, Ib. 235; Oregon, August 14th, 1848, 9 Id. 323; Minnesota, March 3d, 1849, Ib. 403; New Mexico, September 9th, 1850, Ib. 446; Utah, September 9th, 1850, Ib. 453; Nebraska, May 30th, 1854, 10 Id. 277; Kansas, May 30th, 1854, Ib. 277; Washington, March 2d, 1853, Ib. 172; Colorado, February 28th, 1861, 12 Id. 172; Nevada, March 2d, 1861, Ib. 209; Dakota March 2d, 1861, Ib. 239; Arizona, February 24th, 1863, Ib. 664; Idaho, March 3d, 1863, Ib. 808; Montana, May 26th, 1864, 13 Id. 85.

legislature, and not appointed by the governor. We do not perceive how these facts, if truly alleged, would make the mode actually adopted for summoning the jury in this case, legal. But we will examine the objections.

In the first place we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute-book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the secretary of the Territory to transmit to that body copies of all laws, on or before the 1st of the next December in each year. The simple disapproval by Congress at any time, would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.

In the next place, we are of opinion, that the making of the jury lists by the county courts was not a judicial act. Conceding that it was not in the power of the Territorial legislature to confer judicial authority upon any other courts than those authorized by the organic law, and that it was not within its competency to organize county courts for the administration of justice, we cannot doubt the right of the Territorial legislature to associate select men with the judge of probate, and to call the body thus organized, a county court, and to require it to make lists of persons qualified to serve as jurors. In making the selection, its members acted as a board, and not as a judicial body.

Nor do we think the other objection sound, viz.: That the required participation of the Territorial marshal in summoning jurors invalidated his acts, because he was elected by the legislature, and not appointed by the governor. He acted as Territorial marshal under color of authority, and if he was not legally such, his acts cannot be questioned indirectly.

But, we repeat, that the alleged defects of the Utah jury law are not here in question. What we are to pass upon is the legality of the mode actually adopted for impanelling the jury in this case. If the court had no authority to adopt that mode, the challenge to the array was well taken, and should have been allowed.

Acting upon the theory that the Supreme and District Courts of the Territory were courts of the United States, and that they were governed in the selection of jurors by the acts of Congress, the District Court summoned the jury in this case by an open *venire*. We need not pause to inquire whether this mode was in pursuance of any act of Congress, for, if such act was not intended to regulate the procuring of jurors in the Territory, it has no application to the case before us. We are of opinion that the court erred both in its theory and in its action.

The judges of the Supreme Court of the Territory are appointed by the President under the act of Congress, but this does not make the courts they are authorized to hold courts of the United States. This was decided long since in *The American Insurance Company* v. *Canter*,* and in the later case of *Benner* v. *Porter*.† There is nothing in the Constitution which would prevent Congress from conferring the jurisdiction which they exercise, if the judges were elected by the people of the Territory, and commissioned by the governor. They might be clothed with the same authority to decide all cases arising under the Constitution and laws of the United States, subject to the same revision. Indeed, it can hardly be supposed that the earliest Territorial courts did not decide such questions, although there was no express provision to that effect, as we have already seen, until a comparatively recent period.

There is no Supreme Court of the United States, nor is there any District Court of the United States, in the sense of the Constitution, in the Territory of Utah. The judges are not appointed for the same terms, nor is the jurisdiction which they exercise part of the judicial power conferred by the Constitution or the General government. The courts are the legislative courts of the Territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the Territories belonging to the United States.‡

* 1 Peters, 546. † 9 Howard, 235.

‡ American Insurance Company *v.* Canter, 1 Peters, 545.

The Supreme Court of the Territory was doubtless misled by the inadvertent use of the words "marshal of the District Court of the United States for the Territory of Oregon" in the organic law. This act defines the duties, liabilities, and fees of the marshal for the Territory by reference to those of the marshal of the District Court of the United States for the Territory of Oregon. On reference to the act organizing that Territory, we find that the duties of the marshal were to be the same as those of the marshal for the District Court of the United States for the Territory of Wisconsin. On reference to the act organizing the last-named Territory, the duties, liabilities, and fees of the marshal were described to be the same as those of the "marshal of the District Court of the United States for the Northern District of New York." Hence, the words "marshal of the District Court of the United States" have crept into the various acts organizing these Territories. But the description of the court which was proper in a State would be improper in a Territory.

The organic act authorized the appointment of an attorney and a marshal for the Territory, who may properly enough be called the attorney and marshal of the United States for the Territory; for their duties in the courts have exclusive relation to cases arising under the laws and Constitution of the United States.

The process for summoning jurors to attend in such cases may be a process for exercising the jurisdiction of the Territorial courts when acting, in such cases, as Circuit and District Courts of the United States; but the making up of the lists and all matters connected with the designation of jurors are subject to the regulation of Territorial law. And this is especially true in cases arising, not under any act of Congress, but exclusively, like the case in the record, under the laws of the Territory.

There is nothing in this opinion inconsistent with the cases of *Orchard* v. *Hughes*,* or of *Hunt* v. *Palao*,† properly

* 1 Wallace, 73.

† 4 Howard, 589.

understood. The first of these cases went upon the ground that the chancery jurisdiction conferred upon the courts of the Territories by the organic act was beyond the reach of Territorial legislation; and the second, in which the Territorial Court of Appeals was called a court of the United States, was only intended to distinguish it from a State court.

Upon the whole, we are of opinion that the jury in this case was not selected and summoned in conformity with law, and that the challenge to the array should have been allowed. This opinion makes it unnecessary to consider the other questions in the case.

JUDGMENT REVERSED.

UNITED STATES *v.* VIGIL.

The Departmental Assemblies had no power under the laws of Mexico regulating the disposition of the public domain, to give it away, either with or without the assent of the governor, except for the purposes of settlement or cultivation. The right to dispose of it for other purposes rested with the supreme government alone.

Held, accordingly, that a grant by a Departmental Assembly of a tract of land embracing an area of over two millions of acres, the grantees binding themselves to construct two wells for the relief and aid of travellers, and to establish two factories for the use of the State, and to protect them from hostile invasion, was void, whether such grant were approved by the governor or not.

APPEAL from the Supreme Court of the Territory of New Mexico; the case being thus:

On the 28th of December, 1845, one Vigil and certain other persons addressed a petition to the Most Excellent Departmental Assembly, through Armijo, governor of New Mexico, asking for a grant of a tract of land called the *Jornada del Muerto*, binding themselves, if the grant were made, to construct two wells for the relief and aid of travellers, and establish two factories for the use of the State, and to protect them from hostile invasion. The governor transmitted

the petition to the Assembly, but declined to recommend that favorable action should be taken upon it, on account of the novel character of the application. Notwithstanding the refusal of the governor to recommend favorable action, the Assembly, on the 10th of January, 1846, granted the tract to the petitioners for the purpose of constructing wells and cultivating the lands, so far as their means would permit, without being entitled to an exclusive right to the pasture. The tract disposed of in this way, embraced an area of *over two millions of acres.* Soon after this, as is known, war broke out between the United States and Mexico; and the whole region where the land lay passed by conquest and treaty to the government of our own country. Hereupon Vigil and the other parties, asserting title under the grant, presented their claim to the surveyor-general of New Mexico for confirmation. He, however, rejected it. The claimants then applied to Congress for relief, and a law was passed for their benefit, which authorized them to institute a suit in the Supreme Court of the Territory of New Mexico against the United States; the law declaring further that the same principles should be applied to the determination of the controversy, which Congress had prescribed for the decision of similar land claims in California, derived under the authority of the Mexican government. Suit was accordingly brought in the court mentioned—the court below—and that court confirmed the claim. From the decree of confirmation the case was now here on appeal by the United States.

The case was ably and elaborately argued, and a wide range taken in the discussion of questions presented by the record, but collateral to the history already given, which it is not necessary to notice in view of the grounds hereinafter set forth, on which the decision of this court is rested.

Mr. J. A. Wills and Mr. B. H. Bristow, Solicitor-General, for the United States; Mr. J. S. Watts and T. Ewing, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It has been repeatedly decided by this court, that the only

laws in force in the Territories of Mexico for the disposition of the public lands, with the exception of those relating to missions and towns, are the act of the Mexican Congress of 1824, and the regulations of 1828. The avowed purpose of the Congress in enacting this law, and of the supreme government in carrying it into effect, was to colonize the public domain; to preserve it for settlement or cultivation. The favor of the legislature has, doubtless, been often abused by unworthy ministers in charge of the remote Territories, but this consideration in no wise detracts from the wisdom of the policy on this subject. This policy recognized the obligation resting on the government to hold the public lands as a public trust, to be administered for the benefit of those who would settle upon them or cultivate them. They could not be sold for money, nor granted away in consideration of past public services, nor on condition of making public improvements, of use to the travelling community, or of general benefit to the state. The power to cede them depended entirely on the uses to which they were to be put, and these, as we have seen, were cultivation or settlement. The legal right to dispose of them for other objects, was withdrawn from the local authorities, and rested alone with the supreme government.

If the policy of the law were wise, so were the regulations established for the purpose of carrying out its provisions. These regulations conferred on the governors of the Territories, "the political chiefs," as they are called, the authority to grant vacant lands, and did not delegate it to the Departmental Assembly. It is true the grant was not complete until the approval of the Assembly, and in this sense the Assembly and governor acted concurrently, but the initiative must be taken by the governor. He was required to act in the first instance—to decide whether the petitioner was a fit person to receive the grant, and whether the land itself could be granted without prejudice to the public or individuals. In case the information was satisfactory on these points, he was authorized to make the grant, and at the proper time to lay it before the Assembly, who were

required to give or withhold their consent. They were in this respect an advisory body to the governor, and sustained the same relation to him, that the Senate of the United States does to the President in the matter of appointments and treaties. The Mexican government chose to intrust to an officer appointed by it, the execution of its policy on the subject of the public domain, rather than to an elective assembly, over whose conduct it could not in the nature of things exercise the same supervision and control. It would seem, owing to the remoteness of the Territories from the seat of the General government, and the sparseness of the population, that the wisdom of the selection could not be disputed, but be this as it may, it was the undoubted right of the Mexican government to decide the question for itself, and this court cannot be required to go further than to give effect to that decision.

These views dispose of this case, for the grant in controversy was the sole act of the Assembly, and has not even the element of the governor's recommendation in its favor.

But if it were otherwise, and the cession were the act of the governor, it would still be invalid, because it would violate the fundamental rule on which the right of donation was placed by the law. The essential element of colonization is wanting, and, besides, the number of acres granted was enormously in excess of the maximum quantity grantable under the law. The decrees of the Cortes of Spain are invoked as an authority for this grant, but it is sufficient to say, that they were invoked for a similar purpose in Vallejo's case,* and were decided to be inapplicable to the state of things existing in Mexico after the revolution of 1820. And the organic bases of the Mexican republic of June 13th, 1843, are equally ineffectual to support this grant. If it be conceded the powers of the Departmental Assembly were enlarged by these decrees, so far as the private property belonging to the department, as a municipal organization, is

* 1 Black, 541.

concerned, yet they effected no change in the mode of disposing of the public lands, nor was the colonization policy of 1824, at all altered by them, for they expressly declare that "in alienations of lands, the existing laws will be observed and what the colonization laws determine."

In any aspect of this case, the claim for this large tract of land has no foundation to rest upon. The Departmental Assembly, aided in a certain sense by the governor, usurped the prerogative of the supreme government, and no ingenuity of reasoning can sanction a proceeding, which was not only without authority of law, but contrary to the forms prescribed by it.

JUDGMENT REVERSED, and the cause remanded to the court below, with directions to enter a decree

DISMISSING THE PETITION.

TUCKER *v.* SPALDING.

1. In an action at law, where a patent of prior date is offered in evidence as covering the invention described in the plaintiff's patent, on a charge of infringement, the question of the identity of the two instruments or machines, must be left to the jury, if there is so much resemblance as raises the question at all.
2. It is no ground for rejecting the prior patent that it does not profess to do the same things that the second patent does.
3. If what it performs is essentially the same, and its structure and action suggest to the mind of an ordinarily skilful mechanic its adaptation to the same use as the second patent, by the same means, this adaptation is not a new invention, and is not patentable.

ERROR to the Circuit Court for the District of California.

Spalding brought an action at law against Tucker, to recover damages for the infringement of a patent for the use of movable teeth in saws and saw-plates.

The plaintiff's patent claimed the forming of recesses or sockets in saws or saw-plates for detachable or removable

teeth on circular lines, and in combination with these recesses, teeth having their base or bottom parts formed on circular lines as described.

The defendant offered in evidence as covering the subject-matter of the plaintiff's patent a patent to Jonah Newton, confessedly prior in date and invention to that of plaintiff. This patent of Newton's had cutters of the same general shape and form, including circular base, as the saw-teeth of the other patent, attachable to a circular disk, and removable as in the other, but attached by screws or nuts, and the *claim or purpose of the Newton patent was for cutting tongues and grooves, mortices, &c.* In connection with the offer of the patent to Newton, the defendant offered to prove by experts that the process of Newton's patent, and of the machine made thereunder, and of the result produced thereby, were the same process, machine, and result as were involved in the patent of the plaintiff; that saws were made under Newton's patent, and were in practical operation (the exhibition of the saws so made and operated being also offered); that the machine made under Newton's patent rotated in precisely the same manner and with the same effect as a circular saw, and that what in Newton's patent were designated "cutters," performed the same functions as the detachable teeth, described in the plaintiff's patent, and accomplished the same result; and that the said "cutters" were nothing in reality but detachable saw-teeth, inserted on circular lines, and rounded at the base and inserted in circular sockets, and secured an equal distribution of the pressure on the said "cutters," over and upon the circular sockets in which they were set, and thus prevented fracture of the disk or plate.

The court refused to admit the patent to Newton in evidence. Verdict and judgment were rendered accordingly for the plaintiff, Spalding, and the other party brought the case here on error, assigning several errors in the rejection of evidence and in the charge of the court. The cardinal point of the case, however, was the refusal of the court to permit the Newton patent to be read to the jury; the bills

of exception including, however, the rejection of the testimony of experts, to prove the identity of the invention described in the Newton patent with that of the plaintiff.

Mr. W. C. Witter, for the plaintiff in error (*a brief of Mr. George Gifford being filed*), argued that the evidence rejected ought to have been submitted to the jury; and went also into a full exhibition of diagrams and models to show that the two inventions were in truth the same.

Messrs. M. A. Wheaton and J. J. Coombs, contra.

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that the court erred in refusing to admit the patent to Newton, confessedly prior in date and invention to that of the plaintiff, which the defendant offered as covering the subject-matter of the plaintiff's patent.

Whatever may be our personal opinions of the fitness of the jury as a tribunal to determine the diversity or identity in principle of two mechanical instruments, it cannot be questioned that when the plaintiff, in the exercise of the option which the law gives him, brings his suit in the law in preference to the equity side of the court, that question must be submitted to the jury, if there is so much resemblance as raises the question at all. And though the principles by which the question must be decided may be very largely propositions of law, it still remains the essential nature of the jury trial that while the court may on this mixed question of law and fact, lay down to the jury the law which should govern them, so as to guide them to truth, and guard them against error, and may, if they disregard instructions, set aside their verdict, the ultimate response to the question must come from the jury.

The court in rejecting the patent of Newton seems to have been mainly governed by the use which was claimed for it, and also that no mention is made of its adaptability as a saw. But if what it actually did, is in its nature the same as sawing, and its structure and action suggested to

the mind of an ordinarily skilful mechanic this double use to which it could be adapted without material change, then such adaptation to the new use, is *not* a new invention, and is not patentable.

The defendant offered to prove that such was the relation of the principle of the Newton patent and plaintiff's patent by experts, and we are clear that the resemblance was close enough to require the submission of the question of identity to the jury, and the admission of the testimony of experts on that subject.

This subject was fully considered in the case of *Bischoff* v. *Wethered*,* decided since the present writ of error was issued.

This court has no more right than the court below to decide that the one patent covered the invention of the other, or that it did not; and it is obvious that extended argument here, to prove such general resemblance as would require the submission of both patents to the jury, might prejudice the plaintiff's case on the new trial which must be granted. We therefore forbear to discuss the matter further; for the same reason we refrain from comment on the instruction. It is to be understood that in declining to pass upon the other alleged errors of the record, this court neither affirms or overrules the action of the court on those points, and the case is reversed for this fundamental error, which includes several others resting on that.

JUDGMENT REVERSED AND A NEW TRIAL ORDERED.

BUTLER *v.* WATKINS.

1. On a suit for damages by a patentee against a British corporation and its "managing agent," sent to this country, in having been fraudulently pretending in a series of negotiations to conclude an agreement with him, the patentee, to make use of his patent—the alleged real purpose

* 9 Wallace, 815.

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having been through drafts of agreements and protracted consultations to keep the patentee from using his invention during a certain season, and so to get time to use another invention in which they were themselves largely interested—it is error to charge that if the corporation never gave any authority to the managing agent to assent to the draft of agreement in their behalf and in their name, and never sanctioned it as a corporate act, suit for such a fraud as above indicated could not be maintained. The suit not being on any contract, the corporation might be, notwithstanding, responsible for the fraud.

2. In actions for fraud, large latitude is given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may be inferred that similar conduct towards another, at about the same time and in relation to a like subject, was actuated by the same spirit. On such a suit as above mentioned evidence was therefore held admissible that in the same spring or early summer the defendant had similar negotiations with a wholly different person respecting a patented invention of *his*, like the plaintiff's, and acted deceitfully towards him in order to keep *his* invention out of the market in that year.

ERROR to the Circuit Court of the United States for the District of Louisiana; the case being thus:

Butler, of New Orleans, had procured one or more patents for an invention called the "Butler Cotton-tie," a machine for fastening bales of cotton. There was at the same time a large manufacturing company near Birmingham, England, called "The Patent Nut and Bolt Company," of which one Watkins was the managing agent. Watkins being in this country, and at New Orleans, had some negotiation with Butler looking to an arrangement by which the company should largely assume the manufacture of cotton-ties under Butler's patent, giving to him a share of the proceeds of sale. The negotiations, though begun and carried on a certain way, were not concluded. Hereupon Butler sued the company and Watkins for damages.

The plaintiff's petition alleged that in February, 1868, in New Orleans, Watkins, in behalf of himself and the Nut and Bolt Company, had an understanding with him in relation to the manufacture and sale of his cotton-tie, for the year 1868; that Watkins, for himself and the company, promised that shortly after his return to England (which was to take

place a few weeks after the date already stated), certain formalities would be gone through, and the manufacture of the said ties commenced and completed in ample time for the business and demand of the year 1868; that for a long time after the return of Watkins to England (which occurred in or about the latter part of March, 1868), Watkins and the company caused him, Butler, to believe that the arrangement would be carried out, and did not undeceive him until late in the summer of 1868, when it was impossible for him to make any other arrangement for the manufacture and sale of the cotton tie.

The plaintiff then averred that these doings of Watkins and the company were deceitful and in bad faith from beginning to end; that they were done for the purpose of imposing upon him and inducing him to give to Watkins and the company the control of the Butler Cotton-tie for the year 1868, with the hope thereby of keeping it out of the market, and by that means render more certain the sale of the Beard and other ties, in which Watkins and the company were greatly interested. Further, that the artful and deceitful acts of Watkins and the company were so perfectly carried out, and the plaintiff so completely deceived, that his cotton-tie was kept from sale during the year 1868, and a large quantity of the Beard and other ties were sold and disposed of for the benefit of Watkins and the company; that had he, Butler, not been deceived and imposed upon by Watkins and the company he would have kept the management of his tie out of their hands, and under his own control, and would thereby have made from its sale during the year of 1868 at the least $35,000.

The defendants denied the validity of Butler's patent, and asserted, moreover, that they had never come under any obligation to him in regard to it.

On the trial it appeared that Butler had made a form of an agreement, such apparently as he considered had been fixed on between him and Watkins, and gave it to Watkins. The draft was dated February 1, 1868; but was not signed by any one, nor stamped. On the 3d of February Watkins,

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being still in New Orleans, wrote a note to Butler, in which he says that he had read the draft and found it "to be about the thing," and that he will have the same put in shape on his arrival home and send him, Butler, one to retain, the others to be returned. Matters remained in that state till April 17th, 1868, when Watkins thus writes, from the company's works near Birmingham:

"I have laid your proposition before my co-directors and they have given same their favorable consideration; but you will understand that we Englishmen are very particular as to what we do—more so than Americans. We are not quite so fast in promising, but are generally faithful to our promises. There are a few facts in relation to cotton ties and cotton-tie business to be considered before the agreement is completed. In the meantime we have commenced the manufacture of your tie and will send the first shipment (which will be small) to Mobile or New Orleans for Memphis, as tonnage may offer. The ties which we send out will be forwarded without prejudice, whether the agreement is finally sealed by my company or otherwise, and will be disposed of on the same terms as named in your agreement proposal."

This evidence being before the jury, the plaintiff offered in evidence certain letters written by the defendants to one Charles Wailey (who, it was said, had also invented a cotton-tie), in the spring and summer of 1868, wherein the defendants led the said Wailey to believe that a contract between himself and Watkins, managing director of the company, had been recognized by them and would be by them carried out; and in connection therewith, the testimony of Wailey, for the purpose of proving that letters similar in many respects to letters written to Butler, and offered in evidence, were false and deceitful acts on the part of defendants, done in order to keep Wailey's tie out of the market during the year 1868. The letters were offered in connection with the testimony of Wailey for the purpose of showing the fraudulent and deceitful conduct of the defendants in keeping Wailey's tie out of the market in the year 1868, in order to advance their own interests by a sale of the Beard tie, with the object of

showing to the jury the systematic manner and course of the defendants in fraudulently preventing the sale of other cotton-ties, and thereby to establish the fraud and deceit of defendants in relation to plaintiff's tie, as charged and set forth in the petition, and generally to prove the deceitful and fraudulent conduct and bad faith of defendants in keeping the tie of plaintiff from sale during the entire year of 1868.

The defendants objected to the evidence on the ground that their letters to Wailey and his testimony in relation to them could not be proved for the purpose of thereby establishing fraud and deceit on the part of the defendants towards *plaintiff*, and that if such fraud and deceit existed it would have to be established by proof of the acts and conduct of defendants towards Butler, not towards Wailey.

Of this view was the court, and it accordingly refused to permit the letters to be read in evidence, or the testimony of Wailey in relation to them to be heard.

The plaintiff excepted.

The court—under requests from the defendants; the plaintiffs asking no instructions—charged among other things:

That to bind the plaintiff by the terms of the proposed agreement his signature to it was necessary, and that so long as it was unsigned it was only a proposition which he might at any time withdraw.

That if Watkins declined to sign the draft, and informed the plaintiff that it must go before the board of directors of the company and be examined by the board, and put in form, with the corporate seal attached thereto to render it valid, it was a notice to the plaintiff that the agreement was not completed, and that it was not obligatory upon either party until it was completed in that manner, or some other sufficient to bind the company.

That if *the corporation never gave any authority to Watkins to assent to the proposal or draft agreement in their behalf, and in their name, and never sanctioned the same as a corporate act, the suit cannot be maintained against them.*

Argument for the defendant in error.

Verdict and judgment having gone for the defendant, the plaintiff brought the case here.

Mr. W. F. Peckham, for the plaintiff in error:

The court erred in the first and second of the above quoted paragraphs of its charge; for whether the agreement was binding or not, was immaterial. The action was not on the agreement, but for the fraud in inducing plaintiff to enter into negotiations which defendants intended as a sham. The charge had a tendency to distract the jury's attention from the real issue.

So it erred in the portion of the charge above italicized; for here the gist of the action is ignored. The very wrong complained of is, that defendants never did intend to enter into the contract, and of course never authorized any one to bind them by it, but that they did enter into a conspiracy to make the plaintiff believe that they did intend to make the contract, while, in fact, never so intending at all.

And, previously to all this, it had erred on the trial, in excluding the letters to Wailey and his testimony. For in criminal law evidence of other doings under similar circumstances at about the same time is admissible, not as proving the other crimes, but as tending to prove the *intent* or the *animus* with which the act under investigation was done.

Messrs. P. Phillips and J. A. and S. D. Campbell, contra:

The claim for damages rests on an "understanding" evidenced by a certain draft and letters. Now to sustain an action on any agreement it must be complete. No obligation is imposed by a mere affirmation or offer to enter into an agreement. Here, on one side, patent rights were to be conveyed, which as all know pass under the statutes by written assignments, on the other hand a large undertaking for manufacturing by a foreign corporation, and the negotiation is with an agent in this country. The subject-matter then, the corporate character of one of the parties, and its

location in a foreign country, without more, leads to the strongest presumption that the "understanding" was not to be perfected until some written instrument was signed and delivered. But we are not left to *presumption*. The letters of Watkins to Butler place this question beyond doubt. It is evident that Watkins either had not the power to bind the corporation or was unwilling to exercise it.

The whole evidence offered by the plaintiff to show the "understanding," is in paper, and the question whether it amounted to a valid and binding obligation might properly have been determined by the court. But here the plaintiff had the full benefit of the jury as to any inferences which could be drawn from any circumstances.

Even if the rejection of the evidence about Wailey's letters was erroneous, still, if the plaintiff could not have recovered if they had been admitted, the error constitutes no ground for reversal.

Mr. Justice STRONG delivered the opinion of the court.

We are unable to discover error in the instructions given to the jury by the court below, or in the answers made to the prayers of the defendants, except in a single particular. What the court said may have been inadequate to a full presentation of the case, but the plaintiff asked for no instructions, and he cannot therefore now be heard to complain that full instructions were not given. The bills of exceptions bring upon the record only that which was said to the jury, and to that alone can error be assigned.

It is quite true that the suit was not brought upon any contract. The theory of the plaintiff was that no agreement had ever been made, and that the defendants had never intended making one, though all the while during the negotiation, deceptively and fraudulently holding out to the plaintiff a profession of intention to conclude an agreement, and that this was done with the purpose of keeping the plaintiff's "cotton-tie" out of the market. The answers to the defendants' prayers, so far as they tend to show that no contract had been concluded were, therefore, favorable rather

than hurtful to the plaintiff's case, and they furnish no just ground for complaint.

The court, however, erred in charging the jury that if they believed "the corporation never gave any authority to the defendant, Watkins, to assent to the proposal, or draft agreement, in their behalf, and in their name, and never sanctioned the same as a corporate act, the suit could not be maintained against them." If by this it was meant that no suit upon the contract could be maintained, the instruction was correct, but this could not have been so understood by the jury. No such question was before them. It does not follow, because the corporation never authorized or sanctioned a contract, that they may not be responsible for such a fraud as was alleged in the petition. We have not all the evidence before us, but it does appear that some evidence was given tending to show that the acts and conduct of the defendants (Watkins and the corporation), were deceitful and fraudulent, designed to mislead, and done for the purpose of keeping the plaintiff's cotton-tie out of the market, in order that they might secure heavy sales of the Beard tie, in which they were largely interested. If the evidence did establish or tended to establish such deceit and fraud, for such a purpose, and if the plaintiff was injured thereby, as his petition alleged, it was erroneous to charge the jury that the suit could not be maintained. Competition in efforts to secure the market is doubtless lawful. A manufacturer may by superior energy, or enterprise, supply all the buyers of a particular article, and thus leave no market for similar articles manufactured by others. But he may not fraudulently or by deceitful representations induce another to withhold from sale his products without being answerable for the injury occasioned by the fraud. Whether negotiations for a purchase never concluded were in fact fraudulent; whether they were commenced and continued solely with the purpose of dishonestly inducing the plaintiff to forego offering his goods until the market had been supplied, and whether such was the consequence of the defendants' fraudulent conduct, were questions of fact which should have been sub-

mitted to the jury on the evidence. If answered affirmatively, the action was sustainable. In order to maintain an action for fraud it is sufficient to show that the defendant was guilty of deceit, with a design to deprive the plaintiff of some profit or advantage, and to acquire it for himself, whenever loss or damage has resulted from the deceit. This was well illustrated in *Barley* v. *Walford.** There it appeared that a plaintiff, who was a dealer in silk goods, had been hindered in his trade and induced to refrain from making goods with a certain ornamental design, by a false representation made by the defendant, and known by him to be false, that a pattern of the goods had been registered by another, and it was ruled that an action would lie to recover damages for the injury, especially when the deceit was with a view to secure some unfair advantage to the defendant.

We think also the court erred in refusing to receive in evidence the defendants' letters to Wailey in connection with Wailey's testimony. It was an important inquiry in the case, what was the purpose or animus of the defendants in their negotiations with the plaintiff? Was it to mislead him by holding out false hopes of consummating an arrangement by which his cotton-tie could be introduced into the market, and was this in order to secure the defendants themselves against competition? Deceit in effecting such a purpose lay at the basis of the action. But how can such a purpose be shown when it has not been avowed? Actual fraud is always attended by an intent to defraud, and the intent may be shown by any evidence that has a tendency to persuade the mind of its existence. Hence, in actions for fraud, large latitude is always given to the admission of evidence. If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, at about the same time, and in relation to a like subject, was actuated by the same spirit. If therefore it be true that in

* 9 Adolphus & Ellis, N. S. 197.

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the spring or early summer of 1868 the defendant had similar negotiations with Wailey respecting his cotton-tie, and conducted towards him deceitfully in order to keep his tie out of the market that year, the fact tends to show that in their conduct towards the plaintiff, there was the same animus, and that they had the same object in view. That the evidence offered was admissible for that purpose is abundantly proved by the authorities.*

JUDGMENT REVERSED AND A NEW TRIAL ORDERED.

CAUJOLLE *v.* FERRIÉ.

A grant of letters of administration by a court having sole and exclusive power of granting them, and which by statute is obliged to grant them "to the relatives of the deceased, who would be entitled to succeed to his personal estate," is conclusive in other courts on a question of legitimacy; the grant having been made on an issue raised on the question of legitimacy alone, and there having been no question of minority, bad habits, alienage, or other disqualification simply personal.

Held, accordingly, after a grant under such circumstances, that the legitimacy could not be gone into by the complainants on a bill for distribution by the persons who had opposed the grant of letters, against the person to whom they had been granted; but on the contrary, that the complainants were estopped on that subject.

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

The Revised Statutes of New York, on the subject of granting letters of administration, thus enact:

"The surrogate of each county shall have *sole and exclusive power* within the county for which he may be appointed, to grant letters of administration of the goods, &c., of persons dying intestate—when an intestate at or immediately previous to his death was an inhabitant of the county of such surrogate.†

* Castle *v.* Bullard, 23 Howard, 172; Lincoln *v.* Claffin, 7 Wallace, 132.

† 2 Revised Statutes, 73, § 23.

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"Administration, in case of intestacy, shall be granted to the relatives of the deceased, who would be *entitled to succeed* to his personal estate."*

By the further terms of the statute the surplus of an intestate's personal estate, remaining after payment of debts, shall be distributed, if there be no husband or wife, equally to and among the children and such as legally represent them, or if there be no children, and no representatives of a child, then the *next* of kin in equal degree to the deceased, &c.†

To secure a competent person, a large discretion is intrusted to the surrogate. He may exclude minors, aliens, intemperate persons, &c.

With these provisions of the code in force, Jeanne Du Lux, a woman of French extraction, died November 15th, 1854, at an advanced age, in the city of New York, intestate, leaving a large personal estate, to be administered and distributed according to the laws of the place of her domicile.

Within a month of her decease, John Pierre Ferrié applied to the surrogate of the county of New York for letters of administration on her estate, claiming them on the ground that he was her only child, and, therefore, her sole heir at law and next of kin. This application was opposed by the public administrator, an officer who, in the city of New York, is entitled to administer upon the estate of deceased persons where there are no next of kin, and the French consul was allowed to contest for the benefit of any party in interest in France. During the pendency of these proceedings, Benoit Julien Caujolle, Bert Barthelemy Caujolle, and Mauretta Elie, with their respective wives, appeared before the surrogate and asked to be heard, alleging that they were the next of kin, and for that reason, entitled to intervene in the matter of the administration, and "to share upon the distribution of the estate;" and asking to receive their distributive share of the same. The prayer of their petition was granted, and after this was done the French consul with-

* 2 Revised Statutes, 73, § 74.

† Ib. 96, § 75, *sub* 4, 5.

drew from the contest. The only question involved in the application for administration was, whether Ferrié was the legitimate child of Jeanne Du Lux, and all the proofs taken and admitted related to that issue alone. As Ferrié was conceded to have been born in France, a commission was issued to take testimony in that country regarding the real relationship he bore to the said Jeanne Du Lux. This commission was executed and returned to the surrogate, with a large mass of oral evidence on the subject, together with documents and extracts from public records.

The case came to a hearing on the 15th day of September, 1856, on the proofs taken in France, and at home, and the surrogate rendered the following decree:

"*In the matter of the Estate of Jeanne Du Lux, deceased.*

"Upon taking proof of all the parties, who have appeared in this matter, and after hearing counsel in behalf of John Pierre Ferrié, claiming to be the son of the intestate, and counsel in behalf of the public administrator, in opposition thereto, and counsel in behalf of Benoit Julien Caujolle, Bert Barthelemy Caujolle, and Mauretta Elie, and their respective wives, claiming as next of kin of said intestate, it is ordered, adjudged, and decreed that letters of administration upon the estate of said Jeanne Du Lux be granted, and issue to the said John P. Ferrié, as the legitimate son and sole next of kin of the said intestate, or to said Ferrié, and such person as may be joined with him, under the statute, on giving the proper security required by law."

An appeal was taken from this decree to the Supreme Court of the State, by Benoit Julien Caujolle, acting for himself and the other persons in France, and the decree was affirmed. While the case was pending in the Supreme Court, on application of the appellant there, additional evidence was received, not heard by the surrogate, tending to show the illegitimacy of Ferrié. Notwithstanding this additional evidence, the decision of the surrogate was affirmed, and it was reaffirmed on a subsequent appeal to the Court of Appeals. It was on this final decision in his favor that administration of his mother's estate was granted to Ferrié.

Arguments for and against the conclusiveness.

In a short time after the decision against them in the highest court of the State of New York, the persons already named living in France who asserted themselves to be the next of kin of Jeanne Du Lux filed their bill against Ferrié and the person who had been joined with him under the statute in the court below for distribution.

To this bill the defendants pleaded in bar the decision of the State courts on the contest for administration, as an adjudication between the same parties of the very point in issue, by a tribunal having jurisdiction of the subject-matter. This plea was overruled, and the cause, after answer, replication, and the taking of proofs, was heard on its merits, and the legitimacy of Ferrié again established. Appeal was taken to this court by the other side, from this decision. The record brought up the whole evidence on the question of legitimacy; parol and documentary, French and American.

Mr. Whitehead, for the appellants, arranging it with order and clearness, argued forcibly that the evidence failed to establish the legitimacy.

Mr. S. P. Nash, contra, and endeavoring to infer from it a different conclusion, contended, in addition and as a more principal point, that in view of the language of the Revised Statutes of New York, which made it obligatory on the surrogate to grant the administration "to the relatives of the deceased who would be *entitled to succeed* to his personal estate," the question of Ferrié's legitimacy—there having been no question of alienage, minorship, or bad moral habits, or other personal disqualification in the case—was necessarily decided; that the complainants were accordingly estopped by the judgment of the surrogate from going into the consideration of the evidence of that question, and that the court below had therefore erred in not sustaining the plea in bar.

Mr. Whitehead, in reply, denied that Ferrié's relationship had been otherwise than *incidentally* in question, and that a

decision of a surrogate on a question of granting letters—a matter largely one of practice, where great discretion was allowed, and where the matter was passed on summarily—had that conclusive character which belonged to a judgment directly on a point in issue and brought the case within the doctrine of *res adjudicata*. The court below, he argued, had therefore not erred in not sustaining the plea in bar.

Mr. Justice DAVIS delivered the opinion of the court.

If the learned judge of the court below erred in not sustaining the plea in bar, we are relieved of the necessity of looking into the evidence in order to see whether the cause was rightly decided on its merits. The inquiry arises then, in the first place, whether he did so err or not.

There must be an end of every controversy, and the question raised by the plea is, whether the litigation concerning the legitimacy of Ferrié in the State tribunals of New York has been of such a character that it cannot be renewed between the same parties in the Federal courts.

Chief Justice De Grey, in the Duchess of Kingston's case,* has, in a few words, given a comprehensive summary of the law on this subject: "From the variety of cases in respect to judgments being given in evidence," said the chief justice, "these two distinctions seem to follow as being generally true: first, that the judgment of a court of *concurrent* jurisdiction *directly* upon the point is, as a plea, a bar, or, as evidence, conclusive between the same parties on the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question, in another court for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." Did the fact of legitimacy come before the surro-

* 2 Smith's Leading Cases, 6th ed. 648.

gate's court, directly or incidentally, and was it necessary to decide the point before the letters of administration could issue? are the questions to be considered and determined.

In cases of intestacy in New York the surrogate has the sole and exclusive power of granting letters of administration, and is obliged to grant them—no question being made as to personal competency—to the relatives of the deceased who would be entitled to succeed to his or her personal estate, and if Ferrié were the only child of the intestate, he had the legal right to administer, because he succeeded to the whole of her estate.* It is true a large discretion is given to the surrogate to secure a competent person, and if relatives are disqualified, for certain causes mentioned in the statute, or are unwilling to accept, administration may be granted to others, and, in such a case, the basis of action concludes nothing as to the right of succession. But if there be next of kin, and no personal disqualifications attach to them, the surrogate can exercise no discretion on the subject. The inquiry becomes then a matter of right, and is, by the express language of the statute, to be determined by the right to the succession.†

In this state of the law on the subject Ferrié applied for letters of administration on the estate of Jeanne Du Lux, claiming to be her son, and, therefore, her nearest of kin. But these appellants said, You cannot have these letters, because you are illegitimate, and we, as the descendants of a deceased aunt of the intestate, are her nearest relatives, and therefore entitled to the succession. The purpose was to get at the estate, and so they say in their petition addressed to the surrogate for leave to intervene. They allege themselves to be "the nearest of kin" and "entitled to share upon the distribution of the estate," and ask to be heard "and to receive their distributive share of the estate." Manifestly, they sought the contest because they supposed the right to administer involved the right to the property. Their opposition was not based on the ground of Ferrié's personal un-

* 2 Revised Statutes of New York 73, § 23; 74, § 27; 96, § 75; §§ 4, 5.
† Ib. 74, § 27.

fitness, nor did they wish to administer themselves. How, then, can it be said that the administration in this case was granted, without any reference to, or consideration of, the question of distribution? In the absence of personal disqualifications, as we have seen, it is compulsory on the surrogate to grant the letters to the party to whom the inheritance belongs. This is the primary and only object of inquiry, in order to ascertain to whom the letters should be issued. The illegitimacy of Ferrié in any other view was an immaterial issue. It is personal good conduct, and not the status of birth which constitutes a man a fit person to be intrusted with the duties of administration. It is idle, therefore, to suppose that this contest was inaugurated and carried on, on any other theory, than that the result of it settled the right to the estate. Because an administrator can, under certain circumstances, be appointed who is not connected by kinship with the intestate proves nothing. It is enough to say there was no occasion for the surrogate to do this, and his action was not grounded on his ability to do it in certain contingencies. His power was invoked under that clause of the statute which directed him to issue letters, in case there were relatives, to the one to whom the estate went, by the law of descents. Ferrié alleged himself to be that person, because he was the son of the deceased. These appellants said, Not so, for you are illegitimate, and have no inheritable blood, and we propose to try that question, and if it is decided in our favor, we get the estate, as we are, confessedly, in that event the nearest of kin. The issue thus solicited was framed, voluminous evidence both from abroad and at home taken upon it, able arguments heard, elaborate opinions given, and repeated decisions made against the right set up by these appellants, and yet they are not content. Beaten in the State courts on the vital question—the illegitimacy of Ferrié—they turn to this court to try over again the very point decided against them. Can they do this? They say the point was only cognizable incidentally; but how can this be, when the surrogate could not have done the thing he did do without deciding it? It

had to be decided in order to determine to whom the letters should issue, and the decision of it, of necessity, settled the distribution of the estate. If this litigation can be renewed in a separate suit for distribution in another court, then the same persons can try the same question, in respect to the same subject, in two different suits. The question before the surrogate was the legitimacy of Ferrié, and the subject in regard to which it was necessary to decide it, was the distribution of the estate. That the ultimate right of property was the pivot point of the case appears by the decree itself, for it finds Ferrié to be the legitimate son and sole nearest of kin of the intestate, and by reason of this directs administration to be granted to him. And it goes further, for it finds, substantially, that the contest was made on the question of kinship alone, and denies the claim set up by these appellants. Suppose the suit for distribution had been brought in the surrogate's court, can there be a doubt that the decree granting administration to Ferrié would be pleadable in bar to it? If such be its effect in that court, can or ought it to have a different effect in another court of concurrent jurisdiction? If so, then instead of there being uniformity in the exercise of concurrent jurisdiction, there would be conflicting determinations, and the evils resulting from such a course of procedure can be easily foreseen. Neither the policy of the law nor the interests of society require this to be done.

We have thus far considered the question on principle, but we are also sustained by authority.

In the Ecclesiastical Courts in England, in cases of intestacy, the right of administration follows the right to the property,* as it does in New York and elsewhere in this country.

The effect of the sentence of the Ecclesiastical Court, in granting administration, was considered by Lord Hardwicke, in *Thomas* v. *Ketteriche*,† on a bill filed for distribution of an intestate's goods, and he held himself concluded by it.

* 1 Williams on Executors, 394.

† 1 Vesey, 333.

There had been a contest in the Ecclesiastical Court for administration between the same parties on the point which was the nearest of kin. The court decided they were in equal degree, and granted administration to Ketteriche, because Thomas was a minor. Thomas, believing the Ecclesiastical Court had not computed the degrees correctly, and that he was nearer in relationship to the intestate, filed his bill for distribution in the High Court of Chancery for the purpose of getting another computation, but the Lord Chancellor refused to go behind the sentence of the Ecclesiastical Court. "That court," he said, "is bound to grant administration to the next of kin; and, if I should determine these parties not to be equal, but the plaintiff nearer, it is directly contrary to the foundation of this sentence, which would make it erroneous and to be reversed. The consequence of which would be that, by choosing to come here for a distribution, you would change the rule relating thereto, for the suit might have been in the Ecclesiastical Court for a distribution as well as here, and that court could not have contradicted the sentence by which administration was granted." This decision was in 1749.

In *Bouchier* v. *Taylor*,* the same point was raised and decided the same way by the House of Lords in 1776. Notwithstanding these decisions the question was again the subject for discussion, in a suit for distribution, before Vice-Chancellor Bruce, in *Barrs* v. *Jackson*,† as late as 1842, and he denied to the sentence of an Ecclesiastical Court, in a suit for administration, the effect which was given to it in the other cases. But, on appeal to the House of Lords, this decree was reversed, and Lord Chancellor Lyndhurst, on a review of all the authorities, held that the question was no longer an open one.‡ It is to be observed, in regard to the opinion of the learned chancellor, that, although he declined to enter into any of the general arguments in the case, on

* 4 Brown's Parliamentary Cases, 708.

† 1 Younge & Collier's Chancery Cases, 585.

‡ 1 Phillips, 582.

the ground that he was bound by the decision of the House of Lords in *Bouchier* v. *Taylor*, yet he concedes that if the suit for distribution had been instituted in the Ecclesiastical Court, the sentence in the suit for administration would have been conclusive upon it, and, if it were conclusive there, that it ought to be conclusive in the Court of Chancery.

It may, therefore, as the result of these authorities, be safely assumed to be the established law in England, that if the sentence of an ecclesiastical court, in a suit for administration, turns upon the question of which of the parties is next of kin to the intestate, it is conclusive upon that question in a subsequent suit in the Court of Chancery between the same parties for distribution.

We are not aware of any decisions directly upon this subject in any of the State courts of this country. This, doubtless, results from the fact that, with us, estates are settled and distributed in the same court that grants the letters of administration. It seldom occurs here that separate suits for distribution are instituted at all, and very rarely, anywhere else than in the courts of probate. The recent case in this court, of *Blackburn* v. *Crawford*,* is, in some of its features, unlike this, but the principle of that case would seem to create an estoppel in this.

On principle and authority, therefore, the judgment in the suit for administration in New York was pleadable in bar to this suit, and on that ground alone the bill should have been dismissed.

DECREE AFFIRMED.

The CHIEF JUSTICE having been of counsel for the appellee, Ferrié, did not sit in this case.

* 3 Wallace, 175.

Statement of the case in the opinion.

THE ARIADNE.

1. The obligation of a "lookout" on vessels sailing, in crowded waters such as the bay of New York, is of the highest kind. His care must be indefatigable; his vigilance sleepless; and the rigor of the requirement rises according to the power and speed of the vessel on which he is.
2. When strong evidence, in a case of collision, tends to show that the catastrophe was owing to the failure of the lookout of the vessel libelled to attend to his duty, every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.
3. Although where the Circuit and District Court both agree on a question of alleged fault in a vessel libelled for collision, this court will not readily reverse, yet it will do so, where after examination its conviction is that both the courts below were wrong.

APPEAL from the Circuit Court for the Southern District of New York.

This was an appeal in admiralty from the decree of the Circuit Court for the Southern District of New York; the case being one arising from a collision between the steamer Ariadne and the brig William Edwards, and the questions being purely questions of fact.

Mr. J. E. Parsons, for the appellant; Mr. E. H. Owens, contra.

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

The collision, which is the subject of this appeal, occurred in the night of the 13th of December, 1865, off the Jersey coast, about twelve miles from Barnegat, and eight miles from land. The brig was on a voyage from Havre to New York. The wind was north-northeast. The brig was on her port tack, with her starboard side to the steamer, and going at the rate of four or five miles an hour. She was sailing closehauled, as near as she could lie to the wind, and heading west-northwest or northwest. The steamer

Statement of the case in the opinion.

was bound from New York to New Orleans, and was upon one of her regular trips. She was laden with freight and carried passengers. She was on her proper course, south by west one-quarter south, and running at the rate of seven or eight knots an hour. The brig did not change her course down to the time of the collision. The steamer was first made from the brig, about five points from her starboard bow. She was not discovered from the steamer until it was too late to avoid the collision. The steamer struck her on her starboard side, abaft the main chains. The blow was of such force that it cut through into her cabin and down to the water's edge. She sunk in a short time. This libel was filed by her owners to recover damages for her loss. It was dismissed by the District Court. The decree was affirmed by the Circuit Court. The decree of the latter has been brought here by this appeal for review. In this court the controversy between the parties has been narrowed down to two points.

It is insisted by the claimant of the steamer that the brig had no green light, or an insufficient one, on her starboard side; that the collision is due to this cause, and that the steamer is blameless.

The libellants deny this impeachment as to the light, and contend that the lookout on the steamer wholly failed to do his duty; that he could, and should, have seen the brig, whether she had, or had not, a sufficient green light, in season to enable the steamer to avoid the collision, and that in this particular there is fault on her part. We shall consider the case only in these aspects.

In regard to the light on the brig the testimony, as usual in such cases, is conflicting. We think that which sustains the negative largely preponderates. We find no sufficient reason to doubt that Morgan (the brig's lookout) told the truth. He testified:

"The binnacle light used to bother me—it would frequently go out. There was something about the oil that was not right. . . When I was on the lookout I noticed our starboard light, but not until the Ariadne was very near to us. I stepped to the side of

Statement of the case in the opinion.

the brig, thinking that our light might not be burning, and that the Ariadne might, therefore, run into us, and then I looked at our starboard light. The light was very dim. I was, I should judge, fifty feet from the light when I looked at it, and could see it plainly. As the light was then burning, I should not think it could be seen over two hundred feet."

This testimony is fully sustained by all the witnesses, six in number, who were on the steamer. They were in positions to see the light, and must have seen it if it were distinctly visible. The probative force of these proofs is not overcome by the testimony of the libellants. Both the courts below held the charge to be established, and we see no reason to dissent from the conclusion at which they arrived.

The steamer was about two hundred feet long. She obeyed her helm with unusual quickness. When running at her then speed, she could be easily stopped in a space of about twice her length. She approached the brig in the direction most favorable for her lookout to see the hull and sails of the latter. According to the steamer's testimony, a vessel without a light could be seen the eighth of a mile. Her testimony also shows the following facts: She had but one lookout. The second mate saw the brig first. He asked the lookout if he saw her. The lookout thereupon turned and saw her. He had not seen her before. He saw no light, and could not tell which way she was heading. Maloney, who was at the wheel of the steamer, says:

"I saw the brig just a moment before the first bell struck. The second mate struck first one bell, and then a second bell, and then rung again. There was not a second between. It was done as quick as lightning. . . . The Ariadne swung about a point and a half, or two points, before we struck."

The lookout says the steamer ran about a length between the time when he first saw the brig and the time when the steamer struck her.

There is no controversy as to the facts thus stated. They are undisputed and indisputable. Certain inferences from them are inevitable.

The brig was not seen by the lookout or any one else on the steamer when she was distant as far as she could have been seen. She was not seen by the lookout at all until his attention was called to her by the mate. She was not seen by either of them until almost at the moment of the collision. It is by no means certain that the lookout would have seen her before he felt the shock but for the inquiry of the mate. He was on the port side, and had been looking, according to his own account, three minutes in the opposite direction. The discovery came too late to do any good. The catastrophe was then unavoidable. For all the purposes of this case there might as well have been no lookout on the steamer. He could have rendered, and it was his duty to render, a service of vital importance, but he rendered none. If the brig had been seen when she became visible from the steamer, or very soon thereafter, the collision could have been avoided. It would have been the duty of the steamer to stop or slow her engine until everything as to the brig, necessary to be known, was ascertained. This would doubtless have been done; and, if so, the result which followed would have been averted. Indeed, it would have been impossible to occur. We think the conduct of the lookout was marked by gross carelessness, and that it was clearly one of the concurring causes of the disaster.

The waters near the city of New York are at all times crowded with shipping. Navigation there is not unlike the traveller threading his way through the mazes of a forest, with the difference that most of the objects to be avoided are also in motion. The greatest care and caution are necessary. The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel with all the property and the lives of all on board. The same consequence may ensue to the vessel with which his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. The rigor of the requirement rises

according to the power and speed of the vessel in question. It is applied with full force to the steamships belonging to our commercial marine. If this were not so, there would be no safety for other vessels. But it is equally important to vessels of that powerful class for their protection from one another. It is the duty of all courts, charged with the administration of this branch of our jurisprudence, to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty, and the effect of non-performance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.*

The fault of the brig does not excuse the fault of the steamer if the latter were, in any degree, a contributory cause of the collision.†

Both vessels being in fault the damages must be divided.

We are not unmindful that both the Circuit and District Court came to a conclusion different from ours as to the alleged fault of the steamer.

Their judgments are entitled to, and have received, our most respectful consideration. Their concurrence raises a presumption, *primâ facie*, that they are correct. Mere doubts should not be permitted to disturb them. But the presumption referred to may be rebutted. The right of appeal to this court is a substantial right, and not a shadow. It involves examination, thought, and judgment. Where our convictions are clear, and differ from those of the learned judges below, we may not abdicate the performance of the duty which the law imposes upon us by declining to give our own judicial effect.‡

DECREE REVERSED, and the cause remanded to the Circuit Court with directions to enter a decree

IN CONFORMITY TO THIS OPINION.

* The Louisiana *v.* Fisher et al., 21 Howard, 1; Chamberlain *v.* Ward, Ib. 549; Genesee Chief, 12 Howard, 443.

† Chamberlain *v.* Ward, 21 Howard, 549; Gray Eagle, 9 Wallace, 505.

‡ Quickstep, 9 Wallace, 669.

CARPENTIER *v.* MONTGOMERY ET AL.

1. Where a Spanish or Mexican grant of lands in California does not identify the precise tract of land granted, either by description or by reference, the title is an imperfect one, needing the further action of the United States government to make it perfect. Such is the case where one side of the tract is undefined, or one of the exterior boundary lines cannot be located. An authoritative survey is required to demonstrate the particular tract granted.
2. A confirmation of a Spanish or Mexican grant of land in California segregates the land, when surveyed, from the public domain, and invests the confirmee with the legal title. It entitles him to a patent for the land as soon as the requisite survey has been made. No other title, not clothed with equal solemnities, can be set up against the confirmee, or his assigns, in an action of ejectment.
3. But the equitable rights of third persons, under the same title, are not cut off. They will be sustained in a court of equity as against the confirmee and his assigns, who are chargeable with knowledge of the said equities. The position of a confirmee is analogous to that of a patentee under a pre-emption right. Equity will hold him as a trustee for those who have equitable rights in the land, to the extent of their interests.
4. Equitable interests must be sought, not in an action of ejectment, but in an equitable proceeding, where they can be properly investigated with a due regard to the rights of others which may have intervened, such as those of *bonâ fide* purchasers, &c., ignorant of the equities existing between the original parties.

ERROR to the Circuit Court for the District of California.

Carpentier brought suit against Montgomery and a number of other defendants to recover certain lands in their possession, lying on the east side of the bay of San Francisco, and described in the complaint. Answers were put in by the defendants, severally claiming distinct portions of the lands.

On the trial the plaintiff deraigned title under the children of Maria Teodora Peralta, a deceased daughter of Luis Peralta, and proved mesne conveyances from them to the extent of an undivided five and a half ninths of one-ninth of the land in question. But whether the children of Maria Teodora Peralta were entitled to any estate in the lands, upon which the plaintiff could sustain an action of ejectment against the defendants, was the question.

Statement of the case.

Luis Peralta, the father of Maria Teodora, died in August, 1851, in possession of the rancho called San Antonio (of which the premises in question were a part), leaving four sons and four daughters, and several grandchildren by a deceased daughter, the said Maria Teodora. The four sons presented their petition for the confirmation of their claim for the entire rancho to the board of commissioners, organized under the act of Congress of March 3d, 1851, founding their claim upon certain documents establishing their father's right to the rancho, and upon an alleged devise thereof to them. Upon this petition the rancho was confirmed to the said sons in divided parcels, the portion embracing the premises in question being confirmed to Domingo and Vincente Peralta by final decree of this court in December Term, 1856.* No final approved survey, however, took place under the confirmation. The defendants held under the confirmees.

On the trial the plaintiff showed by documentary evidence from the archives, that on 20th June, 1820, Luis Peralta, who was then sergeant of the presidio near San Francisco, and commissioner of the pueblo of San José, presented a petition to Pablo Vincente de Sola, then Governor of California, in which he stated that, "at the distance of eight leagues from the mission of San José, in a northerly or northwesterly course along the coast, there is a creek named by the reverend fathers of the aforesaid mission, San Leandro, and from this to a little hill adjoining the sea-beach, in the same direction and along the coast, there may be four or five leagues, more or less (or about), which place and land he asks and solicits may be granted to him that he may establish a rancho, and place thereon all his goods and chattels."

Governor Sola, on the 3d of August, 1820, ordered Captain Luis Antonio de Arguello, commandant of the presidio, to appoint an officer to put Sergeant Peralta "in possession of the lands petitioned for, giving previous notice of it to

* United States v. Peralta, 19 Howard, 343.

the reverend fathers, the missionaries of the missions bordering on said land, *and then place landmarks on the four points of the compass*, that it may be known at all times, the extent of said lands *which have been granted to him.*"

On the 10th, Arguello appointed Lieutenant Martinez to execute this decree.

On the 16th, Father Duran certified, on behalf of the mission of San José, that there was no objection, on the part of that mission, to the grant asked for by Peralta.

On the same day Martinez certified that, having given due notice, he "proceeded to the said place, and in presence of the two witnesses, Nicholas Berreyesa and Juan Miranda, *the boundaries which separate his (Peralta's) land were marked out to him*, to wit: The deep creek called San Leandro, and, at a distance from this (say about five leagues), there are two small mountains (*cerritos*). The first is close to the beach; next to it follows that of San Antonio, serving as boundaries, the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the land; and, at the entrance of the little gulch, there is a rock elevating itself in the form of a monument, and looking towards the north. *On both boundaries were fixed firm landmarks;* and, inasmuch as this individual does not prejudice any of the adjoining neighbors, and by virtue of the authority on me conferred, and in the name of our Catholic Monarch, Senor Don Ferdinand VII (whom God preserve), I put in possession of the said land the above-named Luis Peralta."

This return was signed by him and the witnesses in testimony of the facts.

On the 30th of August Governor Sola, reciting that Father Chabot, of the mission of San Francisco, alleged that Don Ignatio Martinez had not fulfilled his decree of the 3d of August, and that through this fault possession had been given to Peralta of some lands pertaining to said mission, ordered that these should be withdrawn from those which were assigned to Peralta, and remain, as they were before, in favor of the neophytes of said mission.

Statement of the case.

In a paper dated September 14th, 1820, Fathers Chabot and Ordaz, on behalf of the mission, certified that inasmuch as the mission had had possession since the month of November of the previous year, granted by the superior government for agricultural purposes and the feeding of sheep, as far as a rivulet at the distance from the house of the rancho some three and a half to four leagues in the direction of San Josè, there was "no objection to set the boundaries of Sergeant Luis Peralta from that place up to the creek called San Leandro."

On the 16th of September, 1820, Lieutenant Martinez reported that, in the presence of the same witnesses, he had executed the order of the governor of the 30th August, "by appointing to him (Peralta) anew the boundaries at about one and a half league from the hill of San Antonio towards that part of San Leandro serving as the dividing-line, a rivulet (the Temescal) issuing from the mountain or hill-range, which runs down to the beach, where there is a willow grove, fixing in said place the *four* landmarks, which shall be valid, and not those that were designated before on the little mountain of San Antonio."

On the 18th October, 1822, Governor Sola certified that "this day was issued, in favor of Sergeant Luis Peralta, by the governor of this province, the certifying document *for the land which has been granted to him, as appears in this folio, by the writ of possession*, which the lieutenant of his company, Don Ignacio Martinez, gave him agreeably to an order issued him by the government."

The certifying document recited the original petition of Peralta, the reclamation of the fathers of the mission, the appointment of Martinez to give possession, the performance of that order, "by designating the boundaries, about one league and a half from the small hill of San Antonio, towards the part of the San Leandro Creek serving as a dividing-place, a small brook which falls from the mountains or heights running towards the beach, where ends a willow brake, establishing on said land the four landmarks;" and concluded by saying that this document was given "in order

that, in all time to come, it may be attested that this concession to said Sergeant Luis Peralta was made in remuneration of forty years of service in the military career."

On the 14th of October, 1820, Sergeant Peralta addressed a letter to his captain, Arguello, complaining of having been dispossessed of the land which had been assigned to him. In that letter he insisted that he had a right to the land, and declared that he yielded up the possession only because he was compelled to do so. He replied also to the allegations of the fathers, that he did not need so much land, by saying that "five leagues does not seem to me much, in a narrow tract, as you know it is, from the beach to the mountain range," &c. On 23d June, 1821, Captain Arguello transmitted the memorial of Peralta to the governor, gave the history of Peralta's application, insisted upon his right to the land, and stated his claim upon the government for long and meritorious services as a soldier.

On the 15th of May, 1823, Peralta petitioned the governor directly, praying that "the land may be returned" to him, showing that the reverend father of the mission had practiced a fraud to induce the governor to dispossess him, by which he says, "I was deprived of the best land *which had been granted to me.*" He again refuted the charge that the tract was too large, by saying, "though it appears to be large, it is not so, for two reasons—1st, because it is situated on the coast, *and the shore between the beach and the top of the mountains* (*La Sierra*) is too narrow; 2d, because in the space lying from San Leandro to the said cerrito redondo there is a great part of it forming high lands, ravines, and inlets, which are not suitable for the purpose," &c. Upon this petition, on the 30th November, 1823, the following order or decision was made:

"Let the land which by order of my predecessor, Señor Don Pablo Vincente Sola, was taken from this claimant, *after having been granted him and possession given, for that reason be returned to him.* He shall apply with this decree to the judge then commissioned (Lieutenant Martinez) for the said possession, that he

may comply with it. When this be done, he shall annex all the proceedings to the expediente already formed.

"ARGUELLO."

On the 24th December, 1824, Martinez, who was the person formerly commissioned as the judge to deliver the possession, certified that "in compliance with the foregoing superior decree of the superior chief of the province, Captain Don Luis Antonio Arguello, the land which by order of Colonel Don Pablo Vincente de Sola had been taken from Sergeant Luis Peralta, has hereby been returned to him, and he has newly been put in possession of the place called Cerrito de San Antonio and the rivulet which crosses the place to the coast where is a rock looking to the north; said Peralta has received lawful possession in presence of the same witnesses who assisted when the first possession was given to him."

On the 7th of October, 1827, Governor Echandia issued an order requiring every individual in possession of a rancho to make a statement describing the boundaries thereof, annexing thereto the title of his possession and the foundation he may have for such possession.

In pursuance thereof Peralta returned "a description showing the extent of the lands granted me and of which I was placed in possession since the year 1820, to wit: Along the coast of the mission of San José, in a northwesterly course, there is a deep creek called San Leandro, forming the dividing boundary of said mission of San José, thence to a small, round mountain called San Antonio, the dividing boundary with my neighbor, Francisco Castro, which space is a little over four leagues long, and as it is the narrowest portion of the coast, it at most contains half a league in breadth, *from the mountain to the sea.*"

On the 11th of February, 1844, Ignacio Peralta, a son of Luis, applied to Governor Micheltorena, on behalf of his father, for a new title, stating that the title-papers had been mislaid, and describing the land as the Rancho San Antonio, situated between the mission of San José and San Pablo

Point, which was granted to his father by Señor Don Pablo Vincente de Sola, and of which he was put in possession by Lieutenant Don Ignacio Martinez by superior order, any other authority being at that time unknown. The new grant to be "to the extent expressed by the document of Governor Sola as plat of survey (design) that accompanies it, including the range of hill up to its summit, and thence to the sea."

The governor referred this petition to Jimeno, then Secretary of State, who reported that the land shown by the plat presented *had been granted twenty-two years previously, and had been occupied by the grantee since* 1819, and that there was no objection whatever to the grant of *a new title.* The governor ordered the title to issue on the 13th of February. An instrument was accordingly drawn, which was found in the archives, declaring that Luis Peralta was "the *owner in fee* of said land, which is bounded as follows, namely: On the southeast by the creek of San Leandro, on the northwest by the creek of Los Cerritos de San Antonio (the small hills of San Antonio), on the southwest by the sea, and on the northeast by the tops of the hill range," and directing that this expediente be submitted to the Departmental Assembly. But this paper was not signed by the governor.

The plaintiff gave also parol testimony tending to prove the following facts:

That by the grant of Sola, and the other documents connected with and preceding that grant, and which had been given in evidence, the natural objects described in the original concession, and in the possession given by Martinez, could be ascertained upon the land, and that the objects called for in the second, and reduced or limited possession ordered and given on the representation of the fathers of the mission of San Francisco, and which was intended to be covered by, and included in, the final grant of Sola, could also be ascertained on the ground.

That the original possession given by Martinez was bounded by the San Leandro Creek on the south, southeast,

Statement of the case.

and east, and the crest of the hills to the gap easterly of the monumental rock looking to the north, mentioned in the act or certificate of possession of Martinez; on the north and northwesterly by the creek of the cerrito of San Antonio, and on the west by the bay of San Francisco.

That the boundaries of the restricted possession were the San Leandro Creek on the south, southeast, and east, the Temescal Creek on the north and northwest, and the bay of San Francisco on the west, and that the possession was reduced to the line of the Temescal Creek.

That the sources of the San Leandro Creek and Temescal Creek spring near each other, with merely a narrow dividing ridge between them, not more than a quarter of a mile from the source of the one to the other, and that they both empty into the bay of San Francisco.

He also introduced the evidence of witnesses tending to prove the delivery of possession of the rancho of San Antonio to Luis Peralta, by Lieutenant Martinez, in 1820, and that possession was formally given, and the boundaries designated by Martinez, in accordance with the description thereof, first herein above set forth.

The plaintiff having rested his case the defendants moved the court to strike out all the evidence introduced by the plaintiff, on the ground that the same did not establish nor tend to establish a right in the plaintiff to a verdict.

The court having heard counsel thereon denied the motion, on the ground that the same was irregular in practice, and an evasion of the rule against nonsuits; but stated that, if the defendants would submit their case without evidence on their part, it would instruct the jury to render a verdict for the defendants, to which the plaintiff excepted.

The defendants thereupon declined to offer any evidence on their part, and the evidence was closed.

And the court thereupon, at the request of the defendants, instructed the jury that the plaintiff had failed to establish a case entitling him to a verdict, and that it was their duty to return a general verdict for the defendants, to which decision and instruction the plaintiff excepted. The jury

thereupon rendered their verdict for the defendants; and judgment having been entered thereon, the plaintiff brought the case here on error.

Messrs. M. Blair and F. A. Dick, for the plaintiff in error, insisted that Luis Peralta's title was a perfect title under the Spanish and Mexican laws, and was protected by the treaty of Guadalupe Hidalgo, and that the confirmation of it, on the application of the sons, could not add to its strength, and could not take away the right of the daughters as co-heirs of their father; and, whether so or not, that the confirmation of the title enured to the benefit of those really entitled under the original grant, their heirs and assigns; and that as no devise from Luis to his sons was exhibited on the trial of this cause, that the plaintiff was entitled to recover under the hereditary right of Maria Teodora's children.

Mr. S. O. Houghton, contra, for the defendants, denied that the title of Luis Peralta was a perfect title; and contended that even if it was, the claim of the daughters could not avail in an action of ejectment against the award of the commissioners in favor of the sons of Luis, which gave them the legal title.

Mr. Justice BRADLEY delivered the opinion of the court.

To show that Luis Peralta's title was a perfect one the plaintiff produced in evidence the documents on which it was founded. They are set out in the bill of exceptions, and are the same that were before this court in the case of *United States* v. *Peralta*,* when the claim was confirmed. In that case the court intimated an opinion that the title was perfect for at least a part of the rancho (embracing a part of the premises now in question), but the point was not material in the case, because the claimants were equally entitled to a confirmation, whether their father's title was perfect or imperfect, legal or equitable; so that the intimation was

* 19 Howard, 343.

nothing but an *obiter dictum* of the judge who delivered the opinion. The title, in some of its aspects, again came before the Supreme Court of California, in 1864, in the case of *Minturn* v. *Brower*,* but, as both parties in that case deemed it their interest to concede the title to be a perfect one, the observations of the court on the subject cannot be regarded as precluding further examination. Such examination, exhaustive in its character, was given in 1870 by the same court on this identical title, and on the very point in question, in the case of *Banks* v. *Moreno*;† and the court, with all the documents before it which have been proven in this case, decided that the title was imperfect. If this were a case depending merely on the local land laws of California, we should be bound by that decision. But as the appellant, in case the title is adjudged a perfect one, invokes the guaranty stipulations of the treaty of Guadaloupe Hidalgo in his favor, independent of any action of the commissioners, the question ceases to be a mere local one, and devolves upon this court the duty of deciding it on its merits. An examination, however, of the reasoning of the Supreme Court of California, in the case last cited, satisfies us of its soundness. The point of the decision is, that the rancho of San Antonio never had any clearly defined boundary on the east. In this we concur with that court. The new claim now made to extend that boundary beyond the crest of the mountain, and to take in the eastern slope on the pretence that the Leandro Creek is the boundary to its ultimate source, is itself conclusive to show the uncertainty with which it has always been invested.

Luis Peralta's occupation of the rancho goes back to 1820. In that year he presented to Governor De Sola his petition for a grant, describing the tract as follows: "At the distance of eight leagues from the mission of San Josè, in a northerly or northwesterly course, along the coast, there is a creek named by the reverend fathers of the aforesaid mission, San Leandro, and from this to a little hill adjoining the sea-

* 24 California, 644.

† 39 Id. 233.

beach, in the same direction and along the coast—there may be four or five leagues more or less, or about—which place and land he asks and solicits may be granted to him that he may establish a rancho." Here, certainly, is nothing definite. Supposing the creek, San Leandro, as the point of beginning, and the little hill four or five leagues beyond, as fixed and ascertained points; and suppose the shore of the bay on the west to be meant for the boundary on that side; there is no hint of a boundary on the east. Nor is the quantity specified. Had that been done, perhaps it might have enabled a surveyor to fix a boundary by relation. This is the first and original document on which the title is based—the foundation of all the rest.

Upon this petition, the governor, by an order of August 3d, 1820, directs Captain Arguello to appoint an officer to put Sergeant Luis Peralta in possession of the lands petitioned for, and to "place landmarks on the four points of the compass, that it may be known at all times the extent of said lands which have been granted to him." Lieutenant Martinez being detailed for this service, on the 16th of August, 1820, reports his action as follows: "The boundaries which separate his land were marked to him, to wit: The deep creek called San Leandro, and at a distance from this (say about five leagues), there are two small mountains (*cerritos*). The first is close to the beach; next to it follows that of San Antonio, serving as boundaries, the rivulet which issues from the mountain ranges, and runs along the foot of said small mountain of San Antonio, dividing or separating the land; and at the entrance of the little gulch there is a rock elevating itself in the form of a monument, and looking towards the north. On both boundaries were fixed firm landmarks. . . I put in possession of the said land the above named Luis Peralta." Here we have, again, the two extremities of the tract along the bay, the creek San Leandro, at one end, and the rivulet that runs by the cerritos, at the other, and nothing more.

Next we have a complaint of the fathers of the San Francisco mission, that Peralta has been put in possession of a

portion of their land at the north end of the tract; the result of which is that Peralta is limited, on the north, to the Temescal Creek, or Willow Grove Creek, about a league and a half south of the cerritos. This occurred in September, 1820.

On the 18th of October an entry was made in the public records to the effect, that "this day was issued in favor of Sergeant Luis Peralta, by the governor of this province, the *certifying document* for the land which has been granted to him, as appears in this folio by the writ of possession, which the lieutenant of his company, Don Ignacio Martinez, gave him agreeably to an order issued by the government." We also have the certifying document itself of the same date, which adds nothing to the definiteness of the description.

Now the grant on which the appellant's counsel relies as conferring perfect title is not the certifying document above referred to, but the previous act of directing possession to be given to Peralta, and the actual delivery of possession to him. It is perfectly manifest that Peralta could not have been put into manual possession of several leagues of land. He could only have been put into possession of a certain part or parts in the name of all; and the exterior boundaries of the tract must have been indicated by language or monuments. But we have no evidence of any description of boundaries, or monuments to designate them, except the bay on one side, and the extreme limits of the tract along the bay. The interior line between those limits is entirely wanting in all the documents thus far presented. The title relied on, therefore, is necessarily imperfect, and requires some authoritative survey to distinguish what was intended to be granted from what remained in the public domain.

If we examine the remaining documents we shall not derive any material aid to help us out of the difficulty.

In October, 1820, Peralta addressed a remonstrance to the governor against the curtailing of his tract on the north. The only expression which this paper contains going to show what the tract was which Peralta supposed was granted to him, are the following: "The reverend father says to the

honorable governor that I do not need the land, and that I occupy a great extent; but I would represent that five leagues does not seem to me much *in a narrow tract, as you know it is, from the beach to the mountain range*, and that not all of it is good, as my lieutenant is aware, for great portions contain hills, creeks, and ravines, not fit for the purpose." This would seem to indicate that the rancho extended from the bay to the *foot* of the mountain.

In 1823, whilst the revolution was in progress, Peralta's captain, Arguello, had become Governor of California, and Peralta renewed his application to have the curtailment of his rancho annulled. He speaks of the tract which he originally applied for, as follows: "Which tract of land, though it appears to be large, is not so, for two reasons: 1st. Because it is situate on the coast, and *the space between the beach and the top of the mountain is too narrow.*" This would indicate the *top* of the mountain as his supposed boundary. The governor promptly made an order that the part which had been taken from him should be restored, and Lieutenant Martinez put him in possession accordingly; but nothing yet appears in the lieutenant's return or elsewhere to identify or fix the eastern boundary of the rancho, much less to fix it beyond the eastern slope of the mountain, as since claimed by the parties.

In 1827 some new regulations made it necessary for every proprietor to make a return of all lands occupied by him, with the titles annexed; and, in December of that year, Peralta made a return accordingly, describing his rancho as follows: "Along the coast of the mission of San José, in a northwesterly course, there is a deep creek called San Leandro, forming the dividing boundary of said mission of San José; thence to a small round mountain called San Antonio, the dividing boundary with my neighbor Francisco Castro; which space is a little over four leagues long, and, as it is the narrowest portion of the coast, it at most contains half a league in breadth from the mountain to the sea."

In 1844 Ignacio Peralta, on behalf of his father, whose title-papers he says were mislaid, petitioned the then gover-

nor, Micheltorena, to order the issue of a new title, extending to the top of the range, and accompanies his petition with a diseño, or rough map of the property. The governor ordered a grant to issue, as requested, extending to the top of the hill range, but not to prohibit the inhabitants of the *Contra Costa* from cutting wood for their own use. This order was not signed by the governor, and seems never to have been carried into execution. And this is the last of the documents on which the plaintiff, the now appellant, relied for a perfect title. Leaving out the proceedings of 1844, which are admitted to be imperfect, no human being can tell, from the language of the various documents, what was the eastern boundary of the rancho. It certainly would seem not to embrace the eastern slope of the hills, as is now claimed; but what it did embrace, or where it did run, is not ascertainable from any of the documents which have been adduced; and no parol testimony can aid this defect as regards the question now under consideration. Parol testimony was very properly adduced before the commissioners for the purpose of showing where equity required that the line should be run, in order to separate the rancho from the public domain. But it cannot make that title perfect which was not perfect before.

The Supreme Court of California, in *Banks* v. *Moreno*,* well observed: "The precise point under discussion is, whether or not the title of Peralta, as exhibited by the plaintiff, was a perfect title conveying the fee, and which invested him with absolute dominion over a specific parcel of land without any further action on the part of the United States; or whether, at the time of the cession of California, something remained to be done by the government which was necessary to invest Peralta with a complete legal title to the specific tract.

"In every complete grant conveying a perfect title it is essential that the thing granted be sufficiently described to enable it to be identified. In grants of real estate it is not

* 39 California, 239, 240.

always necessary to describe it by metes and bounds, or by a reference to actual or artificial monuments, nor by courses and distances. If the tract granted have a well-known name, and the boundaries of the tract known by that name are notorious and well-defined, a grant of the tract by its name would, doubtless, convey the title to the whole. In like manner, a grant describing the tract by reference to the known occupation of the grantor or another—or to another instrument containing a sufficient description of the premises —would be sufficient. In short, any description will suffice which identifies the land granted with such certainty that the specific parcel intended to be granted can be ascertained either by the calls of the instrument, as applied to the land, or by the aid of the descriptive portions of the grant. But it is equally certain that to constitute a complete and perfect grant to a specific parcel of land, it must, in some method, appear on the face of the instrument, or by the aid of its descriptive portions—not only that a specific parcel was intended to be granted, but it must also be so described that the particular tract intended to be granted can be identified with reasonable certainty. It would be a contradiction in terms to say that a specific tract was granted if there was nothing in the grant by which it could be ascertained with reasonable certainty what particular parcel was intended to be conveyed."

We entirely concur in these views; and, therefore hold that the title of Peralta was an imperfect title, and necessarily required confirmation in order to vest a full legal estate in private parties.

But it is contended that the confirmation of the title enured to the benefit of the parties really interested, both at law and in equity, and not merely to the benefit of the confirmees. This is undoubtedly true so far as the segregation of the lands from the public domain and the extinguishment of the government title or claim of title is concerned; but as it respects the legal estate, the confirmation enures to the confirmees alone. The eighth and ninth sections of the act require the claimant to show not only the original title, but his own title

by deraignment therefrom. Having established these the object of the inquest is attained. It satisfactorily appears that the land does not belong to the government, and the claimant appears to be the person *primâ facie* entitled to the legal title. Hence the thirteenth section goes on to declare that for all claims finally confirmed a patent shall issue to the claimant upon his presenting to the general land office an authentic certificate of such confirmation and a plat or survey of the said land duly certified and approved by the surveyor-general of California, whose duty it shall be to cause all private claims which shall be finally confirmed to be accurately surveyed and to furnish plats of the same.

This language is utterably irreconcilable with the hypothesis that the legal estate devolves, upon the confirmation, to any other parties than the confirmees. The patent is to be given to them, and the legal title cannot be separated from the patent.

It is true that the fifteenth section of the act declares that the decree of confirmation shall be conclusive between the United States and the claimants only, and shall not affect the interests of third persons. But this was intended to save the rights of third persons not parties to the proceeding, who might have Spanish or Mexican claims independent of or superior to that presented by the claimant; or the equitable rights of other parties having rightful claims under the title confirmed. The former class could still present their claims without prejudice within the time limited by the statute. The latter class, those equitably entitled to rights in the land under the title confirmed, were not to be cut off. Their equities were reserved. But they must seek them by a proceeding appropriate to their nature and condition. The legal title is vested in the confirmees, or will be when the requisite conditions are performed. It is not in these equitable claimants. They cannot maintain an action of ejectment against the confirmees, or those claiming under them; but must go into equity, where their rights can be properly investigated with a due regard to the rights of others. Had the daughters as well as the sons of Luis

Peralta gone before the commissioners, it is possible that they would have participated in the legal advantages of the confirmation. It may now be inequitable on the part of the sons to withhold from them a due share of their father's estate. But other rights may have grown up in the meantime, rights of *bonâ fide* purchasers and others ignorant of the equities existing between the original parties, which it would be unjust to disturb. These questions can be much better examined in an equitable proceeding than they can be in this action, in which, indeed, they are entirely inadmissible.

This view of the relative position of the parties is supported by the weight of authority. The case of *Wilson* v. *Castro** is directly in point to show the form of proceeding proper for those who claim against the confirmee. In that case the claim was confirmed to the widow, who really had no interest. The brother and sister of the owner, as his heirs at law, brought a suit in equity against the widow, and obtained a decree declaring her to be seized, as trustee, for their use. In *Estrada* v. *Murphy*,† the court says: "A court of equity will control the legal title in his [the confirmee's] hands, so as to protect the just rights of others. But in ejectment the legal title must prevail;" and it decided the case accordingly against the plaintiff in ejectment. In *Banks* v. *Moreno*,‡ the same conclusion was reached. In that case, as in this, the plaintiff claimed under the daughters of Luis Peralta; the defendant under the sons; and it was held that the action did not lie. The same view was taken by this court in *Beard* v. *Federy*,§ and *Townsend* v. *Greeley*.‖ In the last case the court uses this language: "The confirmation only enures to the benefit of the confirmee so far as the legal title is concerned. It establishes the legal title in him, but it does not determine the equitable relations between him and third parties."

The case is somewhat analogous to that of patents granted upon a pre-emption right for public land. Whilst the patent

* 31 California, 420.
† 19 Id. 272.
‡ 39 Id. 233.
§ 3 Wallace, 478.
‖ 5 Id. 326.

in that case confers the legal title, and admits of no averment to the contrary, the patentee may be subjected in equity to any just claim of a third party, even to the extent of holding the title for his sole use. The grounds of equitable jurisdiction in such cases are stated in the opinion of this court in the recent case of *Johnson* v. *Towsley*.*

The action of ejectment in this case cannot be maintained. The judgment of the Circuit Court is

AFFIRMED.

CHEW *v.* BRUMAGEN.

1 The assignee of a bond and mortgage who by the terms of the assignment holds it as collateral security for the payment of another debt, may under the 111th and 113th sections of the New York Code of Procedure sue, without making his assignor a party to the suit.

2. And if on such a suit, the debtor seek to recoup a certain amount from the mortgage debt, and judgment goes accordingly for less than the amount of the same, the original assignor cannot bring suit for any balance. He is concluded by the former proceeding.

ERROR to the Supreme Court of New Jersey; the case being thus:

The Code of Procedure of the State of New York enacts by its 111th section that:

"Every action must be prosecuted in the name of the *real party in interest*, except as otherwise provided in section 113."

The exception of this 113th section is that:

"An executor or administrator, *a trustee of an express trust*, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted."

And by the same section:

"A trustee of an express trust within the meaning of this

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* *Supra*, p. 72.

section, shall be construed to include a person with whom or in whose name a contract is made for the benefit of another."

Other sections of the code make provisions which may be referred to. Thus, the 117th enacts that:

"All persons having an interest in the subject-matter of the controversy, may be joined as plaintiffs."

The 118th that:

"Any person may be a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

The 119th enacts that:

"Of the parties to the action, those who are united in interest must join as plaintiffs or defendants, but if the consent of any one who should have joined as plaintiff cannot be obtained, he may be made a defendant."

This Code of Procedure being the law of New York, a certain Walker sold to one Chew a farm in New Jersey, taking Chew's bond for $3500, and a mortgage on the farm sold.

Soon after the bond was given Walker, the obligee, assigned the bond and mortgage to one Wood, as collateral security for the payment of $1700, and afterwards by another instrument of writing declared that the assignee held them as collateral security for the payment of $200 more. Wood, having thus become the assignee, brought suit on the bond in the Supreme Court of New York in 1853, against Chew, the obligor, and joined Walker as a defendant, he having refused to join as plaintiff; but process was not served upon Walker, nor did he appear. After his death, which occurred before the trial, on affidavit of his administratrix that he had died, the court ordered that the action should be continued against her as administratrix, but it did not appear that the order was ever served upon her. Chew, however, pleaded fraud in the sale of the farm, and claimed to recoup the damages he had sustained in consequence of the fraud,

and the case went to trial upon the issue tendered by this plea. On the trial, the jury found for Wood the sum of $2091, for which judgment was given, and which Chew immediately paid.

Pending the suit, however, Wood assigned the bond and mortgage to one Braisted, and, two days after the judgment which had been recovered was paid, Braisted and Walker's administratrix joined in assigning them to a certain Brumagen. A bill was then filed in chancery in New Jersey, at the suit of Brumagen, seeking to foreclose the mortgage, and Chew's administratrix set up in defence the suit in the Supreme Court of New York, the judgment therein and the payment of the judgment; asserting that the debt which the mortgage was given to secure was thereby satisfied, and consequently that the mortgage, which was only a security for the debt, had also been satisfied. But it was decided by the chancellor that the judgment in the Supreme Court of New York was no defence to the bill, beyond the amount actually recovered by Wood and paid to him; that inasmuch as neither Walker nor his administratrix were served with process in that suit, or appeared therein, the assignee was not concluded by the judgment, and the ruling of the chancellor was affirmed in the Court of Errors and Appeals. From that decree the case was brought here.

Mr. J. H. Reynolds, for the plaintiff in error:

The courts below held that the judgment in New York, between Wood and Chew, was inconclusive, because neither Walker nor his legal representative was in fact a party, and because under the law of New York, in order to conclude the rights of Walker or his estate by the judgment, he or his representative should have been brought in as a party. This was error. The expression "*real party in interest*," as used in the code, had long been well known and understood in equity courts, both in England and America, and it meant and intended the party in whom the entire title, whether legal or equitable, was vested, as contradistinguished from a nominal party.

Argument for the obligor.

Assuming then, that the judgment in *Wood* v. *Chew*, was conclusive and binding upon the personal representative of Walker, and his assigns, it merged the entire bond and the mortgage as collateral to it in the judgment, and the payment of the judgment has extinguished the debt. The suit was to recover the entire sum, principal and interest.

Chew, the defendant, set up a defence which as he asserted authorized him to recoup damages by reason of the fraud in the inception of the bond to its entire amount. Upon these issues the case was tried.

By the judgment he was permitted to recoup to an amount less than the whole, and the plaintiff took judgment for the remainder.

Mr. E. T. Green, contra:

The whole effect of the judgment in New York on the bond secured by the mortgage, was simply the reduction, *pro tanto*, of the amount due upon the bond, and Chew's estate has the right to look to the security for the balance.

It is a settled principle that to make a judgment binding and effective, the court must have jurisdiction over both the cause and all the necessary parties thereto, over the parties and things to be affected.*

Who were, then, the necessary parties to this suit in New York upon the bond, so that a judgment obtained there should be binding and conclusive? Wood was interested in the bond to the extent of $1900, it having been assigned to him as collateral security for that amount. Walker was interested in the same bond to the extent of $1600, that being the amount due to him after the satisfaction of the debt for which it was held by Wood as collateral, and Chew was interested in the bond to the extent of $3500, for that was the amount which he had bound himself to pay to Walker. It is apparent, therefore, that Wood, Walker, and Chew were the real parties in interest.

Now, the Code of Procedure of the State of New York requires that all parties in interest must be before the court

* Moulin *v.* Insurance Company, 4 Zabriskie, 222.

to perfect an adjudication. But if the person holding the legal title is the *only* real party in interest under the 111th section—which is in fact the argument of the other side—it was not necessary to enact that "an executor or administrator, or a trustee of an express trust," might sue, without joining those beneficially interested. A "trustee of an express trust," without doubt, has the legal title to a *chose in action*, held for his *cestui que trust*. If so, construing the section as the plaintiff does, he can sue in his own name as the real party in interest, and the 113th section becomes a nullity. So, too, with executors; they have the legal title, but not the beneficial interest. If they could maintain an action in their own name under the 111th section as the "real parties in interest," why enact the 113th section? It would have no other purpose than to confer on them a right and power which they already possessed. To give this construction to the term "real party in interest," must necessarily be violated a plain rule of statutory construction, by depriving an express exception of all meaning and purpose whatever. In fact, the effect of this construction would be to exclude from the operation of the 111th section those who had the "beneficial interest," and to include those only who held the "legal title." And this is absurd.

What, then, was the design contemplated by the 111th section? Evidently to establish a procedure, theretofore unknown to courts of common law, and to assimilate the practice in courts of law with respect to parties, with that which governed in courts of equity.

It would be strange, if one holding a bond as collateral security for one-half its amount, could bring suit upon it in the absence and without the knowledge of the pledgor, and by negligence or collusion, permit a defence to one-half the amount to prevail, on recovering the amount necessary to pay his own claim.

Mr. Justice STRONG delivered the opinion of the court.

Confessedly the judgment must have the same effect given to it in the courts of New Jersey as it has in the State of

New York, by the laws of that State, and either of the parties to it has, under the Constitution of the United States, a right to insist that such shall be its operation.

The question, therefore, is what was its effect in the State of New York?

If, by the assignment to him, Wood, the assignee of the bond and mortgage, was clothed with the legal interest therein, and if when he sued, Walker, the assignor, was not a necessary party to the suit, it is plain the judgment in the suit determined finally the amount of the debt for which the bond was given, and neither Walker nor his administratrix, nor any subsequent assignee of either of them can maintain that the bond was not wholly extinguished in the judgment. They were all represented by Wood, and they can claim only through him. On the other hand, if Walker was a necessary party to the suit, neither he nor those claiming under him by subsequent right can be concluded by the judgment.

By the 111th section of the Code of Procedure in New York, it was enacted that "every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113." The 113th section enacted thus: "An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust within the meaning of this section shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another." Doubtless the object of these provisions was to change the common-law rule that an action must be brought in the name of the party who has the legal right, and to substitute for it the rule in equity, but with considerable enlargement. This is manifest not only in the language of the statute, but in the construction which has been given to it by the courts of New York.

Had there been nothing more than the requirement of the 111th section, that every action must be brought in the name of the real party in interest, it might be that the pre-

cise rule in equity as to parties might have been intended. But this cannot be, in view of the other sections. Thus the 117th enacts that all persons having an interest in the subject-matter *may* be joined as plaintiffs. The 118th enacts that any person *may* be a defendant who has or claims an interest in the controversy adverse to the plaintiffs, or who is a necessary party to a complete determination and settlement of the questions involved therein. The 119th section enacts that those *united in interest* must be joined as plaintiffs or defendants, unless the consent of one who should have been joined as plaintiff cannot be obtained, when he may be made a defendant. The 113th section we have already quoted. That, as we have seen, enables a trustee of an express trust to sue in his own name without joining those who have a beneficial interest. It makes him the representative of the holders of mere equities. Who, then, is a trustee of an express trust within the meaning of the statute? It is plain that the law intended to class among such trustees others than those who, in equity, are regarded as technical trustees. It expressly declares that included among them shall be persons with whom, or in whose name, a contract is made for the benefit of another.

And the judicial decisions of New York have given a liberal interpretation to the description, "trustee of an express trust," in accordance with the apparent intention of the legislature. Thus, in *Cummings* v. *Morris*,* where notes had been assigned to the plaintiff upon his agreement to give to the assignor when the notes should be collected the amount thereof in stock, it was held that the assignee might sue alone, and this though the whole beneficial interest was in the assignor. In *Considerant* v. *Brisbane*,† where a promissory note had been given to the plaintiff, as executive agent of a firm, it was ruled that he might sue in his own name, because he was a trustee of an express trust. In *St. John* v. *The American Life Insurance Company*,‡ the plaintiff was the assignee of two policies of insurance under an agreement

* 25 New York, 625. † 22 Id. 389. ‡ 13 Id. 31

that, if one of the policies was paid, he would pay to the wife of the assignor part of the proceeds thereof, and pay her all he recovered on the other policy. It was held that he could sue alone. *Lewis* v. *Graham*,* was a case where an assignment of property had been made by a debtor in trust for certain creditors, and the assignee was empowered to pay them, returning the balance to the assignor; and it was held that the assignee might bring a suit in his own name, without joining the *cestui que trusts*. In *Slocum* v. *Barry*,† which was an action brought by persons appointed to receive subscriptions for the Troy University against one who had signed a general subscription agreement, it was ruled they were trustees of an express trust, and it was said "no formal or written agreement is necessary to create a trust in money or personal estate. Any declaration, however informal, which evinces the intention of the party with sufficient clearness, will have that effect."‡ A factor, or other mercantile agent, who contracts in his own name in behalf of his principal, is a trustee of an express trust within the meaning of the statute.

These, and other cases which might be cited, show how liberally the term "trustee of an express trust" has been construed in order to preserve, measurably, the common-law rule, that he who has the legal right is the proper plaintiff.

If, now, we turn to the case in hand it will be found not easy to see why, if Wood was not the real party in interest when he sued upon the bond, he was not at least a trustee of an express trust. The assignment of Walker to him, though expressly stated to be for a collateral security, gave him the entire legal interest. It enabled him to employ the entire bond, if necessary, for the payment of the assignor's debt to him. Had the assignment been without reference to the purpose for which it was made, it is not doubted that the assignee would have been the real party in interest, and

* 4 Abbott, 106. † 34 Howard's Practice, 320.

‡ Cummins *v.* Barkalow, 4 Keyes, 514; Reed *v.* Harris, 7 Robertson, 151; Burbank *v.* Beach, 15 Barbour, 326; Brown *v.* Cherry, 38 Howard, 352.

as such entitled to sue without joining the assignor, and this though in fact made as a collateral security. The legal effect of the transfer cannot be different because the purpose of it was expressed. It is to be observed that Walker's assignment was not of part of the bond, making Wood and Walker joint owners, as was the case in *Lewando* v. *Dunham*,* where the agreement was that the assignor should have half the judgment. Walker's rights were not concurrent with those of his assignee. They were subordinate. He had nothing to get until Wood's claim was entirely satisfied. By his assignment he substituted Wood in his place to demand and receive payment of the bond, and agreed to look to Wood for what remained after his notes were satisfied. Surely after the assignment he had no right to demand anything from Chew. How then had he any real interest in the bond? He had an interest in what Wood might collect by virtue of the bond, but that is a different thing from an interest in the bond itself. And Wood, by taking the assignment expressly as a collateral security, undertook to account to his assignor for the property assigned. He became the holder of the legal right under an express trust to hold the beneficial interest or the money collected primarily for himself, and secondarily for his assignor. If faithless to his trust, if he colluded with the obligor in the bond, he was responsible to his *cestui que trust*.

If then, as we think, Wood by the assignment became the trustee of an express trust, neither Walker nor his personal representative was a necessary party to the suit which was brought upon the bond. They were represented by the trustee, and the judgment which he recovered settled finally against them, and all claiming under them as well as against Wood, the amount recoverable. Such, in our opinion, was the legal effect of the judgment in the State of New York. And the plaintiff in error has a constitutional right to have the same effect given to it in the State of New Jersey. The learned court, therefore, erred in decreeing a foreclosure of

* 1 Hilton, 114.

the mortgage. The complainant's bill should have been dismissed.

DECREE REVERSED, and the cause remitted with directions to proceed

IN ACCORDANCE WITH THIS OPINION.

FRENCH v. EDWARDS ET AL.

1. Statutory requirements intended for the guide of officers in the conduct of business devolved upon them and designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected, are not usually regarded as mandatory, unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But requirements intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, are not directory but mandatory. The power of the officer in such cases is limited by the manner and conditions prescribed for its exercise.
2. The provision of a statute of California, that the sheriff, in selling property upon a judgment recovered by the State against the property for delinquent taxes, shall *only sell the smallest quantity* of the property which any purchaser will take and pay the judgment and costs, was intended for the protection of the taxpayer, and is mandatory upon the officer and not directory merely.
3. The recitals in a deed of a sheriff as to the manner in which he executed a judgment directing the sale of property are evidence against the grantee and parties claiming under him. Accordingly a deed of this officer reciting a sale of property under a judgment for taxes to the highest bidder, when he was authorized by the statute *only* to sell the smallest quantity of the property which any one would take and pay the judgment and costs, was held to be void on its face.
4. A bill of exceptions dated during the term at which the trial was had, though some days after the trial, is sufficient if it show that the exceptions were taken *at* the trial.

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

This was an action for the possession of a tract of land

Statement of the case.

situated in the county of Sacramento, in the State of California, "commencing at the corner of Main and Water Streets of the town of Sutter, at the east bank of the Sacramento River; running thence, in a northerly direction, up and along said river one-half of a mile; thence in an easterly direction one mile; thence southerly, at right angles, one-half mile; and thence westerly, at right angles, one mile, to the place of beginning, containing three hundred and twenty acres."

The plaintiff derived his title by deed from a certain R. H. Vance, dated March 1st, 1862. Vance acquired his title through sundry mesne conveyances from John A. Sutter, to whom a grant of land, including the premises in controversy, was made in June, 1841, by the then governor of the Department of California. This grant was, in March, 1852, submitted to investigation under the act of Congress of March 3d, 1851, to ascertain and settle private land claims in California, and was adjudged valid and confirmed by a decree of the Board of Commissioners created under that act, and by the District Court and the Supreme Court of the United States, to which the decision of the board was carried on appeal. A patent of the United States pursuant to the decree followed to the grantee, bearing date in June, 1866. As this patent took effect by relation as of the day when the proceedings for its acquisition were instituted, in March, 1852, all the title and rights, which it conferred to the premises in controversy, enured to the benefit of the plaintiff claiming under the patentee, although the deed to him was executed before the patent was issued.

The defendants asserted title to the premises under a deed executed by the sheriff of Sacramento County upon a sale on a judgment rendered for unpaid taxes assessed on the property for the year 1864, and the whole case turned upon the validity of this tax deed.

By an act of California, passed in 1861, the district attorneys of the several counties of the State are authorized and required to commence actions for the recovery of taxes assessed upon real property and improvements thereon,

which remain unpaid after a prescribed period.* Such actions are to be brought in the name of the people in the courts having jurisdiction of the amount claimed in the counties where the property is situated, against the parties delinquent, the real property and improvements assessed, and against all owners or claimants of the same, known or unknown. The manner in which process issued in such actions shall be served, actually upon the defendants if found, and constructively upon defendants absent from the county, and upon the real property and improvements, is specially prescribed. The answers which shall be allowed therein are also designated, and all acts required between the assessment of the taxes and the commencement of the actions are declared to be directory merely. Personal judgments are only authorized against defendants, who are actually served with process or who appear in the actions; but judgments can be rendered, upon service of process by posting, against the real estate and improvements for the taxes assessed, severally against each, if they belong to different owners and are separately assessed, and jointly against both if they belong to the same owners.

The act regulating proceedings in civil cases generally in the courts of the State, passed in 1851, and its several amendments, so far as they are not inconsistent with the special provisions of the act of 1861, are made applicable to proceedings under the latter act for the recovery of delinquent taxes, subject to the proviso that the sheriff in selling the property under the judgment "*shall only sell the smallest quantity that any purchaser will take and pay the judgment and all costs.*" By the act of 1851 the sheriff is required to sell property under ordinary judgments to the highest bidder.

A further act of the State, passed in May, 1862, in relation to suits of this character, provides for service of process by publication in a newspaper, as well as by posting, and authorizes the court, in enforcing the lien for taxes, to exer-

* Act to provide revenue for the support of the government of the State, approved May 17th, 1861, § 39, Statutes of California of 1861, p. 432.

Statement of the case.

cise all the powers which pertain to a court of equity in the foreclosure of mortgages, but at the same time it declares, that when the decree of the court contains no special directions as to the mode of selling, "*no more of the property shall be sold than is necessary to pay the judgment and costs.*"*

The judgment under which the sale was made for which the deed in suit was executed to the defendants, was rendered in October, 1865, in an action brought against R. H. Vance, who had transferred his interest to the plaintiff in March, 1862, and against John Doe, Richard Roe, and the real estate in controversy. It found that $113.75 of taxes were due on the property for the year 1864, and for that sum and the taxed costs, $37.65, and accruing costs, it directed that a sale of the property, or so much thereof as might be necessary, should be made in accordance with the statute, and the proceeds applied to pay the judgment and costs.

The deed of the sheriff did not show a compliance in the sale of the property with the requirements of the statutes mentioned. It did not show that the smallest quantity of the property was sold for which a purchaser would pay the judgment and costs, or that any less than the whole property was ever offered to bidders, or that any opportunity was afforded them to take any less than the entire tract and pay the judgment and costs. The recitals of the deed were that the sheriff sold the land described to "the highest bidder," and for "the largest sum bid for said property," language which imported that the entire tract was offered in one body, and that there were more than one bidder, and of course that different sums were bid for it in this form.

The court instructed the jury to find for the defendant; to which instruction the plaintiff excepted. Verdict was rendered on 3d of April, 1867; the bill of exceptions was signed and dated on the following 13th, and judgment on the verdict was entered on the following 26th, the court not having adjourned until after this date.

On error brought by the plaintiff the main question was

* Statutes of 1862, p. 520.

whether the departure of the officer from the requirements of the statutes rendered the sale invalid; a minor one—of practice—being to the bill of exceptions.

Messrs. E. Casserly and D. Lake, in support of the ruling below:

1. The bill of exceptions, not having been tendered and signed at the trial, forms no part of the record, and, therefore, cannot be considered on this writ of error.*

2. The recitals in the sheriff's deed show compliance with the statute. Every presumption is in favor of the deed, which was made as the result of an action at law, and bears no analogy to a conveyance by a tax collector. The "highest bidder" was the man who offered to pay the judgment and costs for the least quantity of land, and "the largest sum bid" was the amount of the judgment and costs in connection with the least quantity of land, in other words, the sum which involved the highest appraisement of the value of the tract purchased.

3. Policy and presumptions are in favor of purchasers under sheriff's deed.†

4. The statute of California is directory as to the mode of executing the writ, especially under the decisions of the Supreme Court of that State.‡

5. The remedy of the judgment debtor for a violation of law by the sheriff in the manner of executing the writ is by application to the court to set aside the sale. The sheriff is also liable in damages.§

* Walton *v.* United States, 9 Wheaton, 657; Ex parte Bradstreet, 4 Peters, 102; Sheppard *v.* Wilson, 6 Howard, 275; Phelps *v.* Mayer, 15 Id. 160.

† 4 Kent, *431, note a (p. 478, ed. 1866), note b, *431. See cases, note 2, *432; Cunningham *v.* Cassidy, 17 New York, 278; Neilson *v.* Neilson, 5 Barbour, 565, 568, 569.

‡ Blood *v.* Light, 38 California, 654; Hunt *v.* Loucks, Ib. 377; see also Jones *v.* Clark, 20 Johnson, *51; Crocker Sheriffs, § 506, referring to §§ 501 to 504 (last edition).

§ Jackson *v.* Sternberg, 20 Johnson, 51; Jackson *v.* Roberts, 7 Wendell, 88; Hooker *v.* Young, 5 Cowan, 269-70; Blood *v.* Light, 38 California, 654; San Francisco *v.* Pixley, 21 Id. 58, 59.

6. Recitals in a sheriff's deed, when not required in law, do not vitiate.*

Mr. S. O. Houghton (a brief of Mr. J. Reynolds being filed), contra, for the plaintiff in error.

Mr. Justice FIELD having stated the case, delivered the opinion of the court, as follows:

There are undoubtedly many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them, which do not limit their power or render its exercise in disregard of the requisitions ineffectual. Such generally are regulations designed to secure order, system, and dispatch in proceedings, and by a disregard of which the rights of parties interested cannot be injuriously affected. Provisions of this character are not usually regarded as mandatory unless accompanied by negative words importing that the acts required shall not be done in any other manner or time than that designated. But when the requisitions prescribed are intended for the protection of the citizen, and to prevent a sacrifice of his property, and by a disregard of which his rights might be and generally would be injuriously affected, they are not directory but mandatory. They must be followed or the acts done will be invalid. The power of the officer in all such cases is limited by the manner and conditions prescribed for its exercise.

These positions will be found illustrated in numerous cases scattered through the reports of the courts of England and of this country. They are cited in Sedgwick's Treatise on Statutory and Constitutional Law,† and in Cooley's Treatise on Constitutional Limitations.‡

Tested by them the sale of the sheriff in the case before us cannot be upheld. The provision of the statute, that he

* Jackson *v.* Jones, 9 Cowen, 191–2; Jackson *v.* Streeter, 5 Id. 530; Jackson *v.* Pratt, 10 Johnson, 386; Averill *v.* Wilson, 4 Barbour, 183; Armstrong's Lessee *v.* McCoy, 8 Hammond, 135; Blood *v.* Light, 38 California, 649.

† Pages 368–378.

‡ Chap. iv, pp. 74–78.

shall *only sell the smallest quantity* of the property which any purchaser will take and pay the judgment and costs, is intended for the protection of the taxpayer. It is almost the only security afforded him against the sacrifice of his property in his absence, even though the assessment be irregular and the tax illegal. The proceedings in the actions for delinquent taxes are, as against absent or unknown owners, generally *ex parte*, and judgments usually follow upon the production of the delinquent list of the county showing an unpaid tax against the property described. Constructive service of the process in such actions by posting or publication is all that is required to give the court jurisdiction; and the delinquent list certified by the county auditor is made *primâ facie* evidence to prove the assessment upon the property, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with. When the owner of the property is absent and no appearance is made for him, this *primâ facie* evidence is conclusive, and judgment follows as a matter of course. From the sale which ensues no redemption is permitted unless made within six months afterwards, except in the case of minors and persons laboring under some legal disability.

It is evident from this brief statement of the character of the proceedings and of the evidence permitted in these actions for delinquent taxes, that the provision in question is of the utmost importance to non-resident or absent taxpayers, and that in many cases it affords the only security they have against a confiscation of their property under the forms of law.

It is plain to us, upon a consideration of the different statutes of California upon this subject, that whilst the legislature of that State intended to prevent by the strictest proceedings the possibility of any property escaping its proportional burden of taxation, it also intended by the provision in question to guard against a wanton sacrifice of the property of the taxpayer.

In the present case, real property situated near the second

city in size of California, and the capital of the State, extending one-half a mile along the river Sacramento, and running back one mile, was sold, according to the recitals of the deed, in one body, for less than one-twentieth of its assessed value. It is hardly credible that a less portion than the whole of this large tract would not have been readily accepted and the judgment and costs, amounting to only one hundred and fifty-five dollars and forty cents, been paid, had any opportunity to take less than the entire tract been afforded to purchasers. Be this, however, as it may, it was incumbent upon the officer to afford such opportunity, and not to offer the whole tract at once to the highest bidder.

By the laws of Georgia, of 1790 and 1791, the collector of taxes in that State was authorized to sell the land of the delinquent only on the deficiency of personal estate, and then only so much thereof as would pay the amount of the taxes due, with costs. In *Stead's Executors* v. *Course*,* which came before this court, it appeared that a sale was made under these laws of an entire tract of four hundred and fifty acres, without specifying the amount of taxes actually due for which the land was liable; and the court said, Mr. Chief Justice Marshall delivering its opinion, that the sale ought to have been of so much of the land as would satisfy the tax in arrear; and if the whole tract was sold when a smaller part would have been sufficient, the collector exceeded his authority; and a plea founded upon the supposed validity of the title conferred by the sale could not be sustained.

By a law of New Hampshire, in force in 1843, it was provided that so much of the delinquent taxpayer's estate should be sold as would pay the taxes and incidental charges. In *Ainsworth* v. *Dean*,† which came before the Supreme Court of that State, it appeared that a fifty-acre lot was offered and sold in one body, and the court held the sale to be void, observing that no regard appeared to have been paid to the provision mentioned in the statute, and that no reason was given why the law was not complied with, "if,

* 4 Cranch, 403.

† 1 Foster, 409.

indeed, any reason could be considered as sufficient." A similar decision was made by the Supreme Court of Maine upon a similar clause in one of the statutes of that State.* And numerous analogous adjudications will be found in the reports.† They all proceed on the principle stated by the Supreme Court of Michigan, that "what the law requires to be done for the protection of the taxpayer is mandatory, and cannot be regarded as directory merely."‡

But it is contended that inasmuch as the sale in the present case was had under a decree of a court, the same presumptions must be indulged to sustain the action of the sheriff that would be entertained to uphold ordinary sales made by him under execution; and that he is not to be held to the same strictness in his proceedings that he would be if he had acted without the decree, solely under the statute. And several cases are cited from the reports of the Supreme Court of California, showing that all reasonable presumptions are indulged in support of sales on execution, and that such sales are not rendered invalid by reason of a want of conformity to statutory provisions as to the time, notice, and in some particulars, manner of the sale.§

But the obvious answer to this position is, that here there is no room for presumptions. The officer recites in his deed the manner in which he sold the property, and from the recitals it appears that the sale was made in conformity with directions which the statute, applicable to the case, in effect declares shall not govern sales upon judgments for delinquent taxes. Presumptions are not indulged to sustain irregular proceedings of this character, when the irregularity is manifest. Presumptions are indulged to supply the place of that which is not apparent, not to give a new character to that which is seen to be defective. The courses prescribed for the officer in the conduct of sales upon ordi-

* Loomis *v.* Pingree, 43 Maine, 311.

† Blackwell on Tax-titles, xv, p. 286.

‡ Clark *v.* Crane, 5 Michigan, 154.

§ San Francisco *v.* Pixley, 21 California, 58; Blood *v.* Light, 38 Id. 649; Hunt *v.* Loucks, Id. 375.

nary judgments under the act of 1851, and upon judgments for delinquent taxes under the act of 1861, are entirely unlike, and usually lead to different results. The general authority of the officer in judicial sales under the act of 1851, in the exercise of which he has a large discretion, is limited and defined when applied to sales under judgments for delinquent taxes, by the provision declaring that the sheriff in selling the property assessed "shall *only* sell the smallest quantity that any purchaser will take, and pay the judgment and all costs"—language which imports a negative upon a sale in any other way. The fact that in some cases no purchaser at the sale may, perhaps, be willing to take less than the whole property and pay that amount, does not dispense with the duty of the officer to comply with the law.

It is also contended that the recitals in the deed were not required, and therefore do not vitiate the deed, but the cases cited fail to support the position as broadly as here stated. They only show that a defective or erroneous recital of the execution, under which a sheriff has acted, will not vitiate his deed if the execution be sufficiently identified. Every deed executed under a power must refer to the power. As an independent instrument of the holder of the power it would not convey the interest intended. The deed of a sheriff forms no exception to the rule. But it is not essential that the execution, or judgment under which he acted, should be set out in full, or that his proceedings on the sale should be detailed at length. It is sufficient if they be referred to with convenient certainty, and any misdescription not actually misleading the grantee would undoubtedly be considered immaterial. But if the manner in which the power is exercised is recited, it being a proper matter for recital, then the recital is evidence, not against strangers, but against the grantee and parties claiming under him. Thus, if a sheriff should refer in his deed to an execution issued to him, and recite that in obedience to it and the statute in such case provided, he had sold the property to the highest bidder, it would be presumed that he had done his duty in the premises, given the proper advertisement, and

made the sale at public auction in the proper manner. But if he should go farther and recite that he had sold the property, not at public auction, but at a private sale, the deed would be void on its face, the sale by auction being essential to a valid execution of the authority of the sheriff. The vendee, by accepting the conveyance with this solemn declaration of the officer as to the manner in which his power was exercised, would be estopped from denying that the fact was as recited.*

It is unnecessary to express an opinion whether in any case of a sale on a judgment for taxes under the special provision of the statute of California, any presumption can be indulged that the officer had complied with its directions when the fact does not affirmatively appear. It is sufficient that the recitals in his deed of what he did with respect to the sale under consideration show that these directions were disregarded by him in that case. It may also be added that the return of the officer corresponds with these recitals.

The objection to the bill of exceptions, that it does not purport to have been tendered and signed during the trial, is not tenable. It shows that the exceptions were taken at the trial, and that is sufficient. It is dated during the term, and was in fact filed before the judgment on the verdict was entered.

JUDGMENT REVERSED, AND THE CAUSE REMANDED FOR A NEW TRIAL.

Mr. Justice MILLER, dissenting.

I do not agree that when the State obtains a judgment on the taxes due her by regular proceedings in the courts, that the sale under that judgment is open to all the rigid rules which apply to tax sales made *ex parte* and without the aid of such judgment. The judgment in this case is not assailed by the court, and the sale under it is a *judicial sale*, and entitled to all the presumptions which the law makes in favor of a purchaser at such a sale.

* Robinson *v.* Hardcastle, 2 Term, 252; Jackson *v.* Robert's Executors, 11 Wendell, 427-435; Den *v.* Morse, 7 Halsted, 331.

Statement of the case.

The law of California, while it required the sheriff to offer the smallest portion of the land which any one would take and pay the judgment and costs, undoubtedly contemplated that if no one would take any less than the whole of the land and pay the judgment and costs, that then it should be sold to the highest bidder. If this were not so, the State could not collect the taxes in half the cases, because the right of redemption left no inducement to bidders for a smaller amount than the whole.

It is, therefore, a fair presumption from the recital in the deed, that although the sheriff sold the land to the highest bidder, it was because no one would take less than the whole and pay the taxes and costs. And the recital that is made, as well as that which is omitted, are neither of them necessary to the validity of a deed made in a judicial sale.

RAILROAD COMPANY v. SOUTTER ET AL.

A railroad belonging to an incorporated company, and then under a first and second mortgage, was sold on execution and bought in by certain bondholders, whom the second or junior mortgage was given to secure. These purchasers organized themselves (as they were allowed to do by statute in the State where the road was) into a new corporation, and worked the road themselves, and for their own profit. After a certain time, the mortgagees under the first or senior mortgage pressed their debt to a decree of foreclosure; and to prevent a sale of the road the new corporation paid the mortgage debt. Subsequently to this, and on a creditors' bill, the sale made to the creditors under the second mortgage was set aside as fraudulent and void as against other creditors of the corporation which owned the road originally. *Held*, that no bill in equity would lie by the new corporation against the mortgagees under the first mortgage, to be paid back (as paid under a mistake of fact), what had been thus paid to them by the new corporation, or to be subrogated to their decree of foreclosure.

APPEAL from the Circuit Court for the District of Wisconsin.

The Milwaukee and Minnesota Railroad Company filed a bill in equity, in June, 1859, against Soutter (survivor of

Bronson), Russell Sage, and several other natural or individual persons, as also against the Milwaukee and St. Paul Railway Company, a corporation, to recover back certain large sums of money, amounting in all to $462,057.80, which they had paid into court, in December, 1865, in part liquidation of certain bonds held by the individual defendants, in this suit, which bonds had been issued by the La Crosse and Milwaukee Railroad Company in 1857, and were secured by a mortgage upon a portion of the railroad of the last named company. By way of alternative relief, the complainants prayed that they might be subrogated to the benefit of the decree of foreclosure of the mortgage, under which they had paid the money in question. The Milwaukee and St. Paul Railway Company were made defendants because they were the parties now in possession of the railroad and other mortgaged premises, and asserted themselves to be the owners thereof.

The facts, on which the complainants rested their claim, as set forth in their bill, were substantially as follows:

The La Crosse and Milwaukee Railroad Company, in 1858, after giving the bonds and mortgage above mentioned, gave two other mortgages, one on their road and one on their land grants, to secure certain other bonds issued by them. Failing to pay the interest coupons on the latter bonds, William Barnes, the trustee named in the mortgages, in May, 1859, sold the mortgaged premises, and all the franchises of the company, at public auction, and became the purchaser thereof, in trust for the bondholders, under the laws of Wisconsin, for the sum of $1,593,333. The *bondholders* thereupon, in May, 1859, *organized a new company by the name of the Milwaukee and Minnesota Railroad Company* (*the corporation now complainant in the case*), and Barnes conveyed the property to *the said company;* which thereafter conducted its business under and in pursuance of the charter of the La Crosse and Milwaukee Railroad Company, and immediately entered into possession of the said property and franchises.

But the prior mortgage of 1857 still subsisted on a portion of the road. Of this mortgage Bronson and Soutter

were the trustees, and they filed another bill to foreclose their mortgage, and, after protracted litigation (of which the part in this court is reported in *Bronson* v. *La Crosse Railroad Company*) obtained a final decree in 1865,* for the amount of interest coupons due on the bonds secured thereby, amounting to upwards of $450,000; which decree contained a proviso, that if the Milwaukee and Minnesota Railroad Company (the now complainants) should pay the amount of the decree before a sale of the mortgaged premises, the receiver (the road being then in the hands of a receiver) should deliver the property to them; that is to say, they had the usual privilege of redeeming the property by paying the decree. Thereupon, the complainants, on the 30th of December, 1865, paid into court the amount of $462,057.80, as above stated, the money being afterwards distributed to the holders of the various bonds secured by the Bronson and Soutter mortgage, who are the individual defendants in this suit. The money thus paid was paid by the complainants as purchasers, and claiming to be owners, of the property, upon an acknowledged incumbrance, and in relief of the property claimed.

Prior to this payment, however, certain judgment creditors of the La Crosse and Milwaukee Railroad Company filed in the United States District Court for Wisconsin a *creditor's* bill against the present complainants, alleging that the sale by Barnes was fraudulent and void, and praying that it might be set aside as such, and that the complainants might be enjoined from any further interference with the property or franchises of the La Crosse and Milwaukee Railroad Company. This suit had been pending for some considerable period, and was pending here on appeal—the case of *James* v. *Railroad Company*†—when the complainants paid their money into court, as before stated, and, some time after its payment and distribution, a decree was made on said creditor's bill, in accordance with the prayer thereof, and directing that the property should be resold, and the proceeds

* 2 Wallace, 283.

† 6 Wallace, 752.

applied, after payment of prior liens, *to the satisfaction of the judgments on which the creditor's bill was founded.*

The complainants accordingly now asked to have their money returned to them, on the ground that they paid it under a mistake. Their allegation was that they supposed they owned the property when they did not; that they supposed they were lifting an incumbrance off of their own property, when they were, in fact, lifting it off of property decided to belong to other parties. Their bill, speaking of the order allowing them to pay the amount of the decree, represented that the "said order was made by this court upon the understanding and theory entertained and believed by the judges of said court, and by your orator, and by all persons and parties interested in said cause, that your orator was the owner of said equity of redemption." And again, that "your orator paid said sum of money into this court, this court distributed the same, and the several persons hereinbefore named in that behalf received the same with, upon, and under, and only with, upon, and under, the belief, understanding, and theory, that your orator was the owner of the equity of redemption of the mortgaged premises and property in said cause, and that your orator was thereby paying and extinguishing a lien, charge, and incumbrance upon property owned by your orator as aforesaid." It further stated that "after paying the money, your orator for the first time discovered that the said foreclosure of the Barnes mortgage was fraudulent and void *as to the creditors of the La Crosse and Milwaukee Railroad Company, and as against the said last-named company*, and that, in fact and in law, your orator never was the owner of the said equity of redemption, and that the payment made by your orator into court, and the distribution of the said moneys and the receipt thereof by the said defendants was made, had, and received in mistake of *fact* as aforesaid."

The bill further stated that Russell Sage, one of the defendants, who received a large portion of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and had advised and encouraged the sale by

Argument in favor of the recovery.

Barnes, and participated in the organization of the complainants' company; and alleged further that the board of directors of the corporation complainant became totally changed, and was, at the time of such payment, wholly composed of persons who had not participated personally in the foreclosure of the Barnes mortgage; and that a large majority of the stockholders and directors at the time of the said payment were persons who had no interest at the time of the foreclosure, and no participation in the proceedings.

The defendants demurred to this bill, and on the hearing of the same the demurrer was sustained, and the bill dismissed. From the decree dismissing the complainants' bill, this appeal was taken.

Messrs. G. B. Smith and M. H. Carpenter, for the appellant:

Whether money paid under a mistake of *law* can or cannot be recovered back, it is certain that money paid under a mistake of *fact*, may be so recovered, and by suit in equity.* Mistake is one of the original heads of chancery jurisdiction; it is one of the great trinity of subjects from which all equity jurisdiction flows. No chancellor would be anything without fraud, accident, and mistake.

This money was paid under a mistake of fact. In almost every instance of the payment of money the ultimate determination rests upon some legal conclusion of the parties' right to, or interest in the subject-matter to be affected by such payment. The conclusion must rest upon facts to which it is attempted to apply the legal principle. And the rule is that if any one of a supposed complicated state of facts is unfounded, and that supposed fact induced, or tended to induce, the payment of the money, the party paying is entitled to relief. A man's title to property is always a question of law, after facts are ascertained. But if a man acts upon the belief that he is the owner of property and that belief is based upon a supposed state of facts, which if well founded, would in law make him the owner, and such

* Wilkins *v.* Woodfin, 5 Munford, 183.

supposed facts are misapprehended, the erroneous conclusion of ownership is a mistake of fact, not of law.

In this case the Minnesota company paid this money into court upon the supposition that it was the owner of the equity of redemption; that supposition being a legal conclusion based upon certain supposed facts, one being that the Barnes mortgage was a valid incumbrance. But unfortunately for the company *the supposed state of facts* did not exist. The mistake, therefore, under which the company acted in paying the money was a mistake in regard to the existence of certain facts; or in other words the company paid the money under a *mistake of fact.*

This view of the subject is established by the single consideration that this court, *which cannot make any mistake of law*, expressly declared in its opinion in *Bronson* v. *La Crosse Railroad Company*,* that the foreclosure of the Barnes mortgage had vested the equity of redemption in the Minnesota company. This tribunal knew all law when it made this decision just as well as it did when in the subsequent case of *James* v. *Railroad Company*,† it decided that the Minnesota company had no interest whatever in the premises.

The different conclusions reached by that court, first, that the company did own the property, and second, that it did not, were both sound in law as applied to the cases made by the respective suits.

The difference between the two, in other words, is a difference of fact, not of law. In the first suit, it appeared to the court that the case before mentioned did exist, and therefore the law said: "The Minnesota company is the owner of the equity of redemption." In the second case, the case was shown not to exist, and the law said, "The Minnesota company is not the owner of the equity of redemption." It was the mistake in regard to the facts that induced the court to say, *and induced the company to believe*, that the company was such owner. And the mistake of the company was the same as that made by the court; and as the court cannot make a mistake of law, it follows that the company *did not*

* 2 Wallace, 304.

† 6 Id. 752.

The true distinction between a mistake of law and a mistake of fact is well stated by the court in *Hurd* v. *Hall*,* and there can be no doubt that the money in this instance was paid under a mistake of fact.

An action for money had and received, is maintainable wherever the money of one man has, without consideration, gone into the pockets of another.†

Mr. J. W. Cary, contra, contended that on the face of the bill no case was made, and that judgment was rightly given on the demurrer for the defendants.

Mr. Justice BRADLEY, having stated the case, delivered the opinion of the court.

The bare statement of the claim, even presenting it in the language of the bill itself, seems to us sufficient to condemn it. Who are the complainants? Are they not the very bondholders, self-incorporated into a body politic, who, through their trustee and agent, effected the sale which was declared fraudulent and void, as against creditors, and made the purchase which has been set aside for that cause? Was it ever known that a fraudulent purchaser of property, when deprived of its possession, could recover for his repairs or improvements, or for incumbrances lifted by him whilst in possession? If such a case can be found in the books, we have not been referred to it. Whatever a man does to benefit an estate, under such circumstances, he does in his own wrong. He cannot get relief by coming into a court of equity. By the civil law, the possessor, even in bad faith, may have the value of his improvements, if the real owner choose to take them. The latter has an option to take them or to require their removal. But this rule has never obtained in the common law, nor in the system of English equity. One of the maxims of the latter system is, "He that hath

* 12 Wisconsin, 124.

† Hudson *v.* Robinson, 4 Maule & Selwyn, 478; Kelly *v.* Solari, 9 Meeson & Welsby, 54; Chatfield *v.* Paxton, note, 2 East, 471; Milnes *v.* Duncan, 6 Barnewall & Cresswell, 671; Townsend *v.* Crowdy, 8 C. B. (New S.) 477.

committed iniquity shall not have equity." And various illustrations of it are furnished by the books.*

But the complainants are wrong in asserting that the property was not theirs. It was theirs. Their purchase was declared void only as against the creditors of the La Crosse and Milwaukee Railroad Company. In other words, it was only voidable, not absolutely void. By satisfying these creditors they could have kept the property, and their title would have been good, as against all the world. The property was theirs; but, by reason of the fraudulent sale, was subject to the incumbrance of the debts of the La Crosse company. This was the legal effect of the decree declaring their title void. Therefore, they were, in fact, paying off an incumbrance on their own property when they paid into court the money which they are now seeking to recover back.

They are wrong also in asserting that they made the payment under a mistake of fact. If it was made under any mistake at all, it was clearly a mistake of law. They mistook the legal effect of transactions of which they were chargeable with notice. They were the persons for whose benefit the purchase was made, which was declared to be fraudulent. They were the principal defendants in the creditors' bill, upon which this decree was rendered. All the evidence in that suit had been taken when they made the payment in question. The cause was pending, on appeal, in this court. There was not a fact, therefore, of which they were ignorant. They had full and actual notice of all the transactions, and all the evidence on which the decree was ultimately founded.

All this appears from the statements of the bill in this case. We do not see how such a bill can possibly be sustained. The pleader who drew it evidently felt the force of these objections, and interjected some special circumstances for the purpose of showing that the case is distinguishable from the class of cases referred to. It is stated that Russell Sage, one of the defendants, who received a large portion

* See Francis's Maxims, Maxim VII.

of the money paid into court, was also a large holder of bonds under the Barnes mortgages, and advised and encouraged the sale by Barnes, and participated in the organization of the complainants' company. All these facts may be true, and on the demurrer to the bill must be taken as true; but they do not show, nor is it alleged, that Sage was personally a participant in the fraud which was committed in the sale under the Barnes mortgage. And if it were so alleged, can one fraud-doer obtain relief in equity against his *particeps criminis?*

Again, it is alleged that the board of directors of the complainant was totally changed, and was, at the time of such payment, wholly composed of persons who had not participated personally in the foreclosure of the Barnes mortgage; and that a large majority of the stockholders and directors at the time of the said payment were persons who had no interest at the time of the foreclosure, and no participation in the proceedings. This cannot alter the case. A corporation aggregate retains its identity through all the changes that may take place in its individual membership. This corporation, by its own statement, was adjudged to be the child of a fraudulent and corrupt transaction, and entered upon its career as purchaser of the property, with all the risks of its illicit origin and fraudulent purchase upon its head. Change of membership cannot change its rights. If it can, when is the change effected? How many, or what proportion, of the members must be changed?

It is needless to pursue the subject further. If the present individual stockholders of the complainants have been wronged that wrong cannot be redressed in this proceeding without violating the clearest principles of equity jurisprudence. The bondholders who received the money that was paid into court were entitled to that money. It was due them. Had not the complainants interposed they could have sold the property and realized their claim from the proceeds. How can they be called to account? The present owners of the road have purchased it (it is to be presumed) under the proceedings had in favor of the judgment credit-

ors. How can their title be disturbed by the complainants? What equity would there be in subjecting the property in their hands to an incumbrance from which it was free when their purchase was made?

The decree must be

AFFIRMED.

Mr. Justice FIELD, dissenting.

I differ from Brother Bradley in the construction of the bill in this case, and, therefore, differ from him in the conclusions to be drawn from the facts which it discloses. To my mind it presents a clear case, where money, amounting to over four hundred and sixty thousand dollars, was paid under a mistake of fact, into which the complainant was led by the decision of this court. And it would be, in my judgment, only administering simple justice to the company to compel the defendants to make restitution, or to give to the company the benefit of the decree in the foreclosure suit, upon which the money was paid. I, therefore, dissent from the judgment rendered.

The CHIEF JUSTICE and Mr. Justice MILLER also dissented.

COMMONWEALTH v. BOUTWELL.

Mandamus to the Secretary of the Treasury to compel him to deliver a warrant under the act of July 27th, 1861, directing him to refund to the governor of any State the expenses properly incurred in raising troops to aid in suppressing the rebellion, refused; the Secretary not having been asked to pay the money until the time limited in the appropriation act for the appropriation to take effect had expired; the right of the court to issue such order under other circumstances not being meant to be passed upon.

THIS was a petition by the State of Kentucky, through its constituted authority, asking this court, in the exercise of its original jurisdiction, for a writ of mandamus to com

Statement of the case.

pel the Honorable G. S. Boutwell, Secretary of the Treasury of the United States, to deliver to the said State a warrant to which it alleged itself entitled for expenses incurred in defence of the Union. The application was founded on the provisions of an act of Congress of July 27th, 1861,* directing the Secretary of the Treasury to refund to the governor of any State the expenses properly incurred in raising troops to aid in the suppression of the late rebellion; an act which, having been in force and acted on for several years, was repealed from the 1st July, 1871, by act of the 12th July, 1870.†

The petition, after setting forth the nature of the claim of Kentucky under this law, its approval by the Secretary of War and the accounting officers of the Treasury Department, alleged that the acting Secretary of the Treasury, on the 30th of June, 1871, caused to be issued and signed a warrant upon the Treasurer of the United States for the sum due the State, which, after being countersigned by the First Comptroller, was withheld from the relator by direction of the defendant.

The purpose of the petition was to obtain possession of this warrant, or, if this could not be done, to procure the delivery to the agent of the State of another warrant of like amount.

The court having ordered an alternative writ of mandamus, the defendant, in his return to it, among other things, denied that the acting Secretary of the Treasury, on the 30th day of June, 1871, or on any other day, caused to be issued the warrant as alleged in the petition, but asserted that as he was informed and believed, the facts in regard to the said pretended warrant were these, to wit:

That on said 30th June, one Fayette Hewitt, the agent of the State of Kentucky, about the close of business hours, applied to the chief of the warrant division in the office of respondent to prepare a warrant for the said sum claimed, and that the said chief declined to prepare such warrant at

* 12 Stat. at Large, 276. † 16 Id. 250.

that time, unless specially directed to do so by the acting secretary; that the agent applied to the acting secretary, who determined not to issue such warrant, on the ground that, by the act of July 27th, 1861, the matter was lodged specially in the discretion and judgment of the secretary himself, who was absent, and that the propriety of issuing the said warrant would be determined by him on his return; but that in view of the urgent request of the agent, and representations by him that, after said 30th of June, an appropriation made in the matter would be no longer available for the payment of the said claim, the acting secretary determined to confer with the officers of the department, and, if it was by them deemed advisable and proper, to prepare and sign a warrant on the said day in order to save the appropriation, which warrant should not be issued, nor registered, nor recorded, but should be retained in the office of the acting secretary subject to approval or rejection by the secretary on his return; that the acting secretary did accordingly call together the said officers at his office at about eight o'clock on the evening of said day, and that it was then and there agreed that a warrant should be prepared and signed, and should not be registered nor delivered, but should be retained and submitted to the secretary on his return, to be by him either approved and issued or cancelled, as he should determine; and that the said warrant was accordingly prepared and signed, and countersigned at the office of the acting secretary, and was so retained; that, on the secretary's return to Washington, about the middle of July, 1871, the warrant prepared was presented to him for approval by the acting secretary, in accordance with the understanding between him and the said agent, Hewitt, and that upon mature consideration the claim was rejected and the warrant cancelled by him.

And as a conclusion from these facts the defendant in the case denied that it was the legal right of the said Commonwealth of Kentucky to have the said warrant, and to receive the sum of money as alleged, and asserted that he, the said defendant, could not now deliver the warrant, conditionally

signed as aforesaid, as prayed for by the State of Kentucky, because the same was officially cancelled by him on rejection of the claim, and that he could not now prepare and deliver another warrant upon the Treasurer of the United States, because there was not now any appropriation out of which it could be paid.

To this answer the State of Kentucky demurred.

The case was argued at different times by *Messrs. J. Casey, A. A. Burton, and G. R. McKee, for the State of Kentucky; and by Mr. Akerman and Mr. G. H. Williams, Attorneys-General, Mr. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the Secretary of the Treasury.*

Mr. Justice DAVIS delivered the opinion of the court.

The answer of the respondent must, in the state of the pleadings, be taken as true, so far as its statement of facts is concerned, and, therefore, presents a complete defence against the demand of the writ.

It seems very clear, if no warrant were ever issued, and the condition of the law on the subject at the present time does not authorize the secretary to issue one, that the prayer of the petition cannot be granted. If it be conceded, as is argued by the counsel for the petitioner, that the decision of the accounting officers was conclusive upon the secretary, and that he should have paid the money, if applied to in proper season, still the fact exists that he was not asked to pay the money until the time limited in the law for the appropriation to take effect had expired. It will not do to say that the proceedings by the acting secretary vested a right in the State, which could not be defeated by the refusal of the secretary to approve the prepared warrant, because the validity of this proceeding depended entirely on the future action of the secretary. By the very terms of the agreement the warrant was to be retained in the office, subject to the approval or rejection by the secretary on his return to Washington. If the acting secretary had the power, in the absence of his principal, to sign and deliver the warrant—a

point on which we express no opinion—he did not choose to exercise it, but preferred in a matter of such consequence to leave the ultimate decision of the question to the secretary himself. Nothing fairer than the arrangement which was made could have been expected of a subordinate officer, anxious to preserve the rights of all the parties concerned, but unwilling to take the responsibility of paying so large a claim during the temporary absence of the head of the department, and nothing better for the interest of the State could have been looked for under the circumstances. As the appropriation was not available after the 30th of June, the papers were arranged to save it, if the secretary should on his return approve the warrant, and order it to be issued. On the contrary, if the transaction did not meet with his approbation the warrant was to be cancelled and held for nought. In this state of case, it is quite clear, that the warrant could have no effect without the secretary's approval, and as he decided adversely so soon as his attention was called to the subject, it follows, as a necessary consequence, that this warrant, if it had any life before, ceased to have it after this decision was made, and that the allegation in the petition, that the warrant was wrongfully withheld from the relator, is not sustained.

It is insisted, however, that the court should now order the Secretary of the Treasury to deliver to the relator another warrant in place of the one thus cancelled.

This proposition would present an important question, if there were money in the Treasury appropriated to pay this claim, but as Congress has seen fit to withdraw the appropriation for refunding to States expenses incurred in raising volunteers during the late rebellion, it is difficult to see on what ground it can be based. If it be conceded that the State had a right, on the 30th of June, 1871, to demand of the Secretary of the Treasury, in person, payment of the amount due her under the terms of the act of July 27th, 1861, and that the claim was in such a condition of settlement that he had no power to revise it, still it is manifest that he was justified in refusing compliance with a demand

made after that day. Congress, on the 12th of July, 1870, repealed the law on which this claim is founded. It cannot be supposed that this legislation was directed against the ultimate payment of the promised indemnity, for the repealing act did not go into operation until the 1st of July, 1871. For nearly a year, therefore, the appropriation was continued, and the constituted authorities of the States, were told to hasten their action if they wished to avail themselves of the benefits of the law. It was easy for them to see that if by delay, or from any other cause, they suffered the appropriation to expire without getting a settlement of their claims, that additional legislation would be necessary to furnish them relief, for the effect of the repealing law after the limitation expired, was not only to take the subject out of the control of the secretary, but to place it within the control of Congress.

These views dispose of this case. It is proper to observe, in conclusion, that many important questions are presented in the pleadings, and were argued at the bar, on which we have purposely refrained from expressing an opinion, and which are open for consideration in any future case that may arise, where they are applicable.

DEMURRER OVERRULED and a peremptory writ of mandamus DENIED.

STOCKWELL *v.* UNITED STATES.

1. The second section of the act of March 3d, 1823, amendatory of the act regulating the entry of merchandise imported into the United States from any adjacent Territory (3 Stat. at Large, 781), enacts: "That if any person or persons shall receive, conceal, or buy any goods, wares, or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise so received, concealed, or purchased." *Held*, 1st, that a civil action of debt will lie, at the suit of the United States, to recover the forfeitures or penalties incurred under this section; 2d, that the section is remedial, and not strictly penal in its character; and 3d, that the section applies to illegal importers as well as to accessories after the illegal importation.

Statement of the case.

2. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty requiring no future valuation to settle its amount, and it is immaterial in what manner the obligation is incurred, or by what it is evidenced.
3. The *fourth* section of the act of July 18th, 1866, entitled "An act further to prevent smuggling, and for other purposes," enacts: "That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise contrary to law, or shall *receive, conceal, buy*, sell, or in any manner facilitate the transportation, concealment, or sale of such goods, wares, or merchandise, after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court." The *eighteenth* section of the act declares "that nothing in the act shall be taken to abridge, or limit, any forfeiture, penalty, fine, liability, or remedy provided for or existing under any law now in force, except as *herein otherwise specially provided*." And the *forty-third* section of the act repeals several acts by name, and also "all other acts and parts of acts *conflicting* with or *supplied* by this act." *Held*, that the penalty of the second section of the act of 1823 is not repealed by this act of 1866. The design of this latter act was to punish as a crime that which before had subjected its perpetrator to civil liability, or quasi civil liability.
4. On the trial of a civil action brought by the United States under the second section of the above act of 1823, to recover against two members of a firm residing at Bangor, in Maine, double the value of certain shingles, the produce of one of the British Provinces, alleged to have been received, concealed, and bought by the defendants, knowing them to have been illegally imported, it is not error in the court to instruct the jury that the knowledge of another member of the firm, who was not sued, was to be deemed the knowledge of the defendants, and that if he knew at the time of the importation and reception of the shingles at Bangor, "that they were Province shingles, liable to duty and seizure, and illegally imported, it was not necessary for the government to prove that the defendants sued personally had actual knowledge of these facts, which were then within the knowledge of their partner;" and that "if with this knowledge on the part of the absent partner, that the shingles were illegally imported and liable to seizure, the firm, in the usual course of the business, received the shingles at Bangor, and they were disposed of by them, and the profits of the business divided among all the partners, the jury were authorized to find that the defendants received the shingles, knowing that the same were illegally imported and liable to seizure."

ERROR to the Circuit Court for the District of Maine.

The United States brought an action of debt, in the District Court for the Maine District, against D. R. Stockwell

and J. L. Cutter to recover (*inter alia*) double the value of certain importations of shingles alleged to have been illegally made, and received, concealed, or bought by the defendants, with knowledge that the shingles had been illegally imported into the United States.

The case, which depended partly upon statutes and partly upon facts and evidence, was thus:

On the 3d of March, 1823,* Congress passed an act the 2d section of which enacts:

"That if any person or persons shall *receive*, *conceal*, or *buy* any goods, wares, or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on *conviction* thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise so received, concealed, or purchased."

The 5th section of the act enacted that all penalties and forfeitures incurred by force of it should be sued for, recovered, distributed, and accounted for in the manner prescribed by the act of March 2d, 1799, entitled "An act to regulate the collection of duties on imports and tonnage." That act (by its 89th section) directs all penalties accruing by any breach of the act, to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector, within whose district a forfeiture shall have been incurred, is enjoined to cause suits for the same to be commenced without delay.

On the 18th of July, 1866,† Congress passed another act, entitled "An act *further* to prevent smuggling, and for other purposes." The 4th section of this statute enacted:

"That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise contrary to law, or shall *receive*, *conceal*, *buy*, sell, or in any manner facilitate the transportation, conceal-

* 3 Stat. at Large, 781.

† 14 Id. 179

ment, or sale of such goods, wares, or merchandise after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding $5000 nor less than $50, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court."

The same section declares that present or past possession of the goods by the defendant shall be sufficient evidence to authorize his conviction, unless such possession be explained to the satisfaction of the jury.

The 18th section declares:

"That nothing in the act shall be taken to abridge, or limit, any forfeiture, penalty, fine, liability or remedy provided for or existing under any law now in force, except as *herein otherwise specially provided.*"

And the 43d section, that all other acts and parts of acts conflicting with or supplied by it should be repealed.

It was with both these statutes on the statute-book that the action was brought.

One set of counts was to recover the *duties* on the importations. Another set to recover, under the 2d section of the statute of 1823, double the value of the goods received by the defendants.

The admitted facts of the case and the evidence tending to establish or disprove those disputed were thus:

The defendants, residents of Bangor, Maine, had long been engaged in the trading in shingles there. They were partners with one Chalmers, under the firm of D. R. Stockwell & Co. Chalmers was not proceeded against. In 1863, the firm made an arrangement with one Leman Stockwell, also of Bangor, to go to Aroostook County, in Maine, Fredericton and St. John, in New Brunswick, and there collect, buy, and forward shingles, to be consigned to the firm at Bangor; under circumstances as to the division of profit and loss between the firm and their agent, Leman Stockwell, which it was not here denied made them partners with

him in the shingle business done under this arrangement, but not in their general business.

No question was made in this court that the shingles, for the double value of which the suit was brought, were subject to duties if they were of Provincial growth.

In the years 1863–4, Leman Stockwell was in Aroostook County, in Maine, and on the St. John River, and at Fredericton and St. John, engaged in the business of collecting, buying, and forwarding shingles to Bangor, on the account of this arrangement, consigned to D. R. Stockwell & Co.

There was evidence tending to show that the shingles, for the importation of which these duties and penalties are claimed, were not of the growth and produce of the State of Maine, or of that portion of the State watered by the river St. John or its tributaries, but were the growth and produce of the province of New Brunswick. There was also evidence to rebut this, and tending to show that they were of the growth and produce of Maine, as aforesaid. There was evidence tending to show that the defendants did, in fact, know that the said shingles were of the growth and produce of New Brunswick, and there was evidence tending to show that they had no knowledge or information on the subject.

When these cargoes came to Bangor, in 1863 or 1864, they were reported at the custom-house, with the manifest and foreign clearances, and with certificates of their American origin. The collector required no duties on the cargoes, and no entries to be made, nor invoices, nor bills of lading, to be produced; but the cargoes were allowed to be taken into the shed of D. R. Stockwell & Co., and there to be housed, sorted, and sold, in the usual manner of the trade. They were treated, in fact, by all parties as not being subject to duties. The shingles were openly in the possession of D. R. Stockwell & Co., sometimes lying over a season unsold, and no attempts were made by either of the defendants, or by Leman Stockwell, or Mr. Chalmers, or by any person connected with them, to conceal the shingles, or in any way to interfere with the exercise of the power of seizing them;

and the revenue department did not claim duties, nor attempt to seize the shingles, and made no claim against the defendants, or any one connected with them, of any kind, until the commencement of this suit, which was April 2d, 1868, when the shingles had been sold for three or four years or so.

As to the counts under the act of 1823, to recover double the value of the shingles, the defendants presented the following, among other prayers for instructions:

1. That a civil action will not lie to recover the double value, and that the United States cannot recover both the double values and the duties under the declaration.

2. That the jury must be satisfied, as to each defendant, that he knew that the shingles had been illegally imported, and were liable to seizure, before he received, concealed, or bought the same; and that such receiving, concealing, or buying must have been with an intent to defraud the revenues.

The presiding judge ruled that a civil action would lie for the double values under the act of 1823; and thus instructed the jury:

"If Leman Stockwell, in the conduct and management of the shingle business so intrusted to him, and in the course of the business and for the common and joint benefit of himself and D. R. Stockwell & Co., went into New Brunswick, and there knowingly purchased and received on their joint account, shaved shingles, the growth and produce of New Brunswick, and afterwards, he, by himself or his agents, knowingly sent such shingles to his copartners D. R. Stockwell & Co., at Bangor, fraudulently documenting them as of the growth of Maine, so that thereby, in the regular course of business, they should be and were admitted and received into the country by the defendants as the growth of Maine, the shingles so imported were illegally imported and liable to seizure; and these defendants, being then his partners, are in this action *chargeable with and bound by this knowledge of Leman Stockwell*, if such was his knowledge, viz.: that the shingles were the growth of New Brunswick, liable to duty and seizure, being illegally imported. This being a civil action, and not a criminal prosecution, the knowledge *of one of*

the firm on these matters in this suit is to be deemed the knowledge of the defendants, his copartners in the shingle business."

"If Leman Stockwell, at the time of the importation and reception of the shingles at Bangor, knew that they were Province shingles, liable to duty and seizure, &c., *it was not necessary for the government to prove that the defendants personally had actual knowledge of these facts, which were then within the knowledge of their partner, Leman Stockwell.*"

"If with this knowledge, as before stated, on Leman's part, that the shingles were illegally imported and liable to seizure, D. R. Stockwell & Co., in the usual course of the business, received the shingles at Bangor, and they were disposed of by them, and the profits of the business divided as stated above, the jury are authorized to find that the defendants, being Leman's partners, received the shingles, knowing the same were illegally imported and liable to seizure."

When the charge to the jury was completed, the defendants' exceptions to the refusal of the court to give the instructions requested by them, and to the instructions given to the jury as above stated, were duly reserved to them.

The verdict was for the plaintiffs on the counts for the duties and the double values; and judgment going accordingly in the District Court, and this being affirmed in the Circuit, the defendants brought the case here on writ of error; no error being, however, assigned relating to the first-mentioned counts.

Mr. R. H. Dana, for the plaintiffs in error:

I. *A civil action of debt will not lie in this case in the name of the United States.* Where the proceeding is by the sovereign and for a penalty based on an offence, it must be by indictment or by information of debt. The statute of 1823 makes the penalty depend "on conviction thereof." It requires *knowledge* on the part of the offender. The offence and penalty are not based on the illegal importation, but on the knowingly concealing, &c., goods illegally imported. The penalty is the double value, not of the importation, but of the goods concealed.

The provisions of the 6th section, that the penalties and forfeitures "shall be sued for and recovered" in the manner prescribed by the act of 1799, do not necessarily give a civil action of debt. The words "sued for," "recovered," will embrace the information of debt and even an indictment for a penalty.*

The difference which we here insist on becomes material in this case; for the judge ruled that by reason of this being a civil action, the defendants were bound by an artificial presumption of knowledge from the knowledge of their partner, which they would not have been in a proceeding of a different character.

II. *The court erred in the ruling, that in a proceeding under the act of* 1823, *the knowledge required of the defendants was conclusively presumed from the knowledge possessed by their agent, being their partner in the transaction.*

1. The statute is entirely *punitive.* The loss the government sustains and its civil claim are for the *duties.* These they have recovered in this suit, of these defendants, and no error is assigned to defeat that claim. The utmost loss the government could sustain by the concealing of the goods liable to seizure, would be the value of the goods so concealed. The penalty inflicted by the statute is arbitrary and absolute, and has no reference to indemnification. The penalty is calculated upon the illegal act, and is double the value of the goods received or concealed, without reference to the duties or the value of the consignment. It is in fact purely a *punishment* for the illegal act of receiving and concealing smuggled goods.

The statute requires the existence of four things: *First*, an illegal importation by some person; *second*, that the goods be subject to seizure; *third*, a knowledge by the defendants of both these facts; and, *fourth*, a receiving, concealing, or buying of these goods by the defendants after importation, and after they have become subject to seizure. The *scienter* is the *sine qua non* of the offence. All persons

* Act 1808, ch. 8, sect. 6, 2 Stat. at Large, 454; Walsh *v.* United States, 8 Woodbury & Minot, 345.

are liable to buy smuggled goods subject to seizure. As simply *buying* these goods is made a sufficient *act*, the offence depends on the *scienter*.

This suit is not upon a partnership liability. The defendants could not have pleaded the nonjoinder of Chalmers in abatement. Each defendant was liable for his own act, and, although partners, the verdict might be against one and in favor of the other. If the ruling had been that the fact that Leman Stockwell was agent and partner should be weighed by the jury as a circumstance tending to show knowledge on the part of the defendants, no error could have been assigned.

2. The instructions do not make a proper distinction as to the character of the acts. If an agent or partner, in the course of his employment, *wilfully* does an act *in violation of law*, the principal or partner is not liable, except upon evidence that he authorized or adopted it. In the absence of proof as to actual authorization, or in determining whether he impliedly authorized it, the nature of the employment and of the act must be compared and the instructions should refer to the consideration whether the illegal act was one the doing of which may be fairly held to have been authorized from the nature of the employment, &c., &c. An absolute instruction, as this substantially was, that from the fact of an authority to buy and ship goods, an illegal act of shipping goods by a fraudulent invoice or description was in law the act of the partnership, and not open to rebuttal, would be incorrect.*

3. Such ruling would deprive the defendants of the benefit of the presumption that no one does an act prohibited by law. This presumption applies, of course, to the authorizing of an illegal act by another. It is, doubtless, a rebuttable presumption and cannot overweigh facts and is to be balanced with other presumptions; but the defendants should have the benefit of it in the scales.†

* McManus *v.* Crickett, 1 East, 106.

† Bennett *v.* Clough, 1 Barnewall & Alderson, 461; Sissons *v.* Dixon 5 Barnewall & Cresswell, 758; S. C., 8 Dowling & Ryland, 526, 9; Wilson

4. The instructions were erroneous in that they required the jury to find that the defendants knew of the illegal importations from the mere fact of a knowledge of their partner in a foreign country, without submitting to the jury the question whether the defendants authorized the act of their agent and partner, or did in fact know of it.

5. In all cases where knowledge is required by statute, the question of knowledge is left to the jury, with instructions as to presumptions and *primâ facie* proof, &c., if required; but, on balancing the presumptions arising on each side, and the facts proved, the jury must be satisfied of the knowledge. The cases of *Regina* v. *Dean*,* *Graham* v. *Pocock*,† and numerous others,‡ show that such is always the course taken whenever a principal or partner is charged for a penalty, or even to make good a loss, by reason of an act of an agent or partner, if knowledge on his part is an ingredient. So in civil suits where knowledge is required.§

6. Assuming the instructions to state the law correctly, that a principal or partnership may be liable for a tort of an agent or copartner, done without their knowledge and authority, in suits brought to recover compensation or indemnification for a loss suffered by a third person through the misconduct of an agent or partner—they were erroneous in assuming that the same rule applies in the case of a suit to recover a penalty.

7. It has been said by text-writers, in general terms, that a principal may be held responsible for the illegal or tortious act of his agent, even penally and criminally. But in all cases, when the principal or partner has not authorized the

Rankin, 6 Best & Smith, 208; Peachey *v.* Rowland, 13 C. B. 182; Lyons *v.* Martin, 8 Adolphus & Ellis, 512; Freeman *v.* Rosher, 13 Q. B. 780: Earle *v.* Rowcroft, 8 East, 126, 133.

* 12 Meeson & Welsby, 39. † Law Reports, 3 Privy Council, 345.

‡ Cooper *v.* Slade, 6 House of Lords Cases, 749; Regina *v.* Bradley, 10 Modern, 155; Rex *v.* Dixon, 3 Maule & Selwyn, 11; Rex *v.* Manning, 2 Com. R. 616; Attorney-General *v.* Riddle, 2 Crompton & Jervis, 493; Attorney-General *v.* Siddon, 1 Id. 220; United States *v.* Halberstadt, Gilpin, 262.

§ Lewis *v.* Read, 13 Meeson & Welsby, 834; Castle *v.* Bullard, 23 Howard, 172.

act or adopted it with knowledge, he is held liable only *to make good the loss, or to the extent of the consideration and benefit received.**

III. *The act of* 1823 *cannot be construed to apply to the illegal importers themselves.* It applies only to an offence committed after the goods shall have been the subject of a prior offence by which they shall have been "illegally imported," and have become "liable to seizure." There are, then, two acts: *first*, such an act of illegal importation as shall have made the goods liable to seizure; *second*, after the liability to seizure has attached, an act of receiving, concealing, or buying the goods, with knowledge of the illegal importation and liability to seizure. There are numerous and sufficient laws punishing by fine, penalty, or forfeiture, all forms of illegal importation. The act of 1823 does not assume to provide for the original offender, but only for the person who, with knowledge of that offence, shall aid in keeping the goods out of the reach of the government. In order to cover all the methods by which this may be done, the words "receive, conceal, or buy," are used. These words will cover every act of an accessory after the fact.

IV. The act of 1866 inflicts a penalty for the same offence set forth in the act of 1823. This penalty may be less than that of the act of 1823, as it may be a fine of only $50. It must therefore be held to supersede and repeal the penalty under the former act.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

The first error assigned is that a civil action of debt will not lie, at the suit of the United States, to recover the for-

* Smith's Leading Cases (Hare & Wallace), 329, 330; United States *v.* Halberstadt, Gilpin, 262; Turner *v.* N. B. R. R., 34 California, 594; Hutchins *v.* Turner, 8 Humphreys, 415; Morley *v.* Gaisford, 2 H. Blackstone, 442; McManus *v.* Crickett, 1 East, 106; Gordon *v.* Rolt, 4 Exchequer, 365; Sharrod *v.* L. & N. W. R R. 4 Exchequer, 580; Taylor *v.* Green, 8 Carrington & Payne, 316

feitures or penalties incurred under this act of Congress, and that the court below erred in holding that such an action might be maintained. It is not contended that an action of debt will not lie to recover duties, if the defendant be the owner or importer of the goods imported, for it is conceded that by the act of importing an obligation to pay the duties is incurred. The obligation springs out of the statutes which impose duties. Nor is it doubted that when a statute gives to a private person a right to recover a penalty for a violation of law he may maintain an action of debt, but it is insisted that when the government proceeds for a penalty based on an offence against law, it must be by indictment or by information. No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The act of 1823 fixes the amount of the liability at double the value of the goods received, concealed, or purchased, and the only party injured by the illegal acts, which subject the perpetrators to the liability, is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and as such it must be recoverable in a civil action.

But all doubts respecting the matter are set at rest by the fourth section of the act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed, and accounted for in the manner prescribed by the act of March 2d, 1799, entitled "An act to regulate the collection of duties on imports and tonnage." By referring to the 89th section of that act it will be seen that it directs all penalties, accruing by any breach of the

act, to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector, within whose district a forfeiture shall have been incurred, is enjoined to cause *suits* for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no *action* or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has frequently been ruled that debt will lie, at the suit of the United States, to recover the penalties and forfeitures imposed by statutes.* It is true that the statute of 1823 imposes the forfeiture and liability to pay double the value of the goods received, concealed, or purchased, with knowledge that they had been illegally imported, "on conviction thereof." It may be, therefore, that an indictment or information might be sustained. But the question now is, whether a civil action can be brought, and, in view of the provision that all penalties and forfeitures incurred by force of the act shall "be sued for and recovered," as prescribed by the act of 1799, we are of opinion that debt is maintainable. The expression "sued for and recovered" is primarily applicable to civil actions, and not to those of a criminal nature.

The second assignment of error is that the jury were instructed the knowledge of the defendants required by the statute in order to render them liable, was conclusively presumed from the knowledge of their agent, their partner in the transaction. This is hardly a fair exhibition of what the court did charge. The instruction given to the jury, *and all that is assigned for error*, was that "if Leman Stockwell, as a member of the firm, engaged in the shingle business at the time of the importation and reception of the shingles at

* United States *v.* Colt, Peters's Circuit Court, 145; Jacob *v.* United States, 1 Brockenbrough, 520; United States *v.* Bougher, 6 McLean, 277; Walsh *v.* United States, 3 Woodbury & Minot, 342; United States *v.* Lyman, 1 Mason, 482; United States *v.* Allen, 4 Day, 474.

Bangor, knew that they were Province shingles, liable to duty and seizure, and illegally imported, it was not necessary for the government to prove that the defendants personally had actual knowledge of these facts, which were then within the knowledge of their partner, Leman Stockwell." This is all which is embraced in the assignment. But the court added, that "if with this knowledge, as before stated on Leman's part, that the shingles were illegally imported and liable to seizure, D. R. Stockwell & Co., in the usual course of the business, received the shingles at Bangor, and they were disposed of by them, and the profits of the business divided as stated above, the jury were authorized to find that the defendants, being Leman's partners, received the shingles knowing the same were illegally imported and liable to seizure." Taking this together, and it must be so taken, for the exception was general to the instructions given, it cannot be said to justify the complaint that the court ruled knowledge of the defendants that the shingles had been illegally imported was conclusively presumed from the knowledge of Leman Stockwell, their partner. Qualified by what was added to the language alleged to be erroneous, it amounts to no more than that the jury might presume such knowledge from the facts stated.

To understand the force and merits of this instruction it is necessary to notice concisely the facts of which evidence had been given at the trial.

The defendants were lumber dealers resident in Bangor, in the State of Maine, and partners under the firm name of D. R. Stockwell & Co. In 1863 they made an arrangement with Leman Stockwell, a brother of one of the partners, that he should go to Aroostook County, in Maine, and to Frederickton and St. John, in the Province of New Brunswick, and there collect, buy, and forward shingles, consigned to the firm at Bangor. By the arrangement he became a partner with them in the shingle business, done in pursuance of it. He purchased shingles and shipped them from St. John to Bangor, consigned to the firm. Some of these shingles were of Provincial growth, known to Leman Stock-

well to be such. They were of course subject to duties. There was evidence that Leman Stockwell knew them to be subject to duties, and liable to seizure if the duties were not paid, and that with that knowledge he exported them from St. John, documented as of the growth of Maine, with the intent that they should be, and in order that they might be, imported as free from duty. When the cargoes came to Bangor, in 1863 or 1864, the defendants reported them at the custom-house with the manifest and foreign clearances, and with certificates, or affidavits, of their American origin. No duties were therefore exacted, nor were entries required to be made, or invoices, or bills of lading to be produced; but the collector allowed the shingles to be taken to the sheds of the defendants, where they were received, sorted, and sold in the usual manner of the trade. An account was kept of the business, and at the end of each year the profits were divided between Leman Stockwell and the members of the firm. When subsequently it was discovered, after all the shingles had been sold, that they were not of American origin, but were the growth of the Province of New Brunswick, and as such subject to duties, and consequently that they had been illegally imported, in fraud of the revenue laws, this action was brought, and at the trial the defendants requested the court to charge the jury "that they must be satisfied, as to each defendant, that he knew that the shingles had been illegally imported, and were liable to seizure, before he received, concealed, or bought the same; and that such receiving, concealing, or buying must have been with an intent to defraud the revenues." The court, however, instructed the jury, as we have above stated. It is now insisted that in thus charging the jury the court fell into error. The argument is rested mainly upon the assumption that the statute upon which the action is founded is a penal statute intended solely for the punishment of crimes against the revenue laws. It is not seriously denied that in civil transactions a principal or a partnership is affected by the knowledge of the agent or copartner, and that the knowledge of the agent is in law attributed to his principal, as

well as that of the partner to all the members of the firm; nor is it much insisted that a principal, or copartner, is not liable for the tort of an agent, or copartner, done without his knowledge or authority, in suits brought by third persons to recover compensation, or indemnity for loss sustained in consequence of the tort; but it is argued that the rule does not apply in the case of suits for a penalty. It becomes, then, material to consider the nature and purposes of the statute under which it is claimed the liability of the defendants has arisen. Is it strictly punitive, or is it remedial?

When foreign merchandise, subject to duties, is imported into the country, the act of importation imposes upon the importer the obligation to pay the legal charges. Besides this the goods themselves, if the duties be not paid, are subject to seizure and appropriation by the government. In a very important sense they become the property of the government. Every act, therefore, which interferes with the right of the government to seize and appropriate the property which has been forfeited to it, or which may hinder the exercise of its right to seize and appropriate such property, is a wrong to property rights, and is a fit subject for indemnity. Now, it is against interference with the right of the government to seize and appropriate to its own use property illegally imported that the statute of 1823 was aimed. It was to secure indemnity for a wrong to rights of property. The instant that goods are illegally imported, the instant that they pass through the custom-house without the payment of duties, the right of the government to seize and appropriate them becomes perfect. If any person receives them, knowing them to have been illegally imported, or conceals them, or buys them, his act necessarily embarrasses, if it does not defeat altogether the possibility of the government's availing itself of its right and securing the property. It is therefore manifest that the act of 1823 was fully as remedial in its character, designed as plainly to secure civil rights, as are the statutes rendering importers liable to duties. Its plain purpose was to protect the government in the unembarrassed enjoyment of its rights to all goods and

merchandise illegally imported, and it proportioned indemnity for infringement upon such rights to the loss which such infringement might cause. The amount recoverable is in proportion to the value of the goods abstracted or concealed, or bought, not at all in proportion to the degree of criminality of the act of receipt or concealment. Obviously there may be more guilt in concealing goods illegally imported, worth only one hundred dollars, than in receiving or concealing imported property worth ten times as much, but the statute measures the liability not by the guilt but by the value of the goods. It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of their single value. The act of abstracting goods illegally imported, receiving, concealing, or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. There are many cases in which a party injured is allowed to recover in a civil action double or treble damages. Suits for infringement of patents are instances, and in some States a plaintiff recovers double damages for cutting timber upon his land. It will hardly be claimed that these are penal actions requiring the application of different rules of evidence from those that prevail in other actions for indemnity. Regarding, then, an action of debt founded upon the act of 1823 as a claim for compensation or indemnity, it cannot be maintained upon authority or principle that the knowledge of the agent that the goods had been illegally imported is not presumptively the knowledge of the principal. That as a general rule partners are all liable to make indemnity for the tort of one of their number, committed by him in the course of the part-

nership business, is familiar doctrine. It rests upon the theory that the contract of partnership constitutes all its members agents for each other, and that when a loss must fall upon one of two innocent persons he must bear it who has been the occasion of the loss or has enabled a third person to cause it. In other words, the tortious act of the agent is the act of his principals, if done in the course of his agency, though not directly authorized. And this is emphatically true when the principals, as in this case, have received and appropriated the benefit of the act. These defendants received the shingles on their arrival at Bangor, presenting at the custom-house false certificates of their American origin. They paid no duties. They removed the property to their own lumber sheds, sold it, and divided the profits, retaining a portion for themselves. They have therefore now the proceeds of sale of property which was not their own, but which had been forfeited to the United States, and they have secured and they now hold these proceeds through the tortious act of their own partner, who planned and effected the fraudulent importation for their benefit and his. Can it be that they may derive a profit from his fraud and yet repudiate his act by asserting that his knowledge of the fraud does not affect them? If they can, the revenue laws will be found utterly ineffectual to protect the revenues of the government, and facilities to fraud will be abundant. If an irresponsible agent consigns to his principal foreign merchandise, documenting it as of American growth or production, it will always be difficult if not impossible to prove knowledge by the principal that the agent has perpetrated a fraud, and if that is necessary to give to the government a right of action under the act of 1823 against the principals who claim or conceal property thus brought into the country, the act utterly fails to secure a remedy for the mischief against which it was intended to guard.

The plaintiffs in error have argued that in all cases where knowledge is by statute made essential to liability, whenever an attempt is made to hold a principal or partner responsible

for a loss occasioned by the act of his agent, or partner, the question of his knowledge, apart from that of the agent, is submitted to the jury, or, in other words, the knowledge of the agent or partner is regarded as distinct from that of the principal. Numerous cases have been cited which it is supposed support this position. We do not find, however, that such is the doctrine of any of them. The case of *Regina* v. *Dean*, one of the cases cited, was an information for penalties under the Smuggling Prevention Act of 3 and 4 Will. IV, in which the defendant was charged, *inter alia*, with knowingly harboring goods imported and illegally unshipped without payment of duties. At the trial it appeared that a clerk of the defendant, with the assistance of two custom-house officers, had made false entries of the quantities of goods imported, but no knowledge of the fraud was brought home to the defendant, though it appeared that he had, or must have derived benefit from the fraudulent transaction. Lord Abinger told the jury that as the defendant had derived benefit from the fraud, they might infer knowledge on his part of the fraud having been committed, and that the case, under those circumstances, would be made out against the defendant. This was very like the instruction given, of which the plaintiffs in error complain. On a motion for a new trial, for misinstruction, the Exchequer refused a rule. It was conceded in the argument that when goods illegally imported, without payment of duties, are brought to the place of business of a trader, by an agent or clerk of his, known by him not to have paid any duty, and are found there, there is a fair inference he knew the duties had been evaded. The ruling in this case was in a criminal proceeding. The information was for a penalty, and not for the value of the goods. *Graham* v. *Pocock* is another case cited. There the defendants were sued, and one of them was held liable for unshipping and landing goods liable to forfeiture. No question of knowledge was mooted. And in none of the other cases cited do we find it held that in civil actions for indemnity, or for double or treble value, the knowledge of the agent is not to be imputed to the principal. Upon this

subject the opinion of this court has been outspoken, and it has been in accordance with the instruction given to the jury in the case before us.* The principle asserted in all those cases is that whatever an agent does, or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done, or said, by the principal; and may be proved, as well in a criminal as a civil case, in like manner as if the evidence applied personally to the principal.

The British statutes for the prevention of smuggling differ from our act of 1823. They are both penal and remedial. They impose not only a liability for treble value of goods illegally imported, upon assisting in unlading them, or knowingly harboring or concealing them, but also a stipulated penalty, in some cases leaving to the revenue commissioners to determine whether proceedings shall be instituted for the penalty or for treble the damages. Yet in both classes of cases the fraudulent act of a servant is held attributable to his master when the master has derived a benefit from the illegal importation.† We think, therefore, the charge of the court, of which the plaintiffs in error complain, was not erroneous.

It is next contended that section second of the act of 1823 cannot be construed to apply to the illegal importers themselves. As it extends only to acts done after the illegal importation and requires knowledge of its illegality, it is argued that it aims rather at accessories after the fact. We think, however, it embraces both. If it does not, then greater liabilities are laid on the accessory than on the principal. The mischief at which the act aimed was, as we have seen, embarrassing the right of the government to seize the forfeited goods. That may be done as well by importers as

* *Vide* United States *v.* Gooding, 12 Wheaton, 468; American Fur Company *v.* United States, 2 Peters, 364; and Cliquot's Champagne, 3 Wallace, 140.

† Attorney-General *v.* Siddon, 1 Crompton & Jervis, 220; Rex *v.* Manning, 2 Comyns, 616.

others. They may receive the goods or conceal them, and the wrong to the government is precisely the same, whether the concealment is by them or by others who were not the importers. It certainly would be most strange if the accessory to a wrongful act were held responsible therefor when the principal goes free. As was said in *Graham* v. *Pocock*, the question who is liable for receiving, concealing, or buying the shingles is a question to be determined irrespective of the inquiry who is the principal and who the accessory.

Finally, it is argued that the act of 1823 (section 2) was repealed by the act of July 18th, 1866, entitled "An act further to prevent smuggling, and for other purposes," the 4th section of which enacted "that if any person shall fraudulently or knowingly import or bring into the United States any goods, wares, or merchandise contrary to law, or shall *receive*, *conceal*, *buy*, sell, or in any manner facilitate the transportation or concealment or sale of such goods, wares, or merchandise after their importation, knowing the same to have been imported contrary to law, such goods, wares, and merchandise shall be forfeited, and he or she shall, on conviction thereof before any court of competent jurisdiction, be fined in any sum not exceeding five thousand dollars nor less than fifty dollars, or be imprisoned for any time not exceeding two years, or both, at the discretion of such court." The 43d section of that act enacted that all other acts and parts of acts conflicting with or supplied by it should be repealed. It is now insisted that the act of 1823 was in conflict with this act, or, if not, that it was supplied by it. Very clearly, however, this is not maintainable. The act of 1823 was, as we have seen, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States. The act of 1866 is strictly penal, not at all remedial. It was avowedly enacted *further* to prevent smuggling. Its design, therefore, was not to substitute new penalties which might be less onerous than the liabilities which former acts had imposed, but to punish as a crime that which before had subjected its perpe

trator to civil liability, or quasi civil liability. Hence it is cumulative in its character rather than substitutionary. If it has indeed only supplied what was enacted in 1823, then a party who conceals goods illegally imported and forfeited to the United States is subject to no more than a fine of five thousand dollars, with possible imprisonment, though the goods concealed and thereby wholly lost to the government may be worth one hundred thousand dollars, and this, though the declared purpose of the act was *more effectually* to prevent smuggling. This cannot be. There is no inconsistency between a remedy for an illegal act which works a private wrong, securing pecuniary compensation, and a statute making the same act a criminal offence and punishing it accordingly. Were there nothing more, then, in the act of 1866 than the 4th and the 43d sections, we should feel compelled to hold that the 2d section of the act of 1823 was not repealed by it. But the 18th section expressly enacted that nothing in the act shall be taken to abridge or limit any forfeiture, penalty, fine, liability, or remedy provided for or existing under any law then in force, except as in the act was specially provided. Certainly the act contains no special provision for the civil remedy given by the act of 1823. It merely imposes punishment and superadds criminality to that which before was a civil injury. It is said the court will not construe the statutes so as to give the executive department the option to treat two citizens who have done the same act affecting the same cargo in such manner that one statute may be applied to one, and a different statute to another, thus causing different consequences. But the true question is whether a wrongdoer may not be both civilly and criminally responsible for the same act, and it would not be strange if Congress had given the option to sue for double values, or to prosecute for the crime. The British statutes against smuggling, as we have stated, allow suits for treble value of goods illegally imported and harbored, or prosecutions for penalties, at the election of the government. Our opinion, then, is that the 2d section of the act of 1823 was not repealed by the act of 1866,

certainly not so as to affect this suit, brought to enforce liabilities incurred before the later act was passed.

JUDGMENT AFFIRMED.

Mr. Justice FIELD, dissenting.

I am compelled to dissent from the judgment of the court in this case.

I am of opinion:

1st. That the penalty of the second section of the statute of March 3d, 1823, is superseded and repealed by the act of July 18th, 1866;

2d. That if the penalty be not thus repealed, the provisions of the section are not applicable to importers; and,

3d. That if the penalty be in force, and the section be applicable to importers, the court below erred in ruling that the knowledge by the defendants required by the section to subject them to the penalty prescribed, could be conclusively presumed from the knowledge possessed by their partner.

The second section of the statute of 1823, under which the defendants are charged, is directed against the receiving, the concealing, and the buying of goods illegally imported and liable to seizure. It is not directed against anything else. Whoever does one of these three things, knowing that the goods have been illegally imported, and are liable to seizure under any act relating to the revenue, is subject, on conviction thereof, to a penalty of double the amount or value of the goods.*

The statute of July 18th, 1866,† in its fourth section, embraces not merely the three things designated in the statute of 1823, but several other things not thus designated in connection with the illegal importation of goods, or the disposal of such goods; and it prescribes for each a different penalty from that provided in the first statute. It is directed against the fraudulent importation of goods as well as against receiving, concealing, and buying them after they are thus

* 3 Stat. at Large, 781.

† 14 Id. 179.

imported. It further includes what is omitted in the statute of 1823, the selling of such goods and facilitating their transportation, concealment, and sale. It also declares that such goods shall be forfeited, and that every person who does any one of the things enumerated, shall, on conviction thereof, be subjected to a fine in a sum not exceeding five thousand dollars, nor less than fifty dollars, or to imprisonment not exceeding two years, or to both, in the discretion of the court. This is not all; the statute declares that present or past possession of the goods by the defendant shall be sufficient evidence to authorize his conviction, unless such possession be explained to the satisfaction of the jury.

The statute of 1866, as thus appears, is much broader in its provisions than the statute of 1823. It supplements the first statute by including as offences acts there omitted though equally connected as those designated with the disposal of goods illegally imported, and by providing a rule of evidence which renders it less difficult for the government to enforce the prescribed penalties. Had the statute of 1866 stopped here, there would be no pretence that it conflicts with the statute of 1823. But it does not stop here; it goes farther and changes the punishment for the offences designated. By the first statute, the receiving, concealing, or buying any goods by a person knowing them to be illegally imported and liable to seizure under any revenue act, is punishable by a forfeiture of double the value of such goods. By the second statute, the receiving, concealing, or buying goods after their importation, by a person knowing them to have been imported contrary to law, is punishable by fine and imprisonment, or both, at the discretion of the court. In both acts the same offences are designated, for the liability to seizure attends all illegal importation, and a knowledge of this latter fact necessarily includes the other. Both acts are penal; the first equally so as the last, for it does not go for the value of the goods, or indemnification to the government, but for the enforcement of a penalty upon a party offending in any of the particulars mentioned.

The very definition of a penal statute is that it is a statute which inflicts a penalty for the violation of its provisions. It is admitted in the opinion of the majority of the court that the offences designated in the act might be prosecuted by information or indictment, an admission which seems to me to be inconsistent with the position that the act is not penal. I have not been aware that an information or an indictment could be founded on any statute which was not penal in its character.

Different punishments being prescribed for the same offences by the two statutes, the latter statute must be held, according to all the authorities, to have superseded and repealed the penalty prescribed by the first statute. Such was the unanimous decision of this court in *Norris* v. *Crocker*, reported in 13th Howard, a case which does not differ from this in any essential particular. That was an action of debt to recover a penalty prescribed by the fourth section of the act of Congress of 1793, respecting fugitives from justice and persons escaping from the service of their masters. That section declared that any person who should knowingly and willingly obstruct or hinder the claimant, his agent, or attorney in seizing or arresting the fugitive from labor, or should rescue him from such claimant, agent or attorney when arrested pursuant to the authority given by the act, or should harbor or conceal him after notice that he was a fugitive from labor, should for each of these offences forfeit and pay the sum of five hundred dollars, to be recovered in an action of debt.

Pending the action brought under this section, Congress, in 1850, passed an act amendatory of, and supplementary to, the act of February, 1793, the seventh section of which embraced the same offences specified in the act of 1793, and created new offences and prescribed as a punishment for each offence fine and imprisonment upon indictment and conviction of the offender; the fine not to exceed a thousand dollars and the imprisonment not to exceed six months.

For obstructing the claimant or rescuing the fugitive, or harboring him, the act of 1793 declared that the offender

should "forfeit and pay" for each offence a specified sum, and authorized its recovery by civil action. For the same offences of obstructing the claimant, rescuing the fugitive, or harboring him, as well as for offences of a similar character, the act of 1850 declared that the offender should be punished by fine and imprisonment, and that this punishment should be enforced upon indictment and conviction.

The act of 1850 contained no repealing clause in terms, yet the court held unanimously that it was repugnant to the act of 1793, and necessarily operated as a repeal of the penalty of that act. That case is not distinguishable in principle from the case at bar. The act of 1793, like the act of 1823, prescribed a penalty recoverable by civil action. The act of 1850, like the act of 1866, prescribed, for the offences designated, fine and imprisonment enforceable by indictment.

It was urged with great force in the case of *Crocker* v. *Norris*, on the part of the government, that the act of 1850 only added cumulative remedies, and was enacted to give greater facilities to the master of the slave in securing the fugitive; that it was, as its title indicated, amendatory of and supplementary to the original act, and was designed to carry more effectually into execution a provision of the Constitution, and it could not be supposed that Congress having this object in view intended to repeal the act of 1793, and wipe out liabilities incurred under that act, and thus deprive the master of rights of action in suits then pending; but the court thought otherwise, Mr. Justice Catron delivering its opinion, and observing that, "as a general rule it was not open to controversy, that where a new statute covers the whole subject-matter of an old one, adds offences, and prescribes different penalties for those enumerated in the old law, that the former statute is repealed by implication, as the provisions of both cannot stand together."

The court did not seem to think that the fact that the penalty designated in the act of 1793 was enforced by a civil action, and the penalty designated in the act of 1850 was enforced by indictment, made any difference. In principle

the mode of enforcement could not alter the substantial and important fact that the penalty for the same offence was changed, and that by the change the sovereign power which created the original law had declared that its penalties should no longer be enforced.

If there were no other provisions of law than the two sections mentioned of the acts of 1823 and 1866 before us, I should not hesitate to repeat the language of this court in *Norris* v. *Crocker*, that it is not open to controversy that the latter act repeals the penalty prescribed by the former. But there is another provision of law which removes, as it appears to me, all possible doubt as to the intention of Congress. The forty-third section repeals several acts by name, and also "all other acts and parts of acts conflicting with or supplied by this act."

Now, in my judgment, it does not admit of any question that an act, like that of 1866, which declares that certain specified offences shall be punished by fine or imprisonment, or both, does conflict with an act like that of 1823, which provides that the same offences shall be punished by a forfeiture of double the value of the goods in respect to which the offences are committed. And it appears to me that I have pointed out several particulars in which omissions of the act of 1823 are supplied by the act of 1866.

The eighteenth section of the act of 1866, which is supposed by the majority of the court to preserve the penalty of the act of 1823, does, in my judgment, when read in connection with other provisions, have directly an opposite effect. That section declares "that nothing in the act shall be taken to abridge, or limit, any forfeiture, penalty, fine, liability, or remedy provided for or existing under any law now in force, except as *herein otherwise specially provided.*" This means, as I read it, that the same punishments prescribed by law then in force, without abridgment or limitation, that is in kind, and extent, and mode of enforcement, shall continue to exist, unless for such offences other penalties and remedies are specially provided; and this is equivalent to declaring that such punishments and remedies

shall not continue to exist when other special provisions are made on the subject.

But if I am mistaken in this construction, and Congress did actually intend this strange and anomalous legislation, that for the offences designated there should be three distinct punishments inflicted: 1st, by a forfeiture of double the value of the goods illegally imported; 2d, by a forfeiture of the goods themselves; and, 3d, by fine, which may go from fifty dollars to five thousand, or by imprisonment, which may extend to two years, or by both; then I contend that the act of 1823 does not apply to the defendants in this case. They were the importers of the goods for double the value of which they are sued; and the section applies only to offences committed after their importation. It is directed against the offences of receiving, concealing, or buying the goods with knowledge of their having been illegally imported and being liable to seizure. There are numerous other acts providing punishment for all forms of illegal importation. This act was only intended to reach those who, after the original offence was committed, in some way aided, with knowledge of that offence, in keeping the goods out of the reach of the government. The language used is inappropriate and inapt to describe an act of the illegal importer. It is limited to an act done after the illegal importation. It requires knowledge of such importation, which, as counsel observes, it would be absurd to require of the illegal importer himself. He receives his own goods in the act of importation, not afterwards; he cannot buy them of himself; and if he conceals them it is only an act in execution of the original offence.

The language is appropriate to describe an offence, which is in its nature accessorial after the fact, and counsel have cited several instances of legislation, where similar language has always been held applicable only to accessories after the fact. Thus in the Crimes Act of 1790* it is enacted "that if any person shall receive or buy any goods" stolen from

* 1 Stat. at Large, 116, sec. 17.

another, "knowing the same to be stolen," he shall be subjected to like punishment as in case of larceny. No one has ever supposed that this language was applicable to the act of the original offender. So in the General Post Office Act of 1825* it is enacted, in the forty-fifth section, "that if any person shall buy, receive, or conceal" any article mentioned in a previous section, "knowing the same to have been stolen or embezzled from the mail," he shall be fined and imprisoned. It has never been thought that the purchaser, receiver, or concealer of the stolen property, with knowledge of the larceny, was any other than an accessory after the fact.†

So in the act of 1825, more effectually to provide for the punishment of certain crimes,‡ it is enacted that if any person upon the high seas shall "buy, receive, or conceal" any money, goods, bank-notes, or other effects, subject to larceny, feloniously taken, or stolen from another, "knowing the same to have been taken or stolen," he shall be deemed guilty of a misdemeanor and be punished by fine and imprisonment. And the act shows, on its face, that the language was intended only for the offence of an accessory, for it declares that the person offending may be prosecuted, although the principal offender chargeable or charged with the larceny shall not have been prosecuted or convicted.

In all these cases the receiver, the concealer, and the buyer are accessories after the fact, and the language would be inappropriate if applied to them in any other character; and in the present case it would be extending, in my judgment, the construction of a penal statute beyond all precedent to apply these terms, in the act of 1823, to the original importers.

The act which the illegal importer is likely to do, after the importation, is to sell the goods, but the statute of 1823 does not make the act of selling them an offence. The statute of 1866 does, however, remedy this defect, which is

* 4 Stat. at Large, 114.

† U. S. *v.* Crane, 4 McLean, 317; U. S. *v.* Keene, 5 Id. 509.

‡ 4 Stat. at Large, 116, sec. 8.

one evidence, among others, that it was intended to supply the deficiencies of the original act, and thus supersede it.

The declaration in the case in the counts, upon which double the value of the goods is charged, does not allege that the defendants illegally imported the goods, but that such importation was made by persons unknown, and that the defendants, knowing of the illegal importation, received, concealed, and bought them. Yet it appears that the entire action of the court on the trial, and its instructions to the jury, proceeded upon the supposition that the defendants and the absent partner were the owners of the goods, and that the defendants made the importation. It is expressly stated in the bill of exceptions that no attempts were made by either of the defendants, or any person connected with them, to conceal the property imported, or in any way to interfere with the exercise of the power of seizing it. The case rests, therefore, entirely upon the alleged acts of receiving and buying.

If the penalty of the act of 1823 be not superseded and repealed, and the words used in that act are susceptible of the application made of them, I am still of opinion that the judgment should be reversed, for the ruling of the court below, that the knowledge of the illegal importation by the defendants, required by the act, was to be conclusively presumed from the knowledge possessed by their partner. The instruction of the court clearly went to this extent. After stating hypothetically to the jury that if certain matters were done by Leman Stockwell, the shingles sent by him from New Brunswick to Bangor were illegally imported, the court instructed them as follows:

"This being a civil action, and not a criminal prosecution, the knowledge of one of the firm on these matters in this suit, is to be deemed the knowledge of the defendants, his copartners in the shingle business.

"If Leman Stockwell, as a member of the firm engaged in the shingle business, at the time of the importations and reception of the shingles at Bangor, knew that they were Province shingles, liable to duty and seizure, and illegally

imported, it is not necessary for the government to prove that the defendants personally had actual knowledge of these facts, which were then within the knowledge of their partner, Leman Stockwell."

Here the court tells the jury that the knowledge of one of the firm, Leman Stockwell, is to be deemed the knowledge of the defendants, and that it is not necessary for the government to prove that the defendants, personally, had actual knowledge of the facts, which were within the knowledge of their partner.

If this language does not amount to an instruction that knowledge of the illegal importation by the defendants is to be conclusively presumed from the knowledge of their partner, it is difficult to perceive what else can be made of it.

The ruling of the court in this respect goes against all notions which I have hitherto entertained of the law on the subject of imputed guilty knowledge, and my sense of justice revolts against its application. I cannot reconcile to either law or justice the doctrine that a person can be charged and punished for knowingly doing a thing of which he never had any actual knowledge; and that in a proceeding to enforce penalties imposed for knowingly doing a thing charged, the knowledge, which is an essential ingredient of the offence, can be conclusively imputed to him from its possession by another.

The claim in question, it is to be remembered, is not made for the forfeiture of the goods; that would follow from the act of illegal importation, without reference to the parties engaged. Neither is it made for the duties, for the right to them accrues to the government upon the importation. The claim is not for indemnification, but for penalties prescribed.

The principle upon which partners are made liable for the acts of each other is that each partner is the general agent of the partnership in all matters within the scope and objects of the partnership business. The liability and the limitations upon the liability are measured by the nature of the business of the partnership. The acts of one partner beyond that

business will not bind the firm, for his agency goes not to that extent.

Nor will any act of a partner, done in violation of law, bind his partners unless they originally authorized or subsequently adopted it. Such authorization and adoption are not matters to be presumed from the relationship of the partners to each other, but are to be proved like any other matters done outside of the scope of the partnership business, for which liability is sought to be fastened on the firm. It will often happen, owing to the position of the parties, the nature of the business, and the character of the act, that this authorization or adoption will be inferred from very slight additional circumstances. Thus in some cases it might be inferred that the importation of goods by one partner, without payment of the duties thereon, was approved by the other partners from the management taken by each partner in the affairs of the firm, and the knowledge which such management must give of the payments made and goods received. A jury might sometimes even be justified in inferring authority or approval of the other partners from their silence. But very different evidence would be required if, when one partner made the importation, the other was absent from the country or was a silent partner, taking no part in the management of the affairs of the firm. In the present case the importation of the shingles by the defendants might have been consistent with entire ignorance that they were the product of New Brunswick, and therefore subject to duties. It does not appear that there was anything in their shape or character which would inform the defendants of their foreign origin, or anything which would excite the suspicions, even, of the defendants on the subject. They were brought to Bangor accompanied by the proper documentary evidence that they were of American origin.

Leman Stockwell, who was engaged in purchasing shingles in Maine and New Brunswick, was entitled to half the profits of the partnership, and the illegal transaction may have originated with him, to enlarge his share of the profits, and all knowledge that the shingles were of foreign origin

may have been concealed by him from the defendants. Many motives may be suggested for such concealment. His designs may have been frustrated or endangered by communicating them to his partners. Be this, however, as it may, certain it is that such knowledge by them cannot be presumed from the naked fact of their partnership with him. Presumptions are conclusions which the law draws from a particular state of facts, and the law does not draw from the mere fact of partnership the conclusion that one partner approves or is cognizant of the illegal acts of the other, but, on the contrary, the presumption of innocence, which every one may invoke for his protection when accused, repels such conclusion. The doctrine of imputed knowledge, and consequently of imputed guilt in such cases, finds no support in principle or authority. The adjudged cases all speak another language without a dissentient voice. Even the case of *Regina* v. *Dean*,* cited in the opinion of the majority, does not militate against this view. That was an information for penalties for unshipping goods without payment of duties, knowingly harboring them, and removing them from a place of security. Under a practice of the custom-house the goods had been received without payment of the duties, an entry of the contents of the cases containing the goods having been made in a book kept for that purpose by the officers of the customs. A clerk of the defendant had removed the leaves in the book containing the entry and substituted other leaves containing false entries of the goods. There was no direct evidence that the defendant had been previously concerned in tampering with the book, nor was knowledge of the fraud brought directly home to him; but it appeared that he had, or must have, derived benefit from the fraudulent transaction. Under these circumstances the court told the jury that as the defendant had derived a benefit from the fraud, they might infer knowledge of the fraud on his part. On motion for a new trial, Baron Alderson, one of the judges, said:

"I think there was evidence for the jury of the defendant's being acquainted with this fraud.

* 12 Meeson & Welsby, 39.

"He obtained possession of goods for which less than the proper duty appeared to have been paid. If that were not so, it was incumbent on him to show that he paid the full amount of duty. He must have had books to show the price of the goods, and the amount of duties payable in respect of them; and those books he does not produce. He derives benefit from the fraud, and therefore the jury were warranted, in the absence of evidence to the contrary, in inferring that he had a knowledge of it."

It is not perceived that this case, where the question of knowledge was left to the jury, can give support to the ruling in the case at bar, which was substantially, as I understand it, that knowledge must be conclusively presumed from the fact of copartnership.

The case of *Graham* v. *Pocock*, recently decided by the Privy Council in England, is not without bearing upon this case, for it decides that one partner cannot be subjected to a penalty for an illegal entry by his partner of goods belonging to the partnership where he did not himself personally participate in such entry.* The report shows that appeals were taken from judgments in two actions brought upon an ordinance of the Colony of the Cape of Good Hope. That ordinance provided that no goods should be unladen from a ship in that colony until entry was made of the goods and warrants were granted for their unloading; that the person entering the goods should deliver to the collector a bill of entry containing, among other things, the particulars of the quality and quantity of the goods; and that any goods taken or delivered from a ship, by virtue of an entry or warrant not properly describing them, should be forfeited. The fiftieth section of the ordinance further provided that every person who should assist, or be otherwise concerned, in the unshipping, landing, or removal, or the harboring of such goods, should be liable to a penalty of treble the value thereof, or to a penalty of a hundred pounds, at the election of the officers of the customs. The first action was brought for

* Law Reports, 3 P. R. C. 345.

the forfeiture of goods imported by the respondents; the second action was brought for the penalty of treble the value of the goods under the fiftieth section. The facts of the cases were these: The respondents, Pocock and Matthew, were partners, doing business at Cape Town, in the Colony of Good Hope. Pocock, whilst in England, shipped to his partner at Cape Town twenty-five packages of glassware and three carriages. In the carriages a large number of corks were packed, which were liable to duty. When the goods arrived at Cape Town, the respondent, Matthew, made an entry for the landing of the glassware and carriages, in which no mention was made of the corks. For this defect in the entry the whole shipment was seized. The Supreme Court of the colony decreed a forfeiture of the carriages, but gave judgment for the respondents in the action for the penalty. On appeal to the Privy Council it was contended, in the second case, that the respondent, Matthew, who made the entry, was liable to the penalty of treble the value of the goods, and that Pocock, who was in England at the time, was answerable for his partner's acts; but the court held that Matthew was liable for the penalty, and that Pocock, his partner, was not liable. Lord Cairnes, who delivered the opinion of the court, did not seem to think that the liability of Pocock was a matter to be considered, he not having participated in the actual entry. "I may put out of the case," he said, "the first respondent, Pocock, for it was admitted that there was no case of personal culpability against him." Personal, not imputed, culpability was here considered essential to a recovery by the crown.

It will be found on examination of the authorities that in all cases where a principal or partner has been held liable, penally or criminally, for the act of his agent or partner, the act was originally authorized or assented to, or subsequently adopted. The question in such cases has always been as to the effect of certain acts or employment as evidence of authorization, assent, or adoption, and it has always been held a matter for the jury.

The cases of *Rex* v. *Almon** and *Attorney-General* v. *Siddon*,† usually cited against this position, are consistent with it. In the first case, a bookseller was proceeded against for a libel sold in his bookstore by his servant in the course of his employment, and Lord Mansfield held that the relation of the defendant to the act of sale was *primâ facie* evidence to establish his liability, but that he might avoid it by showing that "he was not privy nor assenting to it nor encouraging it." Here such was the nature of the employment as to imply *primâ facie* authorization of the sale and consequent publication of the libel by the master.

In the second case, a trader was held liable to a penalty for the illegal act of his servant done in conducting his business with a view to protect smuggled goods, although absent at the time. The case was an information for penalties, the second count of which charged that the defendant had harbored and concealed property upon which duties had not been paid. The court placed great reliance upon the fact that the possession of the property without explanation was *primâ facie* evidence to warrant conviction, and that the special circumstances detailed in connection with the transaction and the employment of the servant presented a *primâ facie* case of authorization by the master.

There are numerous cases where a principal or partner will be held liable for the fraud of an agent or partner although entirely ignorant of the fraud, as where goods are obtained by false and fraudulent representation; but the liability in such cases proceeds upon the ground that the title to the property in fact never passed to principal or partnership.‡

So a principal or partner will sometimes be held liable for the fraud of the agent or partner, which was not authorized, where the fruits of the fraud are retained; but the liability in these cases proceeds upon the ground that one cannot

* 5 Burrow, 2686.

† 1 Crompton & Jervis, 220.

‡ Kilby *v.* Wilson, 1 Ryan & Moody, 178; Irving *v.* Motly, 7 Bingham 543; Root *v.* French, 13 Wendell, 570; Cary *v.* Hotailing, 1 Hill, 311.

claim immunity by reason of the fraud, and, at the same time, enjoy the benefits of the transaction. These cases properly fall under the head of implied adoption of the act of the agent or partner.*

So, sometimes, a principal or partner will be held liable where an agent or partner is allowed to exhibit an apparent authority which he does not possess, and, in consequence, fraudulently obtains the property or services of third parties; but the liability in such cases proceeds upon the principle that where one of two innocent parties must suffer, the party who, by his acts, clothes the agent with the apparent authority, and thus enables him to commit the fraud, ought to suffer.†

In all these cases the principals or partners are held liable only to make good the loss occasioned by the fraudulent act of the agent or partner. The rule which governs these cases has no application to an action for penalties, which goes not, as already stated, for compensation or indemnification, but for punishment. Where penalties which are punitive, and not mere liquidated damages, are concerned, there must, in all cases, be personal culpability arising from original authorization of the fraudulent act, or assent to it, or its subsequent adoption with knowledge. This principle is of the highest importance, and its conservation is essential to a just administration of the law. As this principle was disregarded in the trial of this case in the court below, I think the judgment should, on that account, as well as for the other reasons stated, be reversed and the cause remanded for a new trial.

Mr. Justice MILLER concurred in the foregoing opinion on the ground that the statute of 1823 was repealed by that of 1866, and on the point that the act of 1823, when in

* Bennett *v.* Judson, 21 New York, 238; Veazie *v.* Williams, 8 Howard, 134, 137.

† Locke *v.* Stearns, 1 Metcalf, 560; Story on Partnership, sec. 108; Story on Agency, 443; Hern *v.* Nichols, 1 Salkeld, 289.

force, was not applicable to fraudulent importers. He stated that he expressed no opinion as to the instructions imputing knowledge of the guilty partner to the others.

Mr. Justice BRADLEY concurred generally; dissenting from the opinion of the court, on all the points taken in it.

TWENTY PER CENT. CASES.

Under the joint resolution of February 28th, 1867, increasing by 20 per cent. the pay of employés in the Department of the Interior, &c., and in the office of the Capitol and Treasury Extension and Commissioner of Public Buildings, neither a commission nor a warrant of appointment is necessary to entitle an employé to the benefit of the provision under consideration, provided he was actually and properly employed in the office of the Capitol or Treasury Extension, or in the office of the Commissioner of Public Buildings, if it appears that he is one of the persons or class of persons described in the joint resolution. Persons so employed are properly in the service if they were employed by the head of the department, or of the bureau, or any division of the department charged with that duty and authorized to make such contracts and fix the compensation of the person employed, even though the particular employment may not be designated in any appropriation act.

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

A joint resolution of Congress of February 28th, 1867,* provided:

"That there shall be allowed and paid to the following described persons [whose salaries do not exceed $3500] now employed *in the civil service* of the United States, at Washington, as follows: To civil officers and temporary and all other clerks, messengers, and watchmen, including enlisted men detailed as such, to be computed upon the gross amount of the compensation received by them, and *employés* male and female, in the Executive Mansion, and in any of the following-named departments, or any bureau or division thereof, to wit: State, Treasury,

* 14 Stat. at Large, 569.

Statement of the cases.

War, Navy, *Interior*, Post Office, Attorney-General's, Agricultural, and including civil officers and temporary, and all other clerks and *employés*, male and female, *in the offices of* the Coast Survey, Naval Observatory, Navy Yard, Arsenal, Paymaster-General, including the division of referred claims, Commissary-General of Prisoners, Bureau of Refugees, Freedmen, and Abandoned Lands, Quartermaster's, *Capitol and Treasury Extension*, City Post Office, and *Commissioner of Public Buildings;* to the photographer of the Treasury Department, to the superintendent of meters, and to lamplighters under the Commissioner of Public Buildings, an additional compensation of 20 per centum on their respective salaries as fixed by law, or, where no salary is fixed by law, upon their pay, respectively, for one year from and after the 30th day of June, 1866."

I. FITZPATRICK'S AND SEVEN OTHER CASES.

This joint resolution being in force, several persons, named respectively Fitzpatrick, Hall, Bohn, Lytle, Holbrook, La Rieu, Richards, and Newman, and whose salaries were all less than $3500, filed their petitions; each setting forth facts, which, if true, brought him within the act, and each claiming the 20 per cent. additional. By the finding of the Court of Claims it appeared that Fitzpatrick was an employé in the office of the Commissioner of Public Buildings, as keeper of the western gate of the Capitol; that Hall was an employé in the office of the Commissioner of Public Buildings, in that part of the Capitol called the crypt; that Bohn was an employé in the office of the Commissioner of Public Buildings, as a laborer on the public grounds; that Lytle was an employé in the office of the Commissioner of Public Buildings, as watchman in the east grounds of the Capitol; that Holbrook was an employé in the office of the Commissioner of Public Buildings, as watchman at the stables; that La Rieu was an employé in the same office, as watchman in the Smithsonian grounds; that Richards was an employé in the same office, as watchman on the Capitol dome; and Newman was an employé in the same office, as captain of the Capitol police.

II. MILLER'S CASE.

About the same time one Miller filed a petition in the Court of Claims, alleging that he had been as clerk and *employé* in the office of the Capitol Extension, assigned to duty as foreman of construction, receiving a salary of $1800; that he was in the civil service of the United States at Washington, and that he was thus entitled to an addition of 20 per cent. on his salary, under the joint resolution above quoted, and asking judgment against the United States therefor. The United States opposed the demand.

The court found as fact:

1. That the claimant was appointed foreman of carpenters by the Secretary of the Interior Department, March 1st, 1866, at a salary of $1800 per annum, and was in the service of the United States, *in connection with the Capitol Extension*, at Washington, D. C., continuously from June 30th, 1866, to June 30th, 1867, inclusive, at the said salary.

2. That he was paid monthly, as in the case of other salaried officers; that he received materials for the work upon the Capitol building; made up daily reports; had charge of workmen, and performed such duties as were assigned him by the architect of the Capitol Extension, and was paid out of the said fund as the architect of the Capitol Extension, clerks, and others connected with said work, viz., the appropriation for the Capitol Extension.

No other facts than those above mentioned were found by the court. The counsel of the United States, however, after adverting to the fact that the findings contradicted an averment of the petitioner of a matter within his own knowledge, they finding that he was appointed *foreman of carpenters* March 1st, 1866, at a salary of $1800 per annum, and the counsel stating—by way of reconciling the discrepancy—that prior to March 1st, 1866, the claimant was employed in the same capacity as thereafterwards, but at a compensation of only $5 per day of actual employment, that is, exclusive of Sundays, or about $1500 per annum; and that the Secretary of the Interior, on March 1st, 1866, wrote the following letter:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., March 2d, 1866.

"SIR: You are hereby authorized, from and after the 1st of the present month, to pay George Miller, timekeeper, &c., on the Capitol Extension, at the rate of $150 per month, for the time actually employed, until further orders.

"I am, sir, very respectfully, your obedient servant,

"JAMES HARLAN,
"Secretary."

"DR. WM. S. MARSH,
Disbursing Agent, Capitol Extension."

III. MANNING'S CASE.

Near about the same time one Manning filed a petition with a purpose similar to that with which the others filed theirs. The court found that the claimant was employed as watchman or guard at the jail in Washington, for one year, at a salary of $1200 per year, paid to him monthly by the disbursing officer of the Department of the Interior. His pay was fixed at this rate by the Secretary of the Interior, under acts of Congress which place the jail under the supervision of the Department of the Interior.

The Court of Claims gave a decree for the claimants in all of the cases, and the United States appealed in all.

Mr. C. H. Hill, Assistant Attorney-General, for the United States, (*Messrs. L. P. Poland and N. P. Chipman, contra,*) argued:

I. IN REGARD TO FITZPATRICK AND THE SEVEN OTHER CLAIMANTS,

That none of these claimants were "employed in the civil service at Washington," which it was indispensable that any one claiming under the joint resolution should be. No officer, clerk, messenger, watchman, enlisted man, or employé being entitled unless within that special class; a class which not only excluded the military and naval branches, but which, in reference to the civil branch, comprises only those persons who fill some office or hold some appointment established by law.

That the findings of the Court of Claims that the persons were "*employés*," were not findings of fact, but findings of

law, and therefore not findings proper for the court to have made as the basis of its conclusions; that being findings of law they were re-examinable in this court; that thus re-examined it was plain that the word *employés* being found in the phrase, "all other *clerks* and employés," was to be regarded as meaning employés whose duties were clerical; moreover that the "employés" meant to be favored were "employés" *in the office of* the Commissioner of Public Buildings, &c.; that is to say, employés having appointments as officers in the edifice appropriated to the commissioner, &c.

II. IN REGARD TO MILLER,

That the claimant was not in the civil service, nor even an appointee of the Secretary of the Interior; that the letter of March 2d, 1866, was not an appointment but a mere order for an increase of pay; that the letter showed that the claimant was in the service of the United States, "in connection with the Capitol Extension," and not an "employé in the Capitol Extension." Of course he was not an employé in any other of the departments.

III. IN REGARD TO MANNING,

That he did not show that he was an employé in any one of the departments, or in any bureau or division thereof, or in any office named in the resolution; his appointment was not authorized by statute, nor is his compensation prescribed by an appropriation act; that neither his employment nor his compensation being known to any act of Congress, he was not to be regarded as an employé in the civil service at Washington.

Mr. Justice CLIFFORD delivered the opinion of the court in all the cases, giving it as follows:

I. IN FITZPATRICK'S AND THE SEVEN OTHER CASES.

Twenty per cent. additional pay is allowed by the joint resolution of the twenty-eighth of February, 1867, to certain persons or classes of persons therein described, who are employed in the civil service of the United States in this

city, whose salaries, as fixed by law, do not exceed three thousand five hundred dollars per annum, to be paid out of any money in the treasury not otherwise appropriated.*

Objection is made in several of the pending cases arising under that resolution that the claimant does not show himself to be an employé in the civil service of the United States, which, it is said is the primary condition and the one required to be shown in every case before the party can lawfully claim the prescribed additional compensation, and the attempt is made by the appellants to restrict the meaning of the term civil service so as to exclude all persons from the benefits of the provision except such as have been appointed to office or hold appointments of some kind in that service. They contend that the words "in the civil service" were not employed merely to contradistinguish the service described from that of the military or naval service of the United States, but also to show that the persons entitled to the benefits of the enactment must be persons filling offices or holding appointments established by law.

Beyond doubt those words were intended to contradistinguish the service described from that of the military or naval service, but the court is unable to concur in the proposition that they were also intended to restrict the operation of the resolution to persons in office in the civil service, or to persons holding appointments in that service as salaried officers.

Certain described persons and classes of persons are plainly entitled to the benefit of the provision, whether regarded as officers or as mere employés, and it is no valid argument against that proposition to show that there are or may be other employés or persons in the civil service here who are not within that description, as the terms of the enactment are special and do not extend to every employment in that service, but only to the described persons and classes of persons therein mentioned.

Civil officers whose salaries, as fixed by law, do not exceed

* 14 Stat. at Large, 569.

three thousand five hundred dollars per annum are clearly within the terms of the resolution, and so are temporary and other clerks, messengers, and watchmen, including enlisted men detailed as such, and employés, male and female, in the executive mansion, and in the state, treasury, war, navy, interior, and post office departments, and the department of justice, or in any bureau or division of such a department, including the agricultural bureau, and all civil officers, whether permanent or temporary, in the offices of the coast survey, naval observatory, navy yard, arsenal, paymaster-general, commissary-general of prisoners, bureau of refugees, freedmen, and abandoned lands, office of quartermaster, capitol, and treasury extension, city post office, and commissioner of public buildings, and the other officers and employés described in the same resolution.

By the finding of the Court of Claims it appears that Fitzpatrick was an employé in the office of the commissioner of public buildings, as keeper of the western gate of the Capitol; that Hall was an employé in the office of the commissioner of public buildings, in that part of the Capitol called the crypt; that Bohn was an employé in the office of the commissioner of public buildings, as a laborer on the public grounds; that Lytle was an employé in the office of the commissioner of public buildings, as watchman in the east grounds of the Capitol; that Holbrook was an employé in the office of the commissioner of public buildings, as watchman at the stables; that Richards was an employé in the office of the commissioner of public buildings, as watchman on the Capitol dome; and that Newman was an employé in the office of the commissioner of public buildings, as captain of the Capitol police. Employés in the office of the commissioner of public buildings being within the very words of the joint resolution, the Court of Claims in each of these cases rendered judgment for the claimant, and the United States appealed to this court.

Most of the defences to the several claims have already been considered in the remarks preceding the statement of the case, but there are also certain speical objections which

deserve some consideration, as, for example, it is insisted that the question whether the claimant was or was not an employé in the office of the commissioner is a question of law and not a question of fact, and that being a question of law it may be re-examined in this court.

Whether the claimant was or was not employed by the commissioner of public buildings is certainly a question of fact, but the question as to what relation he sustained to that office may perhaps be a question of law, as assumed by the United States. What they contend is that the words of the act "in the office of" have respect to another class of employés, that those words refer to the clerks and messenger and the like, but the court is of a different opinion, as clerks and messenger are specially mentioned in the same enactment, which shows that the words "employés in the office of" were intended to embrace a class of persons other and different from the persons having appointments as officers in the building assigned to the commissioner. Such an interpretation would be too restricted to comport with the general scope and object of the resolution, or with any of the canons of construction usually applied in ascertaining the meaning of a remedial law.

Offices may be and usually are divided into two classes—civil and military. Civil offices are also usually divided into three classes—political, judicial, and ministerial. Political offices are such as are not immediately connected with the administration of justice, or with the execution of the mandates of a superior, as the President or head of a department. Judicial offices are those which relate to the administration of justice, and which must be exercised by the persons appointed for that purpose and not by deputies. Ministerial offices are those which give the officer no power to judge of the matter to be done, and which require him to obey some superior, many of which are merely employments requiring neither a commission nor a warrant of appointment, as temporary clerks or messengers.*

* Mallory's Case, 3 Nott & Huntington, 257; Kirby's Case, Ib. 265.

Neither a commission nor a warrant of appointment is necessary to entitle an employé to the benefit of the provision under consideration, provided he was actually and properly employed in the executive mansion, or in any of the departments, or in any bureau or division thereof, or in the office of the Capitol or Treasury Extension, or in the office of the commissioner of public buildings, or in any other of the offices therein mentioned, if it appears that he is one of the persons or class of persons described in the joint resolution. Persons so employed are properly in the service if they were employed by the head of the department or of the bureau or any division of the department charged with that duty and authorized to make such contracts and fix the compensation of the person employed, even though the particular employment may not be designated in an appropriation act.

Many persons not employed as clerks or messengers of a department, are in the public service by virtue of an employment by the head of the department or by the head of some bureau of the department authorized by law to make such contracts, and such persons are as much in the civil service within the meaning of the joint resolution as the clerks and messengers employed in the rooms of the department building.*

Tested by these rules it is clear that each of the eight claimants whose cases are under consideration were employés in the office of the commissioner of public buildings, and that the judgment of the Court of Claims in each case was correct.

JUDGMENT IN EACH CASE AFFIRMED.

II. IN MILLER'S CASE.

Judgment for the claimant was rendered in this case by the Court of Claims under the joint resolution of Congress

* United States *v.* Belew, 2 Brockenbrough, 280; Graham *v.* United States, 1 Nott & Huntington, 380; Commonwealth *v.* Sutherland, 3 Sergeant & Rawle, 149.

giving additional compensation to certain employés of the government in the civil service in this city. Preceding the entry of the judgment is a finding of the facts, which is also agreed to by the counsel of the parties, as follows: (1.) That the claimant was appointed foreman of carpenters by the Secretary of the Interior, at a salary of eighteen hundred dollars, and that he was in the service of the United States, in connection with the Capitol Extension, continuously for one year at that salary. (2.) That he was paid monthly, as in the case of other salaried officers; that he received materials for the work upon the Capitol building, made up daily reports, had the charge of workmen, and performed such duties as were assigned him by the architect of the Capitol Extension, and that he was paid out of the same appropriation as the architect, clerks, and others connected with that work.

Several defences were set up by the appellants, as follows: (1.) That he is not an appointee of the Secretary of the Interior, and that he was not an employé in the civil service. (2.) That he does not show himself to have been an employé in the office of the Capitol Extension. (3.) That he was not an employé in any of the departments specified in the joint resolution.

Support to first proposition is supposed to be derived from the fact alleged in argument, which is not found by the court, that the claimant was employed in the first place at a compensation of five dollars per day, exclusive of Sundays, and from the copy of a letter not introduced in evidence, addressed by the Secretary of the Interior to the disbursing agent of the Capitol Extension, in which he gives authority to that agent to pay the claimant from that date as timekeeper, &c., on the Capitol Extension, at the rate of one hundred and fifty dollars per month for the time he actually worked until further orders.

Two remarks will afford a sufficient reply to those suggestions: (1.) That such evidence cannot be received in this court to contradict the finding of the Court of Claims. (2.) Suppose it could, it would constitute no defence to the claim,

as it only shows a mistake in the appellation given by the government to the employment. Enough appears in the letter to show that he was employed by authority of the Secretary of the Interior, and that his compensation was fixed as alleged, by the head of that department. Grant that the letter does not amount to a warrant of appointment, still if it be admitted as evidence it clearly shows that he was employed by the authority of the secretary, which, instead of contradicting, actually fortifies the finding of the court.

Sufficient has already been remarked in disposing of the first defence set up by the appellants, to show that the second cannot be sustained, as the claimant does show that he was employed in the public service on the Capitol Extension. Employed as he was by the authority of the Secretary of the Interior, it is clear that he was an employé in the civil service in that department, as neither a commission nor a warrant of appointment is required to evidence such an employment.

Argument to show that the work designated by the words "Capitol Extension" was under the supervision of the Secretary of the Interior is unnecessary, as the act of Congress of the sixteenth of April, 1862, provides that the supervision of the Capitol Extension and the erection of the new dome be and the same is hereby transferred from the War Department to the Department of the Interior.

None of the errors assigned can be sustained, and they are accordingly overruled.

JUDGMENT AFFIRMED.

III. IN MANNING'S CASE.

Persons to act as watchmen or guards at the jails in this District are usually selected by the warden of the jail, subject to the approval of the head of the department, but their number and the amount of their compensation are fixed by the Secretary of the Interior, as they are paid out of the judiciary fund, over which he exercises control.

By the act of the twenty-seventh of February, 1801, the

custody of the jails was intrusted to the marshal of the District, and he was made accountable for the safe keeping of the prisoners.*

Congress, however, on the twenty-ninth of February, 1864, created the office of warden of the jail, and enacted that he should have all the power and should discharge all the duties previously exercised and discharged over the jail and the prisoners by the marshal.†

Supervisory power over the accounts of marshals is given by the act of Congress upon the subject to the Secretary of the Interior, and the express provision is that the warden shall annually, in the month of November, make a detailed report to the Secretary of the Interior.‡

Judgment was rendered for the claimant, and the court below made the following finding of facts: (1.) That the claimant was employed as watchman or guard at the jail in this city for one year, at a salary of twelve hundred dollars per year, paid to him monthly by the disbursing officer of the Department of the Interior, and it is conceded by the appellants that the pay of such employés was fixed at that rate by the secretary of that department. (2.) That he made application to the first comptroller of the treasury for the additional compensation, which is the subject of controversy, and that his application was refused.

1. Objection is made in this case, as in those previously decided, that the claimant does not show that he was an employé in any one of the departments, or in any bureau or division thereof, or in any office named in the joint resolution. His appointment, it is said, is not authorized by statute, nor is his compensation prescribed by any appropriation act; and the argument is, that inasmuch as neither his employment nor his compensation is directly known to any act of Congress, he cannot be regarded as an employé in the civil service of the United States; but the court is entirely of a different opinion, as the office of warden is an

* 2 Stat. at Large, 106. † 13 Id. 12. ‡ 13 Id. 12; 9 Id. 395.

office created by law, and the appointee of the office is required to report to the Secretary of the Interior.

Guards at the jail are selected by the warden, but their compensation is fixed by the Secretary of the Interior, and they are paid by him, and it makes no difference whether the pay is charged to the appropriation for the department or to the judiciary fund, as the fact remains that the whole subject is under the supervision of the head of that department; whether their pay is charged to the one fund or to the other, the charge for their services must be approved by the warden, and must be included in his report to the Secretary of the Interior, where the same is subject to a further revision. Evidently they are employés in a bureau or division of the Interior Department, as their compensation is fixed by the head of that department, and the officer by whom they are employed is required annually to make a detailed report to that department of all his official acts.

Persons employed in a bureau or division of a department are as much employés in the department, within the meaning of the joint resolution, as the messengers and others rendering service under the immediate supervision of the secretary, or those specially named in the provision as entitled to its benefits. Unquestionably guards of the jail are employés of the warden, and the office of warden of the jail is a bureau or division of the Department of the Interior.

Viewed in that light, as the case must be, it is clear that the claim is well founded, and we are all of the opinion that the judgment should be

AFFIRMED.

BLYEW ET AL. *v.* UNITED STATES.

Under the act of 9th April, 1866 (14 Stat. at Large, 27), sometimes called "The Civil Rights Bill," which gives jurisdiction to the Circuit Court of all causes, civil and criminal, *affecting* persons who are denied or cannot enforce in the courts of the State or locality where they may be, any of the rights given by the act (among which is the right to give evidence, and to have full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens), a criminal prosecution is not to be considered as "affecting" mere witnesses in the case, nor any person not in existence. *United States* v. *Ortega* (6 Wheaton, 467), affirmed.

ERROR to the Circuit Court for the District of Kentucky; the case being this:

By the Revised Statutes of Kentucky, published A.D. 1860,* it is enacted:

"That a slave, negro, or Indian, shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, *but in no other case.*"

This enactment being in force in Kentucky, the thirteenth amendment to the Constitution was proclaimed as having been duly ratified, and a part of it, December 18th, 1865,† is in these words:

"SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SECTION 2. Congress shall have power to enforce this article by *appropriate* legislation."

In this state of things, Congress on the 9th April, 1866, passed an act entitled "An act to protect all persons in the United States in their civil rights, and furnish the means of their vindication."‡ The first section of that act declared all

* Section 1, chapter 107, vol. 2, p. 470.

† 13 Stat. at Large, 774.

‡ 14 Id. 27.

persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, to be citizens of the United States, and it enacted that:

"Such citizens, of every race and color, shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, and *give evidence*, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to *full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens*, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

The second section enacted:

"That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right, secured or protected by this act, or to different punishment, pains, or penalties, on account of such person having at any time been held in a condition of slavery, or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, or by reason of his color, or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished," &c.

Then followed the third section, which contains this enactment:

"That the District Courts of the United States, within their respective districts, shall have, *exclusively* of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, *and also concurrently with the Circuit Courts of the United States*, of all *causes*, civil and *criminal*, *affecting persons* who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act."

The section then provided for removal into the Federal courts of any suit or prosecution, civil or criminal, which

had been, or might hereafter be, commenced against any *such person* for any cause whatever.

The sixth section rendered liable to fine and imprisonment any person who should obstruct an officer or other person in execution of process under the act, or should aid a person arrested to escape, or conceal a person for whose arrest a warrant had been issued.

In this state of things, two persons, Blyew and Kennard, were indicted October 7th, 1868, in the Circuit Court for the District of Kentucky, for the murder, on the 29th of August preceding, within that district, of a colored woman named Lucy Armstrong.* The indictment contained three counts, all of them charging the murder in the usual form of indictments for that offence, and with sufficient certainty. But, in order to show jurisdiction in the Circuit Court of the United States, an averment was made in the first count that the said Lucy Armstrong was a citizen of the United States, having been born therein, and not subject to any foreign power; that she was of the African race, and was above the age of seventy-five years; that Blyew and Kennard (the persons indicted) were white persons, each of them at the time of the alleged killing and murder above the age of eighteen years; that the said killing and murder, done and committed, as averred, were seen and witnessed by one Richard Foster, and one Laura Foster, citizens of the United States, having been born therein and not subject to any foreign power, both of the African race; and that the said Lucy Armstrong, Richard Foster, and Laura Foster were then and there denied the right to testify against the said Blyew and Kennard, or either of them, concerning the said killing and murder, in the courts and judicial tribunals of the State of Kentucky, solely on account of their race and color. The second and third counts contained substantially the same averments.

To this indictment the defendants pleaded specially that before it was found they had been in custody of the author-

* The murder and indictment were, it seems, after the ratification of the fourteenth amendment, which was proclaimed July 20th, 1868. (15 Stat. at Large, 708.)

ities of the State, and, after examination, had been held to answer for the killing of Lucy Armstrong, which was the same offence as that charged in the Circuit Court; but on demurrer the plea was overruled, and the case went to trial upon the issues found by a replication to the plea of not guilty. During the progress of the trial the court sealed several exceptions to the admission of evidence offered by the United States, and a verdict of guilty having been returned, a motion was made in arrest of judgment, which the court also overruled. The ground alleged for this motion was, that "the facts stated in the indictment did not constitute a public offence within the jurisdiction of the court."

There were thus three questions presented by the record:

First. Whether the Circuit Court had jurisdiction of the offence charged in the indictment?

Second. Whether the court erred in sustaining the demurrer to the defendants' special plea?

Third. Whether the evidence to which the defendants objected should have been received?

Of course, if the first question was resolved in the negative, any resolution of the remaining ones became unnecessary.

The case was brought here on *error* under the tenth section of the already mentioned act of Congress, which provides "that, upon all questions of law arising in any cause under the provisions of this act, a final *appeal* may be taken to the Supreme Court of the United States."

The murder for which the defendants were convicted, and as they now sought to show illegally, had been one of peculiar atrocity. A number of witnesses testified that on a summer evening of 1868 (August 29th), towards eleven o'clock, at the cabin of a colored man named Jack Foster, there were found the dead bodies of the said Jack, of Sallie Foster, his wife, and of Lucy Armstrong, for the murder of whom Blyew and Kennard stood convicted; this person, a blind woman, over ninety years old, and the mother of Mrs.

Foster; all persons of color; their bodies yet warm. Lucy Armstrong was wounded in the head; her head cut open as with a broad-axe. Jack Foster and Sallie, his wife, were cut in several places, almost to pieces. Richard Foster, a son of Jack, who was in his seventeenth year, was found about two hundred yards from the house of his father, at the house of a Mr. Nichols, whither he had crawled from the house of his father, mortally wounded by an instrument corresponding to one used in the killing of Lucy Armstrong, Jack and Sallie Foster. He died two days afterwards from the effects of his wounds aforesaid, having made a dying declaration tending to fix the crime on Blyew and Kennard. Two young children, girls, one aged ten years and the other thirteen (this last, the Laura Foster above mentioned), asleep in a trundle-bed, escaped, and the latter was a witness on the trial.

Evidence was produced on the part of the United States, that a short time previous to the murder, Kennard was heard to declare, in presence of Blyew, "that he (Kennard) thought there would soon be another war about the niggers; that when it did come he intended to go to killing niggers, and he was not sure that he would not begin his work of killing them before the war should actually commence."

Such a case, and the withdrawal of it from the State courts, naturally excited great interest throughout the State of Kentucky, and by a joint resolution of the General Assembly of that State, passed at its adjourned session in 1869, the governor of the State was directed to cause the commonwealth above mentioned to be represented in this court. Being brought here the case was very fully and interestingly argued; the point to which counsel here addressed themselves chiefly being the one already stated as the first one presented by the record, the point of the jurisdiction of the Circuit Court.

Messrs. J. S. Black and I. Caldwell, for the State of Kentucky, after remarking that this murder was committed on the soil of Kentucky and within her limits; that it was an insult to

her dignity and an outrage on the peace of a community which, by the organic law of the land, was placed under *her* sole protection; that *her* law was offended by it, and that none but she had a right to enter into judgment with the perpetrators of it; that no other state, sovereignty, prince, or potentate on earth had made or could make any law which would punish that offence at that place; that the United States had never pretended that a murder within the limits of a State was an offence against *them*, and that it was no more an offence against the United States than it was against the republic of France or the empire of Germany, contended that the Circuit Court had no jurisdiction, because—

1st. Whether the act of Congress did or did not embrace this case, it was a sheer, flat breach of the Constitution; that the amount, quantity, and extent of the judicial power of the United States was defined by and limited by the 2d section of Article III of the Constitution, which says:

"1. The judicial power shall *extend* to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects."

Thus far the power went and no farther. By no construction—not even the loosest—could it be extended to the punishment of offences against the State. Yet this act gave exclusive jurisdiction to the Federal courts and a total denial of all right on the part of the State to interfere in any case that *affects* a negro; which a case no doubt does where a negro is a party. Such a condition of things could not be tolerated by any State, even if it extended to great cases. But the act extended the jurisdiction of the Federal courts exclusively of that of the State to all cases affecting negroes;

i. e., to all cases where negroes are parties. It extended it to the smallest and lowest case, to assaults and batteries, to small thefts, to the slightest breaches of police regulations; and, if a negro robbed a hen-roost, the suffering party was now obliged either to let him go unpunished or to take him for justice to wherever the Federal court sat, often hundreds of miles off. The consequence was that nine-tenths of the lower class of crimes committed by negroes went now unpunished in Kentucky. The act of Congress had, in cases where it did apply, dislocated all the machinery of the State courts and rendered them powerless to perform their duty.

But the learned counsel contended,

2d. That there was no jurisdiction because, whether the enactment was constitutional and valid, or unconstitutional and void, this case was not within it. This case did not *affect* negroes. It was a proceeding by the State against white men. *The United States* v. *Ortega*,* which arose on the above-quoted clause of the Constitution which gives the Federal courts jurisdiction in "cases affecting ambassadors," decided that a criminal case affects nobody but the party accused and the public.

If the act of Congress be constitutional, and if in such a case as the present negroes are affected by it—that is to say, when the persons prosecuted are white men and only the witnesses are negroes—any man that pleases may set out with a pre-expressed determination and commit any crime that he pleases against the State of Kentucky, and he will do it with impunity if he will only take a negro along with him when he does the deed; or, if he is not so happy as to have done it in the presence of one of that race, if he will hunt up a black man and make a confession in his presence afterwards. It matters not whether the testimony of the black witness be important or not so. The same fact may be testified to by twenty white men, but if there be one negro, that is sufficient (according to the theory of the court below) to oust the State jurisdiction and vest it exclusively in the

* 11 Wheaton, 467.

Federal courts. If a fight take place between white men at a barbecue, or militia muster, or cross-roads meeting—though it concern nobody but white men—they cannot be indicted for the offence in any court of Kentucky if one single negro in the whole crowd saw the thing done; and if actually so indicted, white men, in order to be acquitted, need only prove themselves guilty and that their crime was committed in the presence of a negro! To such results does the view of the court below, that a case between the State and white men "affects" negroes, if any negro is a witness, necessarily lead.

Mr. A. T. Akerman, Attorney-General, and Mr. B. H. Bristow, Solicitor-General, contra:

1. The thirteenth amendment to the Constitution worked a radical change in the condition of the United States. But it did not execute and was not meant to execute itself. Appropriate Congressional legislation was provided for. Most of the members of the Congress who passed the civil rights bill were members of the Congress which framed the thirteenth amendment. This fact adds to the probability of conformity to the purpose of the amendment, independently of which special argument presumptions are always in favor of the constitutionality of an act of Congress. Indeed, till the beginning of the rebellion, this court rarely decided one unconstitutional. The cases of *Marbury* v. *Madison** and perhaps *Scott* v. *Sandford*,† are the only ones we recall. If the thirteenth amendment be liberally construed the act of Congress is legislation quite appropriate. The amendment as a remedial one must be so construed. The obvious intention was to remove an existing evil, which was recognized as the cause of the civil strife in which the country was engaged, and to confer freedom upon the slave as a reward for his military service in the preservation of the government. It is unreasonable to suppose that the framers of this amendment, with this end in view, should have been content to

* 1 Cranch, 137 † 19 Howard, 393.

give to these slaves only that small portion of freedom which the so-called free blacks had theretofore enjoyed. In this age no man can be called free who is denied the right to make contracts, sue and be sued, and to give evidence in the courts. No man is really free who is not protected, by law, from injury. So long as he is denied the right to testify against those who violate his person or his property he has no protection, and is denied the power to defend his own freedom.

The condition of things in Kentucky under its law excluding the evidence of blacks where white persons have committed crime is disgraceful to a Christian community. A band of whites shall set upon and murder half a congregation of blacks, their minister included, and though a hundred blacks who saw the massacre survive, and can identify the murderers, conviction is impossible. The wisdom and *appropriateness* of the legislation of Congress, as shown by the act now in question, cannot be better illustrated than by the facts of this case. At night, in their own humble cabin, an unoffending and defenceless old colored man, his infirm mother more than ninety years of age, his wife, and son, are murdered in a most shocking manner by two brutal white men, actuated by no other motive than that of avowed hostility to the black race. The son lingers long enough to tell the facts of this horrible transaction, and a little sister, twelve or thirteen years of age, survives the cruel wounds inflicted upon her at the same time. The dying declarations of the one and the parol testimony of the other in court, taken in connection with circumstantial evidence produced at the trial, establish the guilt of the accused beyond all reasonable doubt. And yet under the law of the State the accused cannot be punished, because in Kentucky black men cannot give evidence of the crimes of white ones.

2. The case is embraced by the act. The murder did *affect* persons who were denied in the State courts rights which the act of Congress secured. It affected the murdered negro, the negro witnesses in the case, and the whole negro population of Kentucky. *The United States* v. *Ortega* does

not apply. That case arose on a clause of the Constitution which gives the Federal court jurisdiction in all "cases" of a particular sort. The act now under consideration employs the phrase "*causes*, civil and criminal." This is broader language, and, taken in connection with the title and subsequent sections of the act, must be understood in the sense of *causes of civil action* and *causes of criminal prosecution*. It cannot be said that in no case is any one affected by a cause who is not a party to the legal proceeding growing out of such cause. This was the view maintained on the Circuit, after great consideration, by Swayne, J., in *United States* v. *Rhodes*,* which arose on this act of Congress, and where the same arguments were used against the jurisdiction as here.

[Some discussion, not material to be reported, was also had at the bar by the counsel on both sides, as to whether the case was properly brought here by *writ of error;* and also as to the respective jurisdictions of the District and Circuit Courts under the 2d and 3d sections of the act.]

Mr. Justice STRONG delivered the opinion of the court.

Addressing ourselves to the first of the questions presented by the record—the question of jurisdiction—it may be remarked that clearly the Circuit Court had no jurisdiction of the crime of murder committed within the district of Kentucky, unless it was conferred by the third section of the act of Congress of April 9th, 1866.

It must be admitted that the crimes and offences of which the District Courts are, by this section, given exclusive jurisdiction, are only those which are against the provisions of the act, or those enumerated in the second and sixth sections, and that the "causes, civil and criminal," over which jurisdiction is, by the second clause of the section, conferred upon the District and Circuit Courts of the United States concurrently, are other than those of which exclusive jurisdiction is given to the District Courts. They are described

* 1 Abbott's United States, 29.

as causes "affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act."

Was, then, the prosecution, or indictment, against these defendants a cause affecting any such person or persons? If it was, then by the provisions of the act it was within the jurisdiction of the court, and if it was not, that court had no jurisdiction.

It was, the record shows, an indictment for the murder of Lucy Armstrong, a citizen of the United States of the African race, and it contained an averment that other citizens of the United States of the same race, witnessed the alleged murder. It contained also an averment that those other persons, namely, Richard Foster and Laura Foster, as well as the deceased Lucy Armstrong, were, on account of their race and color, denied the right to testify against the defendants, or either of them, of and concerning the killing and murder, in the courts and judicial tribunals of the State of Kentucky.

We are thus brought to the question whether a criminal prosecution for a public offence is a cause "affecting," within the meaning of the act of Congress, persons who may be called to testify therein. Obviously the only parties to such a cause are the government and the persons indicted. They alone can be reached by any judgment that may be pronounced. No judgment can either enlarge or diminish the personal, relative, or property rights of any others than those who are parties. It is true there are some cases which may affect the rights of property of persons who are not parties to the record. Such cases, however, are all of a civil nature, and none of them even touch rights of person. But an indictment prosecuted by the government against an alleged criminal, is a cause in which none but the parties can have any concern, except what is common to all the members of the community. Those who may possibly be witnesses, either for the prosecution or for the defence, are no more affected by it than is every other person, for any one

may be called as a witness. It will not be thought that Congress intended to give to the District and Circuit Courts jurisdiction over all causes both civil and criminal. They have expressly confined it to causes affecting certain persons. And yet, if all those who may be called as witnesses in a case, and who may be alleged to be important witnesses, were intended to be described in the class of persons affected by it, and if the jurisdiction of the Federal courts can be invoked by the assertion that there are persons who may be witnesses, but who, because of their race or color, are incompetent to testify in the courts of the State, there is no cause either civil or criminal of which those courts may not at the option of either party take jurisdiction. The statute of Kentucky which was in existence when this indictment was found, and which denied the right of Richard Foster and Laura Foster to testify in the courts of the State, enacted as follows: "that a slave, negro, or Indian shall be a competent witness in the case of the commonwealth for or against a slave, negro, or Indian, or in a civil case to which only negroes or Indians are parties, but in no other case." It will be observed that this statute prohibits the testimony of colored persons either for or against a white person in any civil or criminal cause to which he may be a party. If, therefore, they are persons affected by the cause, whenever they might be witnesses were they competent to testify, it follows that in any suit between white citizens, jurisdiction might be taken by the Federal courts whenever it was alleged that a citizen of the African race was or might be an important witness. And such an allegation might always be made. So in all criminal prosecutions against white persons a similar allegation would call into existence the like jurisdiction. We cannot think that such was the purpose of Congress in the statute of April 9th, 1866. It would seem rather to have been to afford protection to persons of the colored race by giving to the Federal courts jurisdiction of cases, the decision of which might injuriously affect them either in their personal, relative, or property rights, whenever they are denied in the State courts any of the rights

mentioned and assured to them in the first section of the act.

Nor can it be said that such a construction allows little or no effect to the enactment. On the contrary, it concedes to it a far-reaching purpose. That purpose was to guard all the declared rights of colored persons, in all civil actions to which they may be parties in interest, by giving to the District and Circuit Courts of the United States jurisdiction of such actions whenever in the State courts any right enjoyed by white citizens is denied them. And in criminal prosecutions against them, it extends a like protection. We cannot be expected to be ignorant of the condition of things which existed when the statute was enacted, or of the evils which it was intended to remedy. It is well known that in many of the States, laws existed which subjected colored men convicted of criminal offences to punishments different from and often severer than those which were inflicted upon white persons convicted of similar offences. The modes of trial were also different, and the right of trial by jury was sometimes denied them. It is also well known that in many quarters prejudices existed against the colored race, which naturally affected the administration of justice in the State courts, and operated harshly when one of that race was a party accused. These were evils doubtless which the act of Congress had in view, and which it intended to remove. And so far as it reaches, it extends to both races the same rights, and the same means of vindicating them.

In view of these considerations we are of opinion that the case now before us is not within the provisions of the act of April 9th, 1866, and that the Circuit Court had not jurisdiction of the crime of murder committed in the district of Kentucky, merely because two persons who witnessed the murder were citizens of the African race, and for that reason incompetent by the law of Kentucky to testify in the courts of that State. They are not persons affected by the cause.

We need hardly add that the jurisdiction of the Circuit Court is not sustained by the fact averred in the indictment that Lucy Armstrong, the person murdered, was a citizen of

the African race, and for that reason denied the right to testify in the Kentucky courts. In no sense can she be said to be affected by the cause. Manifestly the act refers to persons in existence. She was the victim of the frightful outrage which gave rise to the cause, but she is beyond being affected by the cause itself.

The conclusions to which we have come are sustained, we think, fully by the judgment of this court in *United States* v. *Ortega*,* in which the opinion was delivered by Mr. Justice Washington. It was the case of an indictment in the Circuit Court for offering violence to the person of the Spanish minister, contrary to the law of nations and the act of Congress. The second section of the third article of the Constitution ordains that the judicial power of the United States shall extend to all cases affecting ambassadors, other public ministers and consuls, and that in all cases affecting ambassadors, other public ministers and consuls, the Supreme Court shall have original jurisdiction. The defendant was convicted, and on motion in arrest of judgment, the question was presented to this court (and it was the only one decided), whether it was a case affecting an ambassador, or other public minister. The court unanimously ruled that it was not. The violence out of which the indictment grew was committed upon a public minister, and he was a competent and material witness. But he was ruled to be not a person affected by the case, because it was a public prosecution instituted and conducted by and in the name of the United States, and for the purpose of vindicating the laws of nations and that of the United States, in the person of a public minister, offended by an assault committed on him by a private individual. It is, said the court, a case then, which affects the United States and the individual whom they seek to punish; but one in which the minister himself, although he was the person injured by the assault, has no concern, either in the event of the prosecution, or in the costs attending it. What was meant by the phrase "a case affecting,"

* 11 Wheaton, 467.

was thus early defined, and we are bound to presume that Congress, when they used the same word "affecting" in the act of 1866, intended to have it bear its defined meaning. This is according to a well-known rule of construction.

An attempt has, however, been made to discriminate between the words "case affecting," as found in the constitutional provision, and the words "cause affecting," contained in the act of Congress. We are unable to perceive any substantial ground for a distinction. The words "case" and "cause" are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action. Surely no court can have jurisdiction of either a case or a cause until it is presented in the form of an action. We regard, therefore, *The United States* v. *Ortega* as an authority directly in point to the effect that witnesses in a criminal prosecution are not persons affected by the cause. It necessarily results from this that jurisdiction of the offence for which these defendants were indicted, was not conferred upon the Circuit Court by the act of Congress.

It is unnecessary, therefore, to consider the other questions presented by the record.

JUDGMENT REVERSED.

The CHIEF JUSTICE was not present at the argument, and took no part in the judgment.

Mr. Justice BRADLEY, with whom concurred Mr. Justice SWAYNE, dissenting.

I dissent from the opinion of the court in this case for the following reasons:

The civil rights bill (passed April 9th, 1866, and under which the indictment in this case was found and prosecuted) was primarily intended to carry out, in all its length and breadth, and to all its legitimate consequences, the then recent constitutional amendment abolishing slavery in the United States, and to place persons of African descent on an equality of rights and privileges with other citizens of the United States. To do this effectually it was not only neces-

sary to declare this equality and impose penalties for its violation, but, as far as practicable, to counteract those unjust and discriminating laws of some of the States by which persons of African descent were subjected to punishments of peculiar harshness and ignominy, and deprived of rights and privileges enjoyed by white citizens.

This general scope and object of the act will often furnish us a clue to its just construction. It may be remarked, however, that the terms of the act are broad enough to embrace other persons as well as those of African descent, but that is a point not now in question in this case.

The first section declares that all persons born in the United States, not subject to a foreign power, and not including untaxed Indians, are citizens of the United States, and that such citizens, of every race and color, without regard to previous condition of slavery, shall have the same right, in every State and Territory in the United States, to make and enforce contracts; to sue, be parties, and give evidence; to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law or custom to the contrary notwithstanding.

This is the fundamental section of the act. All that follows is intended to secure and vindicate, to the objects of it, the rights herein declared, and to establish the requisite machinery for that end.

This section is in direct conflict with those State laws which forbade a free colored person to remove to or pass through the State, from having firearms, from exercising the functions of a minister of the gospel, and from keeping a house of entertainment; laws which prohibited all colored persons from being taught to read and write, from holding or conveying property, and from being witnesses in any case where a white person was concerned; and laws which subjected them to cruel and ignominious punishments not imposed upon white persons, such as to be sold as vagrants, to

be tied to the whipping-post, &c., &c. All these, and all other discriminations, were intended to be abolished and done away with.

The second section makes it a misdemeanor, punishable by fine or imprisonment, for any person, under color of any law or custom, to deprive any inhabitant of a State or Territory of any right secured by the act, or to subject him to different punishment or penalties on account of his having been a slave, or by reason of his color or race, than is prescribed for the punishment of white persons.

The third section proceeds to confer upon the District Courts of the United States, exclusive of the State courts, jurisdiction to try these offences, and then follows the clause under which the indictment in the present case was found, declaring that the said District Courts shall also have cognizance, concurrently with the Circuit Courts of the United States, "of all causes, civil and criminal, *affecting* persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality where they may be, any of the rights secured to them by the first section," with right of removal of causes from State courts, &c. It is evident that the provisions of the second section, making it a criminal offence to deprive a person of his rights, or to subject him to a discriminating punishment, would fail to reach a great number of cases which the broad and liberal provisions of the first section were intended to cover and protect. The clause in question is intended to reach these cases, or, at least, a large class of them. It provides a remedy where the State refuses to give one; where the mischief consists in inaction or refusal to act, or refusal to give requisite relief; whereas the second section provides for actual, positive invasion of rights. Thus, if the State should refuse to allow a freedman to sue in its courts, thereby denying him judicial relief, or should fail to provide laws for the punishment of white persons guilty of criminal acts against his person or property, thereby denying him judicial redress, there can be no doubt that the case would come within the scope of the clause under consideration. Suppose that, in any State,

assault and battery, mayhem—nay, murder itself, could be perpetrated upon a colored man with impunity, no law being provided for punishing the offender, would not that be a case of denial of rights to the colored population of that State? Would not the clause of the civil rights bill now under consideration give jurisdiction to the United States courts in such a case? Yet, if an indictment should be found in one of those courts against the offender, the technical parties to the record would only be the United States as plaintiff and the criminal as defendant. Nevertheless could it be said, with any truth or justice, that this would not be a cause affecting persons denied the rights secured to them by the first section of the law?

The case before us is just as clearly within the scope of the law as such a case would be. I do not put it upon the ground that the witnesses of the murder, or some of them, are colored persons, disqualified by the laws of Kentucky to testify, but on the ground that the cause is one affecting the person murdered, as well as the whole class of persons to which she belonged. Had the case been simple assault and battery, the injured party would have been deprived of a right, enjoyed by every white citizen, of entering a complaint before a magistrate, or the grand jury, and of appearing as a witness on the trial of the offender. I say "right," for it is a right, an inestimable right, that of invoking the penalties of the law upon those who criminally or feloniously attack our persons or our property. Civil society has deprived us of the natural right of avenging ourselves, but it has preserved to us, all the more jealously, the right of bringing the offender to justice. By the common law of England the injured party was the actual prosecutor of criminal offences, although the proceeding was in the king's name; but in felonies, which involved a forfeiture to the crown of the criminal's property, it was also the duty of the crown officers to superintend the prosecution. And, although in this country it is almost the universal practice to appoint public and official prosecutors in criminal cases, yet it is the right of the injured party, and a duty he owes to society, to

furnish what aid he can in bringing the offender to justice; and an important part of that right and duty consists in giving evidence against him.

To deprive a whole class of the community of this right, to refuse their evidence and their sworn complaints, is to brand them with a badge of slavery; is to expose them to wanton insults and fiendish assaults; is to leave their lives, their families, and their property unprotected by law. It gives unrestricted license and impunity to vindictive outlaws and felons to rush upon these helpless people and kill and slay them at will, as was done in this case. To say that actions or prosecutions intended for the redress of such outrages are not "causes affecting the persons" who are the victims of them, is to take, it seems to me, a view of the law too narrow, too technical, and too forgetful of the liberal objects it had in view. If, in such a raid as I have supposed, a colored person is merely wounded or maimed, but is still capable of making complaint, and on appearing to do so, has the doors of justice shut in his face on the ground that he is a colored person, and cannot testify against a white citizen, it seems to me almost a stultification of the law to say that the case is not within its scope. Let us read it once more: "The District Courts shall, concurrently with the Circuit Courts, have cognizance of all causes, civil and *criminal*, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be, any of the rights secured to them by the first section of this act."

If the case above supposed is within the act (as it assuredly must be), does it cease to be so when the violence offered is so great as to deprive the victim of life? Such a construction would be a premium on murder. If mere violence offered to a colored person (who, by the law of Kentucky, was denied the privilege of complaint), gives the United States court jurisdiction, when such violence is short of being fatal, that jurisdiction cannot cease when death is the result. The reason for its existence is stronger than before. If it would have been a cause affecting him when living, it will

be a cause affecting him though dead. The object of prosecution and punishment is to *prevent* crime, as well as to vindicate public justice. The fear of it, the anticipation of it, stands between the assassin and his victim like a vindictive shade. It arrests his arm, and loosens the dagger from his grasp. Should not the colored man have the ægis of this protection to guard his life, as well as to guard his limbs, or his property? Should he not enjoy it in equal degree with the white citizen? In a large and just sense, can a prosecution for his murder affect him any less than a prosecution for an assault upon him? He is interested in both alike. *They are his protection against violence and wrong.* At all events it cannot be denied that the entire class of persons under disability is affected by prosecutions for wrongs done to one of their number, in which they are not permitted to testify in the State courts.

I am well aware of the case of Ortega, who was indicted in the Circuit Court for offering violence to the person of the Spanish minister. The defendant claimed that it was "a case affecting a public minister," and under the Constitution cognizable only in the Supreme Court. But the court, taking the strict and technical view, decided that, being a criminal case, in which the United States was plaintiff and the offender was defendant, they only were the parties whom the case *affected.* Conceding that this decision was good law for the purposes of that case, I do not feel that I am bound by it in this. The effect of that decision was, that the Constitution in giving the Supreme Court jurisdiction in cases affecting ambassadors, other public ministers and consuls, only intended to give these public persons the right *to sue and be sued* in the Supreme Court. In the case before us, I think Congress meant a great deal more than this when it gave the United States courts cognizance of all causes, civil and *criminal*, affecting persons who are denied or cannot enforce in the courts of the State any of the rights secured by the first section of the act.

I have considered the case irrespective of the fact that the witnesses of the transaction were all colored people who, at

the time this indictment was found, were denied the right to testify against white persons in Kentucky. I have placed it on the sole ground, that prosecutions for crimes committed against colored persons, are causes which, in the sense of the civil rights bill, most seriously affect them; and that in Kentucky they were denied the privilege of being witnesses in these causes. I do not mean to be understood as saying that every cause in which a colored person may be called as a witness, for that reason belongs to the cognizance of the United States courts. In ordinary cases of a civil character, the party calling such a person as a witness is the person affected. Such party, be he black or white, may except to the rejection of his witness, and bring the case to this court by writ of error from the State court of last resort under the 25th section of the Judiciary Act. A defendant in a criminal prosecution may do the same thing where a bill of exceptions is allowed in criminal cases.

To conclude, I have no doubt of the power of Congress to pass the law now under consideration. Slavery, when it existed, extended its influence in every direction, depressing and disfranchising the slave and his race in every possible way. Hence, in order to give full effect to the National will in abolishing slavery, it was necessary in some way to counteract these various disabilities and the effects flowing from them. Merely striking off the fetters of the slave, without removing the incidents and consequences of slavery, would hardly have been a boon to the colored race. Hence, also, the amendment abolishing slavery was supplemented by a clause giving Congress power to enforce it by appropriate legislation. No law was necessary to abolish slavery; the amendment did that. The power to enforce the amendment by appropriate legislation must be a power to do away with the incidents and consequences of slavery, and to instate the freedmen in the full enjoyment of that civil liberty and equality which the abolition of slavery meant.

In my opinion the judgment of the Circuit Court should be affirmed.

MASON *v.* ROLLINS ET AL.

Three appeals in equity against collectors and the Commissioner of Internal Revenue dismissed, the pleadings not showing the citizenship required by the Judiciary Act; and the bills having been all filed subsequently to the 13th July, 1866, when the act of 1833, which gave jurisdiction to the courts of the United States of suits under the Internal Revenue Acts against collectors and others, without regard to citizenship, was repealed.

MOTION by *Mr. C. H. Hill, Assistant Attorney-General* (*Mr. Edward Roby, opposing*), to dismiss three appeals from the Circuit Court for the Northern District of Illinois; the appeals being from decrees in equity dismissing the cases for want of jurisdiction.

The first bill described the complainant as a citizen of the State of Illinois, and one defendant (Rollins) as of the District of Columbia, and a citizen of the State of ——, and other defendants (Allen and Ferguson) as citizens of the State of Illinois.

The second bill described the plaintiff as a citizen of the State of Illinois, and three defendants (Mann, Allen, and Ferguson) as citizens of the State of Illinois, and one defendant (Delano) as Commissioner of Internal Revenue, without averring that he was a citizen of any State.

The third bill described the plaintiff as a citizen of the State of Illinois, and did not aver that any of the defendants were citizens of any other State.

All the bills were filed subsequently to the 13th July, 1866, when the act of 1833, which gave jurisdiction to the courts of the United States of suits under the Internal Revenue Acts against collectors and others, without regard to citizenship, was repealed.*

The CHIEF JUSTICE delivered the opinion of the court.

It is manifest that the averments of citizenship in neither

* Insurance Co. *v.* Ritchie, 5 Wallace, 544; 13 Stat. at Large, 241; 14 Id. 172

of the bills are sufficient to give the Circuit Court jurisdiction under the Judiciary Act of 1789; and all were filed subsequent to the 13th of July, 1866.

When these suits were brought, therefore, there was no act in force giving jurisdiction, in cases such as those made by the records, to the courts of the United States. The Circuit Court was obliged, therefore, to dismiss the bill in each case for want of jurisdiction, and the judgment of that court in the several cases must be

AFFIRMED.

INSURANCE COMPANY *v.* BARTON.

The granting or refusing to grant a motion for a new trial resting wholly in the discretion of the court where it is made, the action of such court is not ground for error.

ERROR to the Circuit Court for the District of Missouri.

Mr. M. H. Carpenter, for the plaintiff in error; Mr. F. A. Dick, contra.

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

The suit was brought by Barton upon a policy of insurance. Upon looking into the record we find that the case was tried by a jury; that evidence was adduced by both parties; that the court instructed the jury, and that they found a verdict for the plaintiff, upon which judgment was duly entered. All this was done without any exception being taken by the defendant. The assurers then moved the court to set aside the verdict and grant a new trial upon the following grounds:

That the verdict was against the evidence; that it was against the law and the instructions of the court; because the verdict was uncertain and insufficient. The court over-

ruled the motion. To this the assurers excepted, and in their bill of exceptions have set out all the evidence given in the case. The only point to which our attention has been called by their counsel in this court is, that, according to the evidence thus set out, the plaintiff was clearly not entitled to recover.

The granting or overruling of a motion for a new trial in the courts of the United States rests wholly in the discretion of the court to which the motion is addressed. This is so well settled that it is unnecessary to remark further upon the subject.*

JUDGMENT AFFIRMED.

DOOLEY *v.* SMITH.

1. A plea which states that the sum due on a promissory note is a certain amount, on a certain day, and avers a tender on that day of the sum due in legal tender notes of the United States, is a good plea of tender.
2. In a suit on such note an order of court made by consent that the money might be withdrawn from court, without prejudice to the validity of the tender, cannot be supposed to be the reason why the court held the plea bad on demurrer.
3. As the record in this case showed no other reason why the Court of Appeals of Kentucky sustained a demurrer to the plea than that it was made in legal tender notes of the United States, it sufficiently appeared that the question of the validity of these notes as a tender was made and decided in the negative.
4. This court, therefore, has jurisdiction to review the judgment; and though the note sued on was made before the passage of the legal tender statutes by Congress, *held* that the tender was a valid tender, and that the judgment of the court below must be reversed.

MOTION by *Mr. W. H. Wadsworth, for the defendant in error* (*Mr. G. Davis, opposing*), to dismiss a writ of error to the Court of Appeals of the State of Kentucky, taken on the assumption that the case came within that provision of the

* Henderson *v.* Moore, 5 Cranch, 11; Barr *v.* Gratz's Heirs, 4 Wheaton, 220; Doswell *v.* De La Lanza, 20 Howard, 29; Schuchardt *v.* Allens, 1 Wallace, 371.

25th section of the Judiciary Act which, as is known, gives this court a right to review the decisions of the highest State court whenever there is drawn in question there the validity of a statute of the United States and the decision is against its validity.

The further statement of the case, as also an indication of the points raised by counsel, is made by

Mr. Justice MILLER, who delivered the opinion of the court.

It is argued by counsel for defendant in error that no question cognizable by this court on a writ of error to a State court is presented by the record, while the counsel for plaintiff insists that the validity of the acts of Congress, making certain notes of the United States a legal tender in payment of debts, was the only question raised and decided in the court below.

We are satisfied, from a careful examination of the record, that this latter question was decided against the validity of those statutes, and that such a decision was essential to the judgment rendered by the court.

Dooley being indebted to Smith in a sum of nearly $10,000, evidenced by a note, and made a lien on land by mortgage, filed his petition in the proper State court of Kentucky, alleging that on the 6th day of January, A.D. 1868, the amount due on the note was $9843.92, and that on that day he tendered to Smith that sum in United States legal tender treasury notes, commonly called greenbacks, which Smith refused to receive, and to surrender the note, though he had demanded it. He now brings said legal tender notes into court, and again tenders them, and prays for a delivery of his note and for such other relief as may be proper. He also alleges a prior tender in 1864, but this may be dismissed from further consideration, as he offers the amount due in 1868 without reference to the first tender.

To this petition Smith filed a general demurrer.

While this suit was pending the defendant, Smith, brought an action in the same court to recover the amount due on

the note, and to this action Dooley answered, referring to his petition in the former case, and making his allegation therein, of a tender, his answer in this case, and praying that the two be consolidated, which was ordered by the court. Smith demurred generally to Dooley's answer.

On these pleadings the case was submitted to the court, which ordered both demurrers to be sustained and rendered a judgment for Smith for the amount due, with interest until paid, without regard to the tender. This judgment was affirmed by the Court of Appeals of Kentucky, to which the present writ of error is directed.

Some attempt is made in argument to show that the court might have rested its judgment on the insufficiency of the amount tendered without regard to the character of the currency offered; but as the petition of plaintiff, Dooley, which is adopted as his answer in the suit of Smith, expressly avers that by reason of payments already made, the sum due on the day of the tender was the precise sum tendered, this fact must be taken as confessed by the demurrer of Smith. As regards the sufficiency of the tender of 1864, it is immaterial, as it was not relied on by the plea.

So, also, the argument that the tender paid into court having been withdrawn before judgment, that fact justified the judgment, is answered by the record, which shows that it was withdrawn by a consent order of the court, which provided that the legal effect of the tender should be the same as it would be if the money remained in court.

If the tender was good its effect was to stop the running of interest, and the judgment of the court gave interest ex pressly, as though no tender had been made.

In short, it is not possible to examine the record and discover any ground on which the plea of tender by Dooley was held bad on demurrer but the fact that it was made in legal tender notes of the United States.

This court, therefore, has jurisdiction.

The recent decision here, overruling *Hepburn* v. *Griswold*,*

* Legal Tender Cases, 12 Wallace, 457.

and holding these notes to be a valid tender in payment of contracts made before the enactment of the legal tender statutes, as well as those made since, decides the case before us on the merits, and dispenses with further argument.

JUDGMENT REVERSED, and the case remanded, with directions to that court for further proceedings

IN CONFORMITY WITH THIS OPINION.

Mr. Justice FIELD, dissenting.

The Chief Justice, Mr. Justice Clifford, and myself, dissent from the judgment of the majority of the court just rendered. The question presented is whether a contract for the payment of dollars made previous to February 25th, 1862, can be satisfied, against the will of the holder, by a tender of United States notes equal in nominal amount to the sum due on the contract. This question depends, of course, for its solution upon the validity and constitutionality of that provision of the act of 1862, which makes these notes a legal tender in payment of debts. We have recently had occasion to express on this subject our views at large, and to them we adhere. We have considered with great deliberation the views of the majority, who differ from us, and we are unable to yield our assent to them. With all proper deference and respect for our brethren, we are constrained to say that, in our judgment, the doctrines advanced in their opinions on this subject are not only in conflict with the teachings of all the statesmen and jurists of the country up to a recent period, and at variance with the uniform practice of the government for nearly three-quarters of a century, but that they tend directly to break down the barriers which separate a government of limited powers from a government resting in the unrestrained will of Congress.

We are therefore compelled by every consideration of duty which may be supposed to govern judicial officers on this bench, to express on all proper occasions our dissent from what we regard as a wide departure from the limitations of the Constitution. Those limitations must be pre-

served, or our government will inevitably drift from the system established by our fathers into a vast centralized and consolidated government.

PAIGE *v.* BANKS.

1. Where in consideration of an agreement by publishers to pay him a certain sum of money, and the performance of specified duties in connection with the publication, a reporter of judicial decisions agreed in 1828 "to furnish in manuscript the reports of his court for publication," with an additional clause that the "publishers shall have the copyright of said reports, to them and their assigns forever," *held*, on bill filed by the reporter's executrix for injunction, and account of profits after the expiration of twenty-eight years from the entry of copyright (A.D. 1830), that the publishers had a full right of property in the manuscript; and accordingly that they could publish not only for the twenty-eight years during which the act of May 31st, 1790 (the only copyright act in force when the agreement was made), gave an author and his *assigns* the exclusive right to print, reprint, publish, and vend, but also during the fourteen years granted by an act of 3d February, 1831, subsequently passed, by which the exclusive right was continued to the author if alive, or if dead to his *widow*, *child*, *or children;* the reporter not having died till 1868.
2. *Held*, further, that this view was confirmed by the fact that a notice had been given in 1858, by the reporter to his publishers, that he himself claimed the right to publish on the expiration of the first twenty-eight years, and forbid them to publish further, and that they in reply denied his right and asserted their own, and that though the reporter lived, as already said, till 1868, ten years after this correspondence, no further notice was taken of this subject, and no attempt by the reporter, by act or protest, to interfere with the exercise of the right of the publishers to publish and sell.

APPEAL from a decree of the Circuit Court for the Southern District of New York; the case being thus:

Congress by a copyright law of 31st May, 1790,* enacted that the author and authors of any book or books, "and his or their executors, administrators, or *assigns*," should have

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* 1 Stat. at Large, 124.

the sole right and liberty of printing, reprinting, publishing, and vending such book or books for the term of fourteen years. And if, at the expiration of the said term the said author or authors should be alive, that the same exclusive right should be continued to him or them, "his or their executors, administrators, or *assigns*, for the further term of fourteen years."

With this law in force as governing the subject of copyrights, the late Mr. Alonzo Paige, of New York, reporter of its Court of Chancery, entered, on the 7th of October, 1828, into an agreement with Gould & Banks, law publishers of that State, thus:

"That the said Alonzo during the term of five years from the 28th of April last, shall and will furnish the said Gould & Banks, *in manuscript*, the reports of the said court for *publication*, and that the said Gould & Banks *shall have the copyright of said reports to them and their heirs and assigns forever.*

"And the said Gould & Banks agree to and with the said Alonzo, that they will publish said reports in royal octavo volumes of between 600 and 700 pages, on paper and type suitable for such a work; that they will deliver to the said Alonzo twelve copies free of expense; that they will sell said reports to the members of the bar of New York at a sum not exceeding $6 per volume, bound in calf, for each volume they shall so sell within one year next subsequent to the publication of such volume.

"And the said Gould & Banks agree to pay to the said Alonzo $1000 per volume for every volume they shall publish, and at the same rate for less than a volume, within six months after the publication of each volume.

"It is understood that the said Alonzo is to read and correct the proof-sheets of said reports as the same are furnished him."

Mr. Paige did accordingly furnish to Gould & Banks the manuscript of the volume known as 1st Paige's Chancery Reports; and on the 5th of January, 1830, Gould & Banks took out the copyright therefor in their own names.

On the 3d of February, 1831, that is to say, about two years and a half after the date of the agreement between

the parties, Congress amended the copyright law,* enlarging the rights of copy. The new statute enacted:

"That whenever a copyright shall have been heretofore obtained by an author . . . of any book, &c., if such author . . . be living at the passage of this act, then such author . . . shall continue to have the same exclusive right to his book, . . . with the benefit of each and all the provisions of this act for the security thereof, for such additional period of time as will, together with the time which shall have elapsed from the first entry of said copyright, make up the term of twenty-eight years.

"That if at the expiration of the aforesaid term of years, such author . . . be still living, and a citizen . . . of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author; . . . or if dead, *then to such widow and child or children* for the further term of fourteen years."

The twenty-eight years of right given by the act of 1790, expired on the 5th of January, 1858. Gould & Banks conceiving themselves to be entitled to renewal under the act of 1831, on the 3d of October, 1857, went through the usual process to secure a copyright for the extended term. Mr. Paige, on the 3d of January, 1858, conceiving that the extension enured to *his* benefit, did the same, and on the 13th following informed Gould & Banks that he had thus renewed his copyright, and calling their attention to the fact, that by this renewal "all right on their part to print, publish, or vend volume first of his reports had ceased," and calling on them "henceforth to refrain from printing, publishing, or vending it." To this Gould & Banks, referring to the contract of October 7th, 1828, reply:

"*First.* Your manuscripts were furnished to us for publication without limit as to time, and, therefore, whatever be your rights under the law of 1831, we have an unlimited license to publish and sell.

"In the second place, where the entire interest in the copy-

* 4 Stat. at Large, 439.

right has been assigned, we consider the provisions of the act of 1831 to have been intended to enure to the benefit of the assignee."

They accordingly notify to Mr. Paige that they shall themselves take out all of the renewals of the copyright, "and hold him liable for all damages consequent on any infringement of their rights."

Things remained in this state till March 31st, 1868, when Mr. Paige died; and in about ten months afterwards, and after some correspondence with a view to amicable adjustment, his executors filed a bill for injunction against further printing and vending, and for an account of profits after January, 1858.

The court below (Blatchford, J.) dismissed the bill,* and the executors of Mr. Paige appealed to this court.

Messrs. Clarkson Nott Potter and W. W. Campbell, for the appellants:

The intention of the parties, to be collected from the whole agreement, was simply to convey the copyright, though it may be admitted for the sake of argument that the agreement contains provisions sufficient to create a license if the copyright had not been specifically conveyed. Now, this thing called "copyright" is, so far as the law recognizes it, or so far as it is a matter of practical value and of sale, a creature of statute. A man has no more "copyright" than what the statute gives him. When this agreement was made Mr. Paige had the exclusive right in himself and in his assigns to print, publish, and sell, at the longest for a term of twenty-eight years; and no greater or additional right. That assuredly is what he meant to sell, and all that he meant to sell. Now a new statute—one not dreamt of by any one in 1828—gives to Mr. Paige subsequently a new and different sort of right. How can it be said that Mr. Paige meant to assign *that* when he assigned the other? There are no words in his agreement such as "whatever copyright he may here-

* 7 Blatchford, 154.

after have granted to him;" by which it might be inferred that he meant to part with more property than he had; an inference not to be made easily in any case. Questions have arisen often in the kindred case of patents, how far a grant of a patent right carried a subsequent extension of it. In *Wilson* v. *Rousseau*,* a covenant by the patentee prior to the patent act of 1836, which authorized extensions, that the covenantee should have the benefit of *any* improvement in the machinery, or *alteration* or *renewal* of the patent, was held not to exclude an extension by an administrator under that act; and this court was not unanimous in holding that an extension passed even in such a case as *Railroad Company* v. *Trimble*,† where a patentee conveyed all the right, title, and interest which he had in the "same invention," as secured to him by letters-patent, and also all "the right, title, and interest which *may* be secured to him from *time to time*, the same to be held by the assignee for his own use and for that of his legal representatives, "to the full end of the term for which said letters are OR *may* be granted."

2. The copyright act of 1790 gives the right to the author and to his *assigns*. The act of 1831 which created this new term, gives it specifically to the author if living, to *his family* if he is dead. Assignees are not mentioned in it, nor provided for. It looks much as if Congress in this case had meant specially to take care of men of literary genius; often as we know not men of business, and, therefore, subject to be hardly dealt with by the trade. A book is rarely much demanded after it has been published twenty-eight years. Some books, the works of men of high genius, are as much so or more than ever. The provision seems specially to have been for the authors of them; and for their families; just as Congress by various acts provides for our soldiers, our occupants of bounty lands, making very liberal provision for them and for their families, but declaring that their vendees shall take nothing. Mr. G. T. Curtis, in his work on Copyright,‡ questions whether the author by any assignment

* 4 Howard, 682. † 10 Wallace, 367. ‡ Page 235.

could dispose of the contingent interest given by the act of 1831, so as to deprive his widow and children of the right in case of his death. A similar provision in the patent law has been construed by this court against the right.*

We have the benefit of the views on the circuit by Mr. Justice Nelson, in the case of *Cowen* v. *Banks*,† in support of the position which we take. There the reporter Cowen had assigned in 1823 to this same house of Gould & Banks, the copyright of his reports by an instrument like the present one.‡ He lived till 1844, that is to say, three years after the expiration of his first term of copyright. The executrix of the reporter after his death claiming the fourteen years of the extended term of twenty-eight years, given by statute of 1790, to authors or their *assigns*, filed a bill for injunction and account. His honor, Judge Nelson, after careful consideration, decided in her favor. It is true indeed that he decreed ultimately in favor of the publishers, on a cross action brought by them to amend the agreement, so as to convey all the interest of Mr. Cowen in the extended term. On the hearing of that cross-bill a deposition of Mr. Cowen given in a prior suit brought by the publishers against one Hastings, as a violator of the copyright, was read in evidence. In this deposition Mr. Cowen testified "*that it was his intention, by the agreement, to convey his whole interest in the copyright of the work*," and he added: "I supposed the book to belong to my assignees, as soon as made, including all that was in it. I would not have taken the office of reporter, with its salaries and duties, unless I was to have a proprietary right which I could use or dispose of." The present case is much stronger than that of Mr. Cowen, for the term claimed by his representatives, was the second term granted by the statute of 1790, in case the author lived through the first fourteen years; a term grantable under the statute to assigns; while what we have claimed is the ex-

* Wilson *v.* Rousseau, 4 Howard, 646; Bloomer *v.* McQuewan, 14 Id. 539

† 24 Howard's Practice Cases, 72.

‡ A copy of the instrument was shown to the court from the judgment roll of the case.

tension granted by the statute of 1831, an extension conferred on the author and his *family*, and where the rights of assigns seem to have been carefully excluded.

Messrs. Joseph Laroque and E. E. Anderson, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The whole controversy turns upon the true interpretation of the agreement made on the 7th October, 1828.

Independent of any statutory provision the right of an author in and to his unpublished manuscripts is full and complete. It is his property, and, like any other property, is subject to his disposal. He may assign a qualified interest in it, or make an absolute conveyance of the whole interest.

The question to be solved is, do the terms of this agreement show the intent to part with the whole interest in the publication of this book, or with a partial and limited interest?

The agreement on the one side is "to furnish, in manuscript, the reports of said court for publication," with an additional clause that the publishers "shall have the copyright of said reports to them and their assigns forever." The cause or consideration of this agreement is a stipulation by the other side for a certain sum of money, and the performance of certain duties in connection with the publication.

It is insisted by the appellants that a just interpretation confines the agreement to a mere assignment of the interest in such copyright, as is provided for in the act of 31st May, 1790; that this was the law in force when the contract was entered into; that the fourteen years therein provided for, with the right to a prolongation of fourteen years more, is all that the publishers, at most, are entitled to, and that they are excluded necessarily from the benefit of the provisions conferred by the act of the 3d February, 1831, granting to authors an additional extension of fourteen years.

In our view this is too narrow a construction. The fair and just interpretation of the terms of the agreement indicate unmistakably that the author of the manuscript, in

agreeing to deliver it for publication at a stipulated compensation, intended to vest in the publishers a full right of property thereto.

The manuscript is delivered under the terms of the agreement "for publication." No length of time is assigned to the exercise of this right, nor is the right to publish limited to any number of copies. The consideration is a fixed sum of $1000. Whether one or one hundred thousand copies were published the author was entitled to receive, and the publishers bound to pay, this precise amount.

As between the parties to the agreement the absolute interest was conveyed by the stipulation of Paige, that he would furnish the manuscript for publication. Paige could no longer do any act after such delivery for publication inconsistent with the absolute ownership of the publishers. But it was proper, for the protection of the publishers, that they should be in position to assert the remedies given by the law against intruders, and it is to this end it is added in the agreement, "*and* the said Gould & Banks shall have the copyright of said reports to them, their heirs, and assigns forever." It is not covenanted that the publishers should take out the copyright, nor is there any express agreement for an assignment to them by Paige, if he should take it out. Undoubtedly the provision, that the publishers "should *have* the copyright," would authorize them to apply for it, and if Paige had taken it out in his own name it would have enured to their benefit. But, as between Paige and the publishers, the rights of the latter could not be estimated differently, whether they had or had not availed themselves of the provisions of the act.

We have been referred to the case of *Cowen* v. *Banks*, in which Mr. Justice Nelson, on a similar agreement, expressed the opinion that the construction now contended for by the appellants was the true one. No reason is assigned by the judge for his opinion, and the case was such that it was not necessary that this point should be maturely considered. The practical construction by Judge Cowen of his own contract, in opposition to his interest, is cited in the decision to

which we are now referring, together with the fact that the judge died in 1844, three years after the expiration of the first term of the copyright. On this it is said, with some emphasis,* "that he had all this time acquiesced in the claim of the assignee." The decree was that the contract be reformed accordingly.

In the case now before us the construction contended for by the appellants was, for the first time, urged by letter of Mr. Paige, 13th January, 1858, addressed to the appellees, who replied on 3d February following, asserting their absolute right of ownership, with an unlimited license to publish and sell. The parties lived together after this in the same State until 31st March, 1868, when Paige died, a period of ten years, during which no further notice was ever taken of this subject, and no attempt by Paige, by act or protest, to interfere with the exercise of the right of the appellees to publish and sell. It is difficult to account for this long acquiescence upon any assumption that Paige, after the receipt of the reply to the publishers, had faith in the construction now urged. If this agreement needed any extraneous aid to indicate the intention of the parties, this acquiescence would certainly be persuasive of the view we have taken of it.

DECREE AFFIRMED.

INSURANCE COMPANY *v.* BAILEY.

Although equity have power to order the delivery up and cancellation of a policy of insurance obtained on fraudulent representations and suppressions of facts, yet it will not generally do so, when these representations and suppressions can be perfectly well used as a defence at law in a suit upon the policy. Hence a bill for such a delivery up and cancellation was held properly "dismissed, without prejudice," though the evidences of the fraud were considerable, there being no allegation that the holder of the policy meant to assign it; and suit on the policy having after the bill was filed been begun at law.

APPEAL from the Supreme Court of the District.

The Phœnix Mutual Life Insurance Company filed a bill

* 24 Howard's Practice Cases, 72.

Statement of the case.

against Mrs. Elizabeth Bailey, widow of Albert Bailey, to compel the cancellation of two policies of insurance issued by that company upon the life of the said Albert, on the 12th of June and 15th of July, 1867, respectively.

The grounds of the bill were that the policies had been procured by the defendant by fraudulent suppression of certain material facts, and the misrepresentation of other ones of the same class. The answer denied the allegations made.

Evidence was given tending to show that the defendant, then bearing the name of Mrs. Von Kammecher, after a husband from whom she had been divorced, went, on the 10th June, 1867, to the office of the insurance company to have Mr. Bailey's life insured; the insurance being in Bailey's own favor, he representing himself as unmarried. Bailey being required, in the usual form, to name an intimate friend who could answer as to his health, referred to Mrs. Von Kammecher, in whose house he was then boarding, and who accordingly signed a certificate that he was in good health and of temperate habits. A policy was accordingly made out to Bailey for $4000. Nine days afterwards, that is to say, on the 19th June, 1867, the same lady called at the office and requested that the policy should issue to *her* as the wife of Bailey and should be increased to $6000. The policy was thus made, and was dated as of the 12th June, 1867, the date intended for the other. An additional policy was made for $4000 on the 15th July, 1867. Bailey and Mrs. Von Kammecher were married June 22d, 1867, and Bailey died October 11th following, of phthisis pulmonalis. Evidence was also given tending to show that Bailey had been under treatment from February till May, 1867, was told that his lungs were diseased, and that he "must strenuously take care of himself;" and, moreover, that Mrs. Von Kammecher knew this, and had been told that Mr. Bailey "might live two years or not more than six months;" and that she had been herself principally if not solely instrumental in procuring the policies. Evidence was also given tending to show that Bailey's habits were not temperate.

On the other hand evidence was given tending to a contrary conclusion, but it did not perhaps establish it.

It was not alleged in the bill, nor was there evidence given to show that Mrs. Bailey had attempted to assign or that she was about to dispose of the policies. The averment of the bill was that Mrs. Bailey, insisting upon the obligation of the company under the policies, "demanded the $10,000, and threatened to bring an action at law to recover the same, and by such suit to harass and injure the company." But, on the other hand, it appeared that after the bill had been filed, suit was brought at law on the policies; so that the company could *now* set up the fraud alleged.

The court below dismissed the bill without prejudice.

Messrs. Carlisle, McPherson, and W. S. Cox, for the appellant:

The jurisdiction of courts of equity to compel the cancellation of agreements obtained through false and fraudulent representations is well established, and insurance cases are peculiarly within the jurisdiction. The facts show a clear case of fraud.

Messrs. W. D. Davidge and R. B. Washington, contra:

There is a complete defence at law in favor of the insurance company, if the allegations of the bill are true, and it is sued. If not sued no injury is done to it. The issues of fact raised in the cause are peculiarly suited for the determination of a jury; and even if a court of equity has *discretion* to entertain the case, which we do not deny, that discretion should not be exercised.

Mr. Justice CLIFFORD delivered the opinion of the court.

Policies of life insurance are governed, in some respects, by different rules of construction from those applied by the courts in case of policies against marine risks or policies against loss by fire.

Marine and fire policies are contracts of indemnity, by which the claim of the insured is commensurate with the damages he sustained by the loss of, or injury to, the prop-

erty insured. Such being the nature of the contract, it is clear that an absolute sale of the property insured, prior to the alleged disaster, is a good defence to an action on the policy, as the insured cannot justly claim indemnity for the loss of, or injury to, property in which he had no insurable interest at the time the loss or injury occurred.

Life insurances have sometimes been construed in the same way, but the better opinion is that the decided cases which proceed upon the ground that the insured must necessarily have some pecuniary interest in the life of the *cestui qui vie* are founded in an erroneous view of the nature of the contract, that the contract of life insurance is not necessarily one merely of indemnity for a pecuniary loss, as in marine and fire policies, that it is sufficient to show that the policy is not invalid as a wager policy, if it appear that the relation, whether of consanguinity or of affinity, was such, between the person whose life was insured and the beneficiary named in the policy, as warrants the conclusion that the beneficiary had an interest, whether pecuniary or arising from dependence or natural affection, in the life of the person insured.*

Insurers in such a policy contract to pay a certain sum, in the event therein specified, in consideration of the payment of the stipulated premium or premiums, and it is enough to entitle the insured to recover if it appear that the stipulated event has happened, and that the party effecting the policy had an insurable interest, such as is described, in the life of the person insured at the inception of the contract, as the contract is not merely for an indemnity, as in marine and fire policies.

Two policies for insurance upon the life of Albert Bailey, the husband of the appellee, were issued by the appellants, and made payable to the appellee in ninety days after due notice and proof of the death of the husband. He died on the eleventh of October following, and due notice of that

* Dalby *v.* The India and London Ins. Co., 15 C. B. 365; Loomis *v* Eagle Life and Health Ins. Co., 6 Gray, 396; Lord *v.* Dall, 12 Massachusetts, 118; Trenton Life and Fire Ins. Co. *v.* Johnson, 4 Zab. 576; Rawls *v.* American Life Ins. Co., 36 Barbour, 357; S. C., 27 N. Y. 282.

event was given to the appellants by the appellee, to whom the sums insured, amounting to ten thousand dollars, were payable, but they refused to pay the same, upon the ground that the policies were obtained by fraudulent misrepresentations and by the fraudulent suppression of material facts. They not only refused to pay the sums insured, but instituted the present suit in equity to enjoin the appellee from assigning or in any manner disposing of the policies, and also prayed that she might be compelled by the decree of the court to deliver up the policies to be cancelled, and for further relief. Process was issued and served and the respondent appeared and answered, denying all the charges set forth in the bill of complaint, and alleging that the complainants were bound to pay her the entire sums insured in the respective policies. Proofs were taken on both sides, and the cause having been duly transferred to the general term, the parties proceeded to final hearing, and the Supreme Court of the District entered a decree dismissing the bill of complaint with costs, but without prejudice, and the complainants appealed to this court.

Fraudulent misrepresentations and the frandulent suppression of material facts are the principal grounds alleged for the relief prayed in the bill of complaint, and it must be conceded that the proofs introduced by the complainants tend strongly to support the allegations which contain those charges. Those allegations in the bill of complaint are denied in the answer, and the respondent has introduced proofs in support of those denials, but it is not going too far to say that the weight of the evidence, as exhibited in the record, is adverse to the pretensions of the respondent, nor does it appear that any different views were entertained by the subordinate court. Grant all that, and still it does not follow that the decree in the court below is erroneous, as the bill of complaint may well have been dismissed upon grounds wholly disconnected from the merits of the controversy.

Suits in equity, the Judiciary Act provides, shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be

had at law, and the same rule is applicable where the suit is prosecuted in the Chancery Court of this District.*

Much consideration was given to the construction of that section of the Judiciary Act in the case first referred to, and also to the question whether a party seeking to enforce a legal right could resort to equity in the first instance in a controversy where his remedy at law is complete, and the court, without hesitation, came to the conclusion that he could not, if his remedy at law was as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Most of the leading authorities were carefully examined on the occasion and the court came to the following conclusion, which appears to be correct: That whenever a court of law in such a case is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must in general proceed at law, because the defendant, under such circumstances, has a right to a trial by jury.†

Exceptions undoubtedly exist to that rule, of which there are many to be found in the reports of judicial decisions, and in which preventive relief was administered by injunction. Such relief is granted to prevent irreparable injury or a multiplicity of suits, or where the injury is of such a nature that it cannot be adequately compensated by damages at law, or is such, as, from its continuance or permanent mischief, must occasion constantly recurring grievance, which cannot be removed or corrected otherwise than by such a preventive remedy.

Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress oppressive and intermin-

* Hipp *v.* Babin, 19 Howard, 271; Parker *v.* Lake Co., 2 Black, 545; Boyce Executors *v.* Grundy, 3 Peters, 210; Graves *v.* Ins. Co., 2 Cranch, 444; 1 Stat. at Large, 82.

† Foley *v.* Hill, 1 Philips 399; S. C., 2 House of Lords Cases, 28; Fire Ins. Co. *v.* Delavan, 8 Paige's Chancery, 422; Alexander *v.* Muirhead, 2 Desaussure, 162; 5 American Law Register, 564.

able litigation, or to prevent multiplicity of suits, is unnecessary, as that proposition is universally admitted.

Jurisdiction may also be exercised by courts of equity to rescind written instruments in cases where they have been procured by false representations or by the fraudulent suppression of the truth, if it appear that the rescission of the same is essential to protect the opposite party from pecuniary injury. Equity will rescind or enjoin such instruments where they operate as a cloud upon the title of the opposite party, or where the instruments are of a character that the vice in the inception of the same would be unavailing as a defence by the injured party if the instruments were transferred for value into the hands of an innocent holder. Title-deeds fraudulently procured may, under such circumstances, be decreed to be cancelled or reformed, as the case may be, and bills of exchange or promissory notes may be enjoined and practically divested of their negotiable quality.

Such jurisdiction also extends to the protection of letters-patent against infringement, and is exercised in many cases to prevent waste, and for many other judicial purposes, but the rule in the Federal courts is universal, that if the defendant has a good defence at law, and the remedy at law is as perfect and complete as the remedy in equity, an injunction will not be granted.

Whether the remedy sought in this case would have been available if the suit had been instituted before the death of the person whose life was insured it is not necessary to determine, as no such question is involved in the record. Suffice it to say upon that topic that the complainant has not referred the court to any decided case which supports the affirmative even of that inquiry, but the difficulty in the way to such a conclusion in the case before the court is much greater, as by the death of the *cestui que vie* the obligation to pay, as expressed in the policies, became fixed and absolute, subject only to the condition to give notice and furnish proof of that event within ninety days. Notice having been given and the required proof furnished, the obligation to pay certainly became fixed by the terms of the policies and the

sums insured became a purely legal demand, and if so, it is difficult to see what remedy, more nearly perfect and complete, the appellants can have than is afforded them by their right to make defence at law, which secures to them the right of trial by jury.*

Where a party, if his theory of the controversy is correct, has a good defence at law to "a purely legal demand," he should be left to that means of defence, as he has no occasion to resort to a court of equity for relief, unless he is prepared to allege and prove some special circumstances to show that he may suffer irreparable injury if he is denied a preventive remedy. Nothing of the kind is to be apprehended in this case, as the contracts, embodied in the policies, are to pay certain definite sums of money, and the record shows that an action at law has been commenced by the insured to recover the amounts, and that the action is now pending in the court whose decree is under re-examination.

Courts of equity unquestionably have jurisdiction of fraud, misrepresentation, and fraudulent suppression of material facts in matters of contract, but where the cause of action is "a purely legal demand," and nothing appears to show that the defence at law may not be as perfect and complete as in equity, a suit in equity will not be sustained in a Federal court, as it is clear that the case, under such circumstances, is controlled by the sixteenth section of the Judiciary Act.

DECREE AFFIRMED.

UNITED STATES *v.* RUSSELL.

1. Where the government, in emergencies, takes private property into its use, a contract to reimburse the owner is implied.
2. The United States having, under a military emergency, during the rebellion, taken into its service certain already officered and manned steamers

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* Foley *v.* Hill, 2 House of Lords Cases, 45; Thrale *v.* Ross, 3 Brown's Chancery Cases, 56; Arundel *v.* Holmes, 4 Beavan, 325; Norris *v.* Day, 4 Young & Collyer, 475.

of a citizen of the United States, under circumstances which on a petition filed by the owner in the Court of Claims for remuneration, led the court to find "that when the same were respectively taken into the service of the United States, the officers acting for the government did *not* intend to '*appropriate*' them, nor even their services, but did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and that such was the understanding of the claimant;" and the property having been returned to the exclusive possession and control of its owner so soon as the emergency was over, *Held*, that there was no such "appropriation" as brought the case within the act of July 4th, 1864, which enacts "that the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of . . the *appropriation* of property by the army or navy . . engaged in the suppression of the rebellion."

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

By the act of Congress of 1855,* constituting the said court, jurisdiction is given to it to hear and determine all claims against the United States, "founded on 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."

A subsequent act, however, the act of July 4th, 1864,† enacts:

"That the jurisdiction of the said court shall not extend to or include any claim against the United States, growing out of the destruction or *appropriation of*, or damage to property by the army or navy, or any part of the army or navy engaged in the suppression of the rebellion, from the commencement to the close thereof."

In this state of the court's jurisdiction, one Russell filed a petition in that court for compensation for the seizure and use of three steamers belonging to him, by the military authorities. The first was the steamer J. H. Russell, which was taken by the Assistant Quartermaster of the United States army at St. Louis, on the 2d of October, 1863, under the following letter:

* 10 Stat. at Large, 612.

† 13 Id. 381.

"CAPTAIN OF THE STEAMER J. H. RUSSELL.

"SIR: Imperative military necessity requires that you make no arrangements for private freight without first consulting this office, and obtaining permission in writing so to do.

"Yours very respectfully,

"CHARLES PARSONS,

"Captain and Assistant Quartermaster."

The steamer was detained in the service of the United States in pursuance to this order, being used in the transportation of government freight from the 2d of October until the 20th of November, 1863.

The second vessel was the steamer Liberty, taken on the following order:

"TRANSPORTATION DEPARTMENT,

"ST. LOUIS, Mo., Sept. 2d, 1864.

"CAPTAIN OF THE STEAMER LIBERTY.

"SIR: Imperative military necessity requires the services of your steamer for a brief period. Your captain will report at this office at once, in person, first stopping the receipt of freight, should the steamer be so doing.

"L. S. METCALF,

"Captain and Assistant Quartermaster."

In pursuance of this order the steamer was taken into the service of the United States, and was engaged in it for twenty-six days. The steamer was subsequently again taken into the service of the United States at New Orleans, under orders from an assistant quartermaster in the army.

The third steamer was the "Time and Tide," which was taken into the service of the United States, in pursuance of a military order issued by an assistant quartermaster in the United States army at New Orleans, on the 21st of March, 1864, and continued in the service of the United States in pursuance of such order for the period of sixty days.

The court found:

"That during the time each of said steamers was in the service of the United States, as hereinbefore stated, they were in command of the claimant, or of some person employed by him, subject to his control and under his pay.

"That in the case of each of these steamers, at the times when the same were respectively taken into the service of the United States, the officers acting for the United States, *did not intend to 'appropriate' these steamers to the United States, nor even their services; but they did intend to compel the captains and crews with such steamers to perform the services needed, and to pay a reasonable compensation for such services, and such was the understanding of the claimant;* and that each of said steamers, so soon as the services for which they were respectively required had been performed, were *returned* to the exclusive possession and control of the claimant."

The court, upon these facts, decided, as a conclusion of law, that there was not such an "appropriation" of the claimant's property as prohibited the court from taking jurisdiction of the case under the act of July 4th, 1864, but that there was such an *employment* and *use* of the claimant's property in the service of the United States as raises an implied promise on the part of the United States to reimburse the claimant for the money expended by him for and on behalf of the United States, and also a fair and reasonable compensation for the services of the claimant and for the services of said steamers.

Judgment was accordingly rendered against the United States for the sum of $41,355, and from that judgment the United States appealed, and assigned as error that, under the already quoted act of July 4th, 1864, the Court of Claims had no jurisdiction of the claim of the appellee against the government.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, appellant:

The construction put upon the act of July 4th, by this court, in *Filor* v. *United States*,* is decisive of the present question. "The term 'appropriation,'" the court there says, "is of the broadest import; it includes all taking and use of property by the army or navy, in the cause of the war, not

* 9 Wallace, 49.

authorized by contract with the government." That case was a temporary occupation of real property by the Quartermaster's Department, under a lease which was held to be invalid.

Messrs. Weed, Cooley, Clarke, and Corwine, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.*

Private property, the Constitution provides, shall not be taken for public use without just compensation, and it is clear that there are few safeguards ordained in the fundamental law against oppression and the exercise of arbitrary power of more ancient origin or of greater value to the citizen, as the provision for compensation, except in certain extreme cases, is a condition precedent annexed to the right of the government to deprive the owner of his property without his consent.† Extraordinary and unforeseen occasions arise, however, beyond all doubt, in cases of extreme necessity in time of war or of immediate and impending public danger, in which private property may be impressed into the public service, or may be seized and appropriated to the public use, or may even be destroyed without the consent of the owner. Unquestionably such extreme cases may arise, as where the property taken is imperatively necessary in time of war to construct defences for the preservation of a military post at the moment of an impending attack by the enemy, or for food or medicine for a sick and famishing army utterly destitute and without other means of such supplies, or to transport troops, munitions of war, or clothing to reinforce or supply an army in a distant field, where the necessity for such reinforcement or supplies is extreme and imperative, to enable those in command of the post to maintain their position or to repel an impending attack, provided it appears that other means of transportation could not be

* This case was decided at the close of the last term, December Term, 1870, No. 220.

† 2 Kent, 11th ed. 339; 2 Story on the Constitution, 3d ed. 596.

obtained, and that the transports impressed for the purpose were imperatively required for such immediate use. Where such an extraordinary and unforeseen emergency occurs in the public service in time of war no doubt is entertained that the power of the government is ample to supply for the moment the public wants in that way to the extent of the immediate public exigency, but the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply, and the circumstances must be such as imperatively require the exercise of that extreme power in respect to the particular property so impressed, appropriated, or destroyed. Exigencies of the kind do arise in time of war or impending public danger, but it is the emergency, as was said by a great magistrate, that gives the right, and it is clear that the emergency must be shown to exist before the taking can be justified. Such a justification may be shown, and when shown the rule is well settled that the officer taking private property for such a purpose, if the emergency is fully proved, is not a trespasser, and that the government is bound to make full compensation to the owner.*

Three steamboats, owned by the appellee, during the rebellion, were employed as transports in the public service for the respective periods mentioned in the record, without any agreement fixing the compensation to which the owner should be entitled. Certain payments for the services were made in each case by the government to the owner, but he claimed a larger sum, and the demand being refused he instituted the present suit. Prior to the orders hereinafter mentioned the steamboats were employed by the owner in carrying private freights, and the findings of the court below show that he quit that employment in each case and went into the public service in obedience to the military order of an assistant quartermaster of the army. Reference to one of the orders will be sufficient, as the others are not

* Mitchell *v.* Harmony, 13 Howard, 134.

substantially different. Take the second, for example, which reads as follows, as reported in the transcript: "Imperative military necessity requires the services of your steamer for a brief period; your captain will report at this office at once in person, first stopping the receipt of freight, should the steamer be so doing." Pursuant to that order, or one of similar import in substance and effect, the respective steamboats were impressed into the public service and employed as transports for carrying government freight for the several periods of time set forth in the findings of the court. Throughout the whole time the steamboats were so employed in the military service they were in command of the owner as master, or of some one employed by him and under his pay and control, and the findings of the court show that he manned and victualled the steamboats and paid all the running expenses during the whole period they were so employed. Unexplained and uncontradicted the findings of the court show a state of facts which plainly lead to the conclusion that the emergency was such that it justified the officers in each case in ordering the steamboat into the service of the United States, as the orders purport to have been issued from an imperative military necessity, and if so they show beyond all doubt that the officers who issued them were not trespassers, and that the government of the United States is bound to make full compensation to the owner for the services rendered.

Such a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending, and it is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.

Beyond doubt such an obligation raises an implied promise on the part of the United States to reimburse the owner for the use of the steamboats and for his own services and expenses, and for the services of the crews during the period the steamboats were employed in transporting government freight pursuant to those orders. *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, but the law will not imply a promise to pay unless some duty creates such an obligation, and it never will sustain any such implication in a case where the act of payment would be contrary to duty or contrary to law.*

Tested by those rules it is quite clear that the obligation in this case to reimburse the owner of the steamboats was of a character to raise an implied promise on the part of the United States to pay a reasonable compensation for the service rendered, and if so, then it follows that the decree was properly made in favor of the plaintiff, unless it appears that the adjustment of the claim belonged to Congress or to the executive department, and not to the Court of Claims.

Jurisdiction is vested in the Court of Claims, by the act of Congress establishing the court, to hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract express or implied with the government of the United States, which may be suggested to it by a petition regularly filed in the court.† Express authority, therefore, is given to the court by that act to hear and determine claims founded upon a contract with the government of the United States, whether express or implied. Claims of the kind before the court would certainly be within the jurisdiction of that court were it not that Congress has passed a later act restricting to some extent the jurisdiction conferred by that provision. By the act of July 4th, 1864, it is provided that the jurisdiction of the Court of Claims shall not extend to or include

* Curtis *v.* Fiedler, 2 Black, 478.

† 10 Stat. at Large, 612.

any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement thereof to the close.*

Special reference is made in behalf of the appellants to that provision, and the argument is that it is decisive to show that the decree in this case is erroneous. Support to that proposition is chiefly drawn from the signification attributed to the word appropriation, and from certain remarks of this court in one of its recent decisions.† Those remarks were made in respect to a claim where a military order was issued for the seizure of certain real estate for the purpose of compelling a lease of the premises, and the findings of the court show that the agreement for the lease was concluded under the pressure of that order. Apart from that it also appeared that the premises belonged to an insurgent in the rebel army, and the Court of Claims also found that the contract was void on that account. Applied as those remarks must be to the case then under consideration no doubt is entertained that they were correct, but they cannot be applied to the case before the court, as the conclusion to which they would tend would contradict the finding of the court below in matters of fact, which cannot be reviewed in this court.

Briefly stated, the findings of the court in that behalf are as follows: That the military officers did not intend to appropriate the steamboats to the United States, nor even their services; that they did intend to compel the masters and crews, with the steamers, to perform the services needed and that the United States should pay a reasonable compensation for such services, and that such was the understanding of the owner; that the steamers, as soon as the services for which they were required had been performed, were returned to the exclusive possession and control of the owner. They were equipped, victualled, and manned by the owner,

* 13 Stat. at Large, 381.

† Filor v. United States, 9 Wallace, 48

and he, or persons by him appointed, continued in their command throughout the entire period of the service. He yielded at once to the military order and entered into the service of the government, and the court here fully concur with the Court of Claims that there was not such an appropriation of the steamboats or of the services of the masters and crews as prohibited the court below from taking jurisdiction of the case. On the contrary, the court is of the opinion that the findings of the Court of Claims show that the employment and use of the steamboats were such as raise an implied promise on the part of the United States to reimburse the owner for the services rendered and the expenses incurred, as allowed by the Court of Claims. Valuable services, it is conceded, were rendered by the appellee, and it is not pretended that the amount allowed is excessive. Neither of the steamers was destroyed nor is anything claimed as damages, and inasmuch as the findings show that an appropriation of the steamers was not intended and that both parties understood that a reasonable compensation for the services was to be paid by the United States, the court is of the opinion that the objection to the jurisdiction of the Court of Claims cannot be sustained, as the claim is not for "the destruction or appropriation of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion." Viewed in that light, the case is free of all difficulty, as the jurisdiction of the court, by the express words of the act of Congress, extends to claims founded upon an implied contract as well as upon that which is express.

Certain other acts of Congress have been passed in respect to property impressed or employed in the suppression of the rebellion, but it is not necessary to refer to them, as they have no application to any question presented in this record.

DECREE AFFIRMED.

[See the next two cases.]

PUGH *v.* UNITED STATES.

A petition to the Court of Claims setting forth—

First. That the United States, during the late civil war, illegally, violently, and forcibly took possession of the petitioner's plantation, in one of the rebellious States, on the false pretext that it had been abandoned by the owner, and held it until January, 1866, during which time the United States, and the agents placed in charge of the plantation, destroyed and carried away the property of the petitioner to the value of $42,508;

Secondly. That the United States, during the same period, rented the plantation to sundry persons who made large crops, worth $15,000 or $30,000;

does not present a case within the present jurisdiction of that court.

The case made by the first allegation is barred by the act of July 4th, 1864, which excludes claims growing "out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion."

The second, because presenting the leasing of the property no otherwise than as an incident to the unlawful appropriation and spoliation of the plantation; and therefore not within the second and third sections of the act of July 2d, 1864, which provide for leasing abandoned lands by *the agents of the Treasury Department*, and the payment of the net amounts into the Treasury.

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

By the act of Congress of 1855, constituting the Court of Claims, jurisdiction is given to it to hear and determine all claims against the United States founded on 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.

A subsequent act, however—that of July 4th, 1864—enacts that this jurisdiction "shall not extend to or include any claim against the United States growing out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion from the commencement to the close thereof."

An act of July 2d, 1864,* amendatory of the Abandoned and Captured Property Act (an act which provides for taking possession and selling of captured and abandoned property

* 13 Stat. at Large, 375.

and paying the net proceeds to loyal owners) enacts, by its second and third sections, that the Treasury agents shall take charge of and lease the abandoned lands and houses, &c., and pay the net amount of rents collected into the Treasury.

In this state of statutory law one Pugh filed his petition in the Court of Claims, the substantial averments of it being:

First. That the United States, during the late civil war, illegally, violently, and forcibly took possession of his plantation, in the State of Louisiana, on the false pretext that it had been abandoned by the owner, and held it until January, 1866, during which time the United States, and the agents placed in charge of the plantation, destroyed and carried away the property of the petitioner to the value of $42,508; and,

Secondly. That the United States, during the same period, rented the plantation to sundry persons, who made large crops, worth $15,000 or $30,000.

This petition was dismissed by the Court of Claims for want of jurisdiction, and the case was now here on appeal.

Mr. T. J. Durant, for the appellant:

1. The first part of the case, the claim for the $42,508, is founded on an implied contract; on that *assumpsit* or undertaking which the law raises, *ex æquo et bono*, against every one who carries off property rightly belonging to another, to restore it. It is not less plainly founded on a law of Congress. There is no allegation in the petition that it was the "army or navy engaged in the suppression of the rebellion," which destroyed or carried off the property to the value of the $42,508, and accordingly there is nothing to bring the case within the act of July 4th, 1864, which excludes destruction or loss from those sources.

2. But if that act is supposed to be a bar to the first part of the claim, certainly it is no bar to the second. The claim for the profits from leasing comes plainly within the act providing for the leasing of abandoned lands.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court.

The destruction of property complained of was during the war and in one of the States engaged in the rebellion, and the presumption, in the absence of inconsistent allegations, is that it was by the military forces of the United States. It is clear that a petition for compensation for injuries of this character could not be sustained in the Court of Claims, for the demand plainly grows "out of the destruction or appropriation of or damage to property by the army or navy engaged in the suppression of the rebellion," and is excluded from the cognizance of that court by the express terms of the act of July 4th, 1864.

But it is insisted that the court had at least jurisdiction of the case made by the petition in respect to the leasing of the plantation, under the amendment to the Captured and Abandoned Property Act made by the second and third sections of the act of July 2d, 1864. These sections provide for leasing abandoned lands by the agents of the Treasury Department, and the payment of the net amounts of rents collected into the Treasury. But the petition in this case makes the leasing an incident only to the unlawful appropriation and spoliation of the plantation. It does not allege any leasing by the agents of the Treasury Department, or that any rents were collected by them or paid into the Treasury.

It is plain, therefore, that the petition does not state a case within the jurisdiction of the Court of Claims. If the petitioner has any claim upon the government he must seek relief from Congress.

The decree dismissing the petition must be

AFFIRMED.

UNITED STATES *v.* KIMBAL.

1. A marginal note put by the Quartermaster's Department on bills of lading of vessels chartered by them, "that if on the arrival of the vessel at the port of destination the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading," does not make a part of the contract entered into by the vessel; and if her port of destination be plainly expressed in the body of the bill, the consignee cannot, in virtue of the marginal memorandum, order her to go forward to another port.
2. The jurisdiction of the Court of Claims to pass upon claims against the United States, growing out of the destruction or appropriation of property by the army or navy engaged in the suppression of the rebellion, which jurisdiction was taken away by act of July 4th, 1864, was not restored even as to steamboats by the joint resolution of 23d December, 1869, relating to the mode of settling for them when impressed into the service of the United States during the rebellion.

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

An act of March 3d, 1849,* enacts that any person who shall sustain damage by the abandonment or destruction by order of the commanding general, quartermaster, of any *horse*, &c., while such property was in the service of the United States, either by impressment or contract . . . . shall be allowed and paid the value thereof, at the time he entered the service. "The claims provided for under this act," continues the statute, "shall be adjusted by the Third Auditor, under such rules as shall be prescribed by the Secretary of War," &c.

A subsequent act† (March 3d, 1863), extends these provisions so as to include all "*steamboats* and other vessels."

Between the dates of these two acts, that is to say, in A.D. 1855,‡ Congress constituted the Court of Claims, and by the act constituting it, made it *its* duty to hear and determine

"All claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States."

A subsequent act, however, that of July 4th, 1864,§ some-

* 9 Stat. at Large, 415.
‡ 10 Stat. at Large, 612.
† 12 Id 743.
§ 13 Id. 381.

what limited this jurisdiction; declaring by its first section that it should

"Not extend to nor include any claim against the United States growing out of the destruction or appropriation of, or damage to, any property, by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof."

The second and third sections of the last-mentioned act provide that the claims of loyal citizens in loyal States for quartermaster's stores, and for subsistence furnished to the army, shall be submitted to the Quartermaster-General and the Commissary-General of Subsistence, and if found just, shall be reported to the Third Auditor of the Treasury with a recommendation for *settlement*.

After this came an act of February 21st, 1867,* which enacted that the provisions of the act of 1864 should

"Not be construed to authorize the *settlement* of any claim for supplies taken or furnished for the use of the armies of the United States, nor for the occupation of or injury to real estate, nor for the appropriation or destruction of or damage to personal property, by the military authorities or troops of the United States, where such claim originated during the war for the suppression of the Southern rebellion, *in a State or part of a State declared in insurrection.*"

Finally, came a joint resolution of Congress, passed the 23d of December, 1869,† resolving that the act of 1867 shall not be so construed as

"To debar the *settlement* of claims for *steamboats* or other vessels, taken without the consent of the owner or impressed into the military service of the United States during the late war, in States or parts of States declared in insurrection, provided the claimants were loyal at the time their claims originated, and remained loyal thereafter, and were residents of loyal States, and such steamboats or other vessels were in the insurrectionary districts by proper authority."

As to the matter of loyalty, it was agreed in writing by

* 14 Stat. at Large, 397.

† 16 Id. 368.

the counsel on both sides, that the defendant "had at all times borne true allegiance to the government of the United States, and had not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government, and that proof of such fact was duly made upon trial in the Court of Claims, and might be regarded as of record in the findings now for hearing before the Supreme Court of the United States."

In the state of the statutes above set forth, and of the Court of Claims' jurisdiction under them, the military authorities of the United States chartered the bark Annie Kimbal, on the 18th of April, 1865, to carry a cargo of 1061 tons of coal from Philadelphia to Port Royal, S. C. By the terms of the bill of lading the coal was to be delivered to the quartermaster or his assignee. Freight was payable at the rate of $6.25 per ton, and demurrage $100 per day, allowing 21 days for discharging. In the margin of the bill were these *two* memoranda:

"*If on the arrival of this vessel at the port of destination, the consignee should order her to another place to discharge, such order in all cases to be in writing on the bill of lading.*

"Freight and demurrage payable only on certificate of quartermaster that the cargo has been received in good order."

The marginal note, above italicized, on the bill of lading, was a printed direction placed by the Quartermaster's Department, intended for the convenience of the department, and as a direction to the officers thereof. There was no express evidence as to the intention of the parties concerning it; but such marginal note was placed on bills of lading by the United States officers in the Quartermaster's Department, and did not form a part of the body of the instrument as did certain other formal clauses and conditions.

The bark arrived at Port Royal with her freight on the 4th May, 1865, and immediately tendered it to the consignee, the quartermaster of the United States. The quartermaster, on the 6th of May, refused to receive the same, and ordered the master of the bark to proceed with it to

Statement of the case.

Key West, and report to the quartermaster at that port, which additional service the master of the bark refused to perform, and notified to the quartermaster that the owners would hold the United States liable for all damages if such service was enforced. On the 8th May the master was compelled to undertake the additional voyage, and received notice from the quartermaster that in case of refusal he would be taken from the vessel and another master be substituted and sent in command of the vessel. The master then protested at being compelled to sail at the time specified by the quartermaster for the reason that it was not safe, as the tide had ebbed about two hours, and there would not be water enough on the bar to take the vessel safely over. The delay requested was refused, and the vessel was taken in tow by a government tug. She struck violently on the bar off Port Royal by reason of the low water, it being near the ebb, and sprang aleak. Being severely injured, she was towed back and beached to prevent her from foundering.

After the injury to the vessel, she was detained by the defendants' delay in discharging her freight at Port Royal until the 24th of June, 1865, the detention being owing to no fault of the master or crew. The vessel was then further detained at Port Royal by her injuries received as aforesaid, from and including the 25th June until the 11th July. She was then towed by the agents of the United States to Boston, which port she reached on the 18th July, 1865, when her crew were discharged. The damages suffered by the claimants for the loss of their vessel's service and her expenses was the sum of $100 per day, making the sum of $5300; that is to say:

30 days (from 24th May, when the 21 lay days expired, to 24th June, when she was formally discharged), 30 days at $100, ...	$3000
23 days (from June 25th to when the discharge was completed till July 18th, when the vessel reached Boston), 23 days at $100, ...	2300
	$5300

The claimants paid $7604.41 for the repairs of the bark at

Boston, and this amount was expended strictly in making good the vessel's injuries.

The United States paid to the claimants the amount due for the freight, but they refused to pay the demurrage up to the 24th June, caused by their delay in discharging the cargo, and the further demurrage caused by their impressment of the vessel up to the 18th July, 1865, when she arrived at Boston, and they also refused to pay the $7604.41 paid by the claimants in the necessary repairs of the vessel.

The certificate of the quartermaster showed that the cargo had been received in good order.

Upon these facts the court decided as conclusions of law:

1st. That the bill of lading on which the action was brought constituted a valid contract of affreightment for the transportation of goods and merchandise from Philadelphia to Port Royal, and that the marginal note thereon, expressing no consideration for further services, imposed no obligation upon the owners to transport the goods to any other port, except with their consent, and upon a rate to be agreed upon.

2d. That for the demurrage caused by the defendants in not discharging their freight within twenty-one days after the vessel's arriving at Port Royal, that is to say, by the 25th May, the claimants should recover demurrage until the freight was discharged on the 24th June, at the rate agreed upon in the bill of lading, to wit, $100 per day, or $3000.

3d. That the enforced service of the vessel, while remaining in the possession of her master and crew, was not an "appropriation" of the claimants' property by the army of the United States within the meaning of the act July 4th, 1864, but that it was an impressment of their vessel and crew's service within the meaning of the acts 3d March, 1849, and 3d March, 1863, and of the joint resolution 23d December, 1869, and that the claimants were entitled to recover the value of their vessel's services and expenses from the 25th June to the 18th July, 1865 ($2300), and their costs and expenditures ($7604.41) in repairing and making whole her injuries.

The Court of Claims thus decreed:

Demurrage of both kinds, ...	$5,300 00
Repairs, ...	7,604 41
Whole amount of decree, ...	$12,904 41

From this decree the United States appealed.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, appellant:

1. The court erred in deciding that the marginal memorandum was no part of the contract. The bill of lading and the memorandum must be construed together. The marginal clause was not merely a direction to the government officers at Port Royal, but, like the memorandum or marginal clause in a policy of insurance, was a part of the contract entered into between the parties, and by it the master was required to proceed to Key West, when directed so to do by the quartermaster at Port Royal.*

If this be so, then it is evident that the delay in getting away from Port Royal for Key West was owing to the fault of the master. But, however this might be, the stranding of the bark when going over the bar was a peril of the sea, and the consequent injury is one which must be borne by the owners of the vessel and not by the government.†

But if the contract of affreightment did not require the master to proceed, when ordered from Port Royal to Key West, and there discharge his cargo, it follows either that the action of the government officers in requiring this duty of him was tortious, in which case no action can be maintained against the government in the Court of Claims for the consequence thereof, or else it was an appropriation of the vessel for the military service of the government, within the meaning of the act of July 4th, 1864, and, therefore, is a case expressly taken out of the jurisdiction of the Court of Claims thereby. In neither case can the consequences of ordering the vessel to sea be considered as damages arising from a breach of contract by the government.

* Barnard *v.* Cushing, 4 Metcalf, 230.

† Reed *v.* United States, 11 Wallace, 591.

Recapitulation of the case in the opinion.

Messrs. Chipman, Peck, and Durant, contra:

1. The marginal memorandum was not a part of the contract. It was a mere direction to the Federal officers by their superiors and was meant for cases where the right existed. The whole of the contract was in the body of the instrument.

2. It has been considered by persons competent to form an opinion that this joint resolution, of December 23d, 1869, restored the jurisdiction of the Court of Claims in a case like the present, which comes fully within the terms of the proviso; and in support of this view we submit that as the acts of February 19th, 1867, and July 4th, 1864, are referred to in general terms by the joint resolution of December 23d, 1869, the latter embraces the whole of the former. Now the first section of the act of July 4th, 1864, prohibited the Court of Claims from settling by judgment the whole of a certain class of claims, while the joint resolution declares said act shall not debar the settlement of certain individual claims of that class; and this claim is one of those individuals; therefore the Court of Claims is not debarred from settling it.

If all this is so, the decree was plainly right, as the loyalty of the claimant is fully admitted, and indeed was open to no question whatever.

Mr. Justice SWAYNE delivered the opinion of the court.

On the 18th of April, 1865, the United States contracted with the bark Annie Kimbal to convey a cargo of anthracite steamer coal from Philadelphia to Port Royal, in South Carolina. The United States agreed to pay freightage "at the rate of $6.25 per ton, and demurrage $100 per day, allowing 21 days for discharging." In the margin of the bill of lading was the following memorandum: "Freight and demurrage payable only on the certificate of quartermaster that the cargo has been received in good order."

The vessel arrived at Port Royal on the 4th of May, 1865. The master immediately tendered the delivery of the cargo to the quartermaster, who was the consignee. He refused to receive it, and ordered the master to proceed with the

vessel and cargo to Key West. This the master refused to do, and notified the quartermaster that the owners would hold the United States responsible for damages if the order was enforced. The master protested against being compelled to sail immediately, upon the ground that the state of the tide would render his departure then unsafe. Permission to delay was refused. The vessel was towed by a government tug. She struck violently on a bar off Port Royal, was severely injured, and sprung aleak. She was towed back and beached to prevent her from foundering. She was detained at Port Royal, by the delay of the authorities of the United States in discharging her cargo, until the 24th of June. The quartermaster certified that the cargo was received in good order, and that the detention of the vessel was owing to no fault of the master or crew. The vessel was unavoidably further detained at Port Royal until the 11th of July. She then left, a government tug towing her, for Boston, where she arrived on the 18th of that month. Her crew were thereupon discharged.

The twenty-one days specified in the contract for the delivery of the cargo expired on the 24th of May. The Court of Claims found that the damages which the appellees had sustained by the loss of the vessel's service, and her expenses, was $100 per day, making an aggregate of $5300, and that they had expended at Boston, in repairing the injuries to the vessel, the sum of $7604.41.

Before the commencement of this suit the United States paid the amount due, according to the terms of the contract, for freight, but refused to pay anything more.

The Court of Claims held that the appellees were entitled to recover the sums above mentioned, making an aggregate of $12,904.41, and gave judgment accordingly.

So far as the thirty days' demurrage, extending from the 24th of May to the 25th of June, is concerned, the judgment is clearly correct. The certificate of the quartermaster brings the case within the terms of the contract. The appellees were as much entitled to this compensation as to the amount

stipulated to be paid for freight. The right to both rests upon the same foundation, and the appellants might as well have refused to pay the latter as the former. This item amounted to the sum of $3000.

The allowance of the residue of the damages, and of the amount expended for repairs, involves other considerations, and requires a separate examination.

The order to the master to proceed to Key West was certainly not authorized by the contract. That imposed no such obligation. No rate of freight for this voyage had been agreed upon, and no such stipulation had been entered into. The contract expired upon the delivery of the cargo at Port Royal. It is silent as to anything further. It may be safely assumed that nothing beyond this was in the contemplation of either party when the vessel left Philadelphia. The Court of Claims held that the conduct of the quartermaster was not an appropriation, but the impressment of the vessel. The duress, the *vis major*, the resistance of the master, and his compulsory obedience, are clearly developed in the findings of the record. We think the view of the court below upon this subject was the proper one; but did that entitle the appellee to recover for the damages and repairs here under consideration?

The first section of the act of July 4th, 1864, declares that the jurisdiction of the Court of Claims shall not extend to "any claim against the United States growing out of the destruction or appropriation of, or damage to, any property, by the army or navy, or any part of the army or navy, engaged in the suppression of the rebellion, from the commencement to the close thereof." The second and third sections provide for the adjustment and payment, through the Quartermaster-General, the Commissary-General, and the Third Auditor of the Treasury, of all claims of loyal citizens in States not in rebellion, for quartermaster stores and subsistence furnished to the army.*

The act of February 21st, 1867,† declares that the act of

* 13 Stat. at Large, 381.

† 14 Id. 397.

1864 shall not be construed to authorize the settlement of any claim for supplies taken or furnished for the use of the armies of the United States, nor for the occupation of or injury to, real estate, nor for the appropriation or destruction of, or damage to, personal property, by the military authorities or troops of the United States, "where such claim originated during the war for the suppression of the Southern rebellion, *in a State or part of a State declared in insurrection.*"

The resolution of the 23d of December, 1869,* provides that the act of 1867 shall not be so construed as "to debar the settlement of claims for steamboats or other vessels, taken without the consent of the owner or impressed into the military service of the United States during the late war, in States or parts of States declared in insurrection, provided the claimants were loyal at the time their claims originated, and remained loyal thereafter, and were residents of loyal States, and such steamboats or other vessels were in the insurrectionary districts by proper authority."

The act of 1864 took away the jurisdiction of the Court of Claims as to all the cases there specified. The act of 1867 forbade the payment of the claims which it described, while the resolution permitted the settlement of those within the category which it laid down and the qualifications prescribed in the proviso. The resolution refers expressly to the act of 1867, and that act to the act of 1864. They are in *pari materiâ*, constitute a common context, and must be construed together. This case, in the aspect of it we are considering, is clearly within the body of the resolution. Whether it is also within the requirements of the proviso is not disclosed by the findings in the record. They are silent upon that subject. If the appellees can bring themselves within both they will be entitled to be paid, but not, we think, by the instrumentality of the Court of Claims.

The purpose of the resolution, obviously, was not to enlarge or restore the jurisdiction of that court, but to remove the bar which the act of 1867 had been held to create. That

* 16 Stat. at Large, 368.

bar affected not the court, but the officer of the army and of the treasury, whose duty it would otherwise have been to adjust and liquidate such demands. When the restriction was removed the jurisdiction and authority of those officers, and not of the court, was revived. The phrase "*settlement*," used in the resolution, has reference to executive and not to judicial action. The context of the two acts and the resolution point clearly to this construction of the latter. The remedy of the appellees, if they are entitled to any, must be sought at the hands of the executive or legislative department of the government. The judicial department is incompetent to give it.

In our opinion, the Court of Claims erred in taking jurisdiction of either of the claims outside of the contract. The *United States* v. *Russell** is clearly distinguished by its controlling facts from the present case. It is not intended to impugn anything said by the court in that case.

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

IN CONFORMITY TO THIS OPINION.

WHITE *v.* HART.

1 The Constitution adopted by Georgia, A.D. 1868, by which it was provided that "no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt, the consideration of which was a slave, or the hire thereof," is to be regarded by the court as voluntarily adopted by the State named, and not as adopted under any dictation and coercion of Congress. Congress having received and recognized the said Constitution as the voluntary and valid offering of the State of Georgia, this court is concluded by such action of the political department of the government.

2 At no time during the rebellion were the rebellious States out of the pale of the Union. Their constitutional duties and obligations remained unaffected by the rebellion. They could not then pass a law impairing the obligation of a contract more than before the rebellion, or now, since.

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* *Supra*, p. 623.

Statement of the case in the opinion.

3. The ideas of the validity of a contract, and of the remedy to enforce it, are inseparable; and both are parts of the obligation which is guaranteed by the Constitution against invasion. Accordingly, whenever a State, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the Constitution, and to that extent void.
4. *Held*, therefore, that the clause of the Constitution of Georgia, quoted in the first paragraph above, had no effect on a contract made previous to it, though the consideration of the contract was a slave.
5. A note of which the consideration is a slave, slavery being at the time lawful by the law of the place where the note was given, is valid.

ERROR to the Supreme Court of the State of Georgia.

Mr. P. Phillips and Mr. Edwin N. Broyles argued the case fully and ably for the plaintiff in error.

No counsel appeared on the other side; the reliance of that party having apparently been on the argument contained in the opinion given by Brown, C. J., in behalf of the Supreme Court of Georgia.

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

The suit was instituted by the plaintiff in error on the 10th of January, 1866, in the Superior Court of Chattooga County. He declared upon a promissory note made to him by the defendants in error for twelve hundred and thirty dollars, dated February 9th, 1859, and payable on the 1st of March, A.D. 1860. The defendant pleaded in abatement that "the consideration of the note was a slave," and that "by the present Constitution of Georgia, made and adopted since the last pleadings in this case, the court is prohibited to take and exercise jurisdiction or render judgment therein." To this plea the plaintiff demurred. The court overruled the demurrer and gave judgment for the defendants. The plaintiff excepted and removed the case to the Supreme Court of the State, where the judgment was affirmed, and the plaintiff thereupon prosecuted this writ of error. The

Statement of the case in the opinion.

Constitution of Georgia of 1868, which is still in force, contains* the following clause:

"Provided, that no court or officer shall have, nor shall the General Assembly give, jurisdiction to try, or give judgment on, or enforce any debt the consideration of which was a slave or the hire thereof."

From the close of the rebellion until Georgia was restored to her normal relations and functions in the Union, she was governed under the laws of the United States known as the Reconstruction Acts. Under these laws her present constitution was framed, adopted, and submitted to Congress. Among the terms of her rehabilitation prescribed by the acts referred to it was made a fundamental condition that certain designated parts of the constitution so submitted should "be null and void, and that the General Assembly of the State" should, "by a solemn act, declare the assent of the State" to the required modification.† The constitution was modified accordingly. When submitted it contained the proviso here under consideration. No objection was made to the proviso, and it has since remained a part of the instrument. With her constitution thus modified, Congress enacted "that the State of Georgia, having complied with the Reconstruction Acts, and the fourteenth and fifteenth amendments to the Constitution of the United States having been ratified in good faith by a legal legislature of said State, it is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States."‡ Her representatives and senators were thereupon admitted to seats in Congress. This act removed the last of the disabilities and penalties which were visited upon her for her share of the guilt of the rebellion. The condonation by the National government thus became complete.

The judgment we are called upon to review is sought to be maintained upon the following grounds:

* Art. 5, § 17, paragraph 7.

† 15 Stat. at Large, 73; Act of June 25th, 1868.

‡ Act of June 15th, 1870, 16 Stat. at Large, 363, 364.

(1.) That when the constitution of 1868 was adopted Georgia was not a State of the Union; that she had sundered her connection as such, and was a conquered territory wholly at the mercy of the conqueror; and that hence the inhibition of the States by the Constitution of the United States to pass any law impairing the obligation of contracts had no application to her.

(2.) That her constitution does not affect the contract, but only denies jurisdiction to her courts to enforce it.

(3.) That her constitution was adopted under the dictation and coercion of Congress, and is the act of Congress, rather than of the State: and that, though a State cannot pass a law impairing the validity of contracts, Congress can, and that, for this reason also, the inhibition in the Constitution of the United States has no effect in this case.

The third of these propositions is clearly unsound, and requires only a few remarks. Congress authorized the State to frame a new constitution, and she elected to proceed within the scope of the authority conferred. The result was submitted to Congress as a voluntary and valid offering, and was so received and so recognized in the subsequent action of that body. The State is estopped to assail it upon such an assumption. Upon the same grounds she might deny the validity of her ratification of the constitutional amendments. The action of Congress upon the subject cannot be inquired into. The case is clearly one in which the judicial is bound to follow the action of the political department of the government, and is concluded by it.* We may add, that if Congress had expressly dictated and expressly approved the proviso in question, such dictation and approval would be without effect. Congress has no power to supersede the National Constitution.

The subject presented by the first proposition has been considered under some of its aspects several times by this

* Luther *v.* Borden, 7 Howard, 43. 47, 57; Rose *v.* Himely, 4 Cranch, 272; Gelston *v.* Hoyt, 3 Wheaton, 324; Id. 634; Williams *v.* The Suffolk Ins. Co., 13 Peters, 420.

court. We need do little more upon this occasion than to reaffirm the views heretofore expressed, and add such further remarks as are called for by the exigencies of the case before us.

The National Constitution was, as its preamble recites, ordained and established by the people of the United States. It created not a confederacy of States, but a government of individuals. It assumed that the government and the Union which it created, and the States which were incorporated into the Union, would be indestructible and perpetual; and as far as human means could accomplish such a work, it intended to make them so. The government of the Nation and the government of the States are each alike absolute and independent of each other in their respective spheres of action; but the former is as much a part of the government of the people of each State, and as much entitled to their allegiance and obedience as their own local State governments—"the Constitution of the United States and the laws made in pursuance thereof," being in all cases where they apply, the supreme law of the land. For all the purposes of the National government, the people of the United States are an integral, and not a composite mass, and their unity and identity, in this view of the subject, are not affected by their segregation by State lines for the purposes of State government and local administration. Considered in this connection, the States are organisms for the performance of their appropriate functions in the vital system of the larger polity, of which, in this aspect of the subject, they form a part, and which would perish if they were all stricken from existence or ceased to perform their allotted work. The doctrine of secession is a doctrine of treason, and practical secession is practical treason, seeking to give itself triumph by revolutionary violence. The late rebellion was without any element of right or sanction of law. The duration and magnitude of the war did not change its character. In some respects it was not unlike the insurrection of a county or other municipal subdivision of territory against the State to which it belongs. In such cases the State has inherently

the right to use all the means necessary to put down the resistance to its authority, and restore peace, order, and obedience to law. If need be, it has the right also to call on the government of the Union for the requisite aid to that end. Whatever precautionary or penal measures the State may take when the insurrection is suppressed, the proposition would be a strange one to maintain, that while it lasted the county was not a part of the State, and hence was absolved from the duties, liabilities, and restrictions which would have been incumbent upon it if it had remained in its normal condition and relations. The power exercised in putting down the late rebellion is given expressly by the Constitution to Congress. That body made the laws and the President executed them. The granted power carried with it not only the right to use the requisite means, but it reached further and carried with it also authority to guard against the renewal of the conflict, and to remedy the evils arising from it in so far as that could be effected by appropriate legislation.* At no time were the rebellious States out of the pale of the Union. Their rights under the Constitution were suspended, but not destroyed. Their constitutional duties and obligations were unaffected and remained the same. A citizen is still a citizen, though guilty of crime and visited with punishment. His political rights may be put in abeyance or forfeited. The result depends upon the rule, as defined in the law, of the sovereign against whom he has offended. If he lose his rights he escapes none of his disabilities and liabilities which before subsisted. Certainly he can have no new rights or immunities arising from his crime. These analogies of the county and the citizen are not inapplicable, by way of illustration, to the condition of the rebel States during their rebellion. The legislation of Congress shows that these were the views entertained by that department of the government.

In the several acts admitting new States the same formula substantially is used in all cases. It is, that the State named

* Stewart *v.* Kahn, 11 Wallace, 506.

"shall be and is hereby declared to be one of the United States of America, and is hereby admitted into the Union, upon an equal footing with the original States, in all respects whatsoever."* In the several Reconstruction Acts, the language used in this connection is, that the State in question "shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom."† "Shall be entitled and admitted to representation in Congress as a State of the Union, when," &c.‡ And, lastly, in the final act as to Georgia—"It is hereby declared that the State of Georgia is entitled to representation in the Congress of the United States."§

The different language employed in the two classes of cases evinces clearly that, in the judgment of Congress, the reconstructed States had not been out of the Union, and that to bring them back into full communion with the loyal States, nothing was necessary but to permit them to restore their representation in Congress. Without reference to this element of the case, we should have come to the same conclusion. But the fact is one of great weight in the consideration of the subject. And we think it is conclusive upon the judicial department of the government.‖

Georgia, after her rebellion and before her representation was restored, had no more power to grant a title of nobility, to pass a bill of attainder, an *ex post facto* law, or law impairing the obligation of contracts, or to do anything else prohibited to her by the Constitution of the United States, than she had before her rebellion began, or after her restoration to her normal position in the Union. It is well settled by the adjudications of this court, that a State can no more impair the obligation of a contract by adopting a constitution than by passing a law. In the eye of the constitutional inhibition they are substantially the same thing.

* Act of June 15th, 1836, 5 Stat. at Large, 50.
† Act of March 2d, 1867, 14 Id. 429; act of March 23d, 1867, 15 Id. 4.
‡ Act of June 25th, 1868, Ib. 73. § Act of July 15th, 1870, 16 Id. 364.
‖ Luther *v.* Borden, 7 Howard, 57.

Opinion of the court.

The second proposition remains to be considered. When the note was executed and until the constitution of 1868 was adopted, the courts of the State had unquestionable jurisdiction to entertain a suit brought to enforce its collection, and if that jurisdiction ceased it was by reason of the provision of the constitution of the State, here under consideration.

The question presented by this proposition was fully considered by this court in *Van Hoffman* v. *The City of Quincy*.* The city had sold its bonds under acts of the legislature of Illinois, which authorized their issue and required the assessment and collection of a special tax to meet the interest; and it was declared that the amount so raised should be applied to that object "and to no other purpose whatsoever." The legislature subsequently passed an act which prohibited any tax beyond the amount therein specified to be imposed. This tax yielded a sum barely sufficient to meet the municipal wants of the city—leaving nothing to be applied to the interest upon the bonds. This court held the prohibition, so far as it affected the special tax, to be void, and by a writ of mandamus ordered that tax to be collected and applied, as if the subsequent act had not been passed. It was said, "the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. . . . Nothing can be more material to the obligation than the means of enforcement." Without the remedy, the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties, which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of a contract "is the law which binds the parties to perform their agreement." It was said further, that the State may modify the remedy, but not so as to impair substantial rights; and

* 4 Wallace, 552.

that whenever this result "is produced, the act is within the prohibition of the Constitution, and to that extent void." When the contract here in question was entered into, ample remedies existed. All were taken away by the proviso in the new constitution. Not a vestige was left. Every means of enforcement was denied, and this denial if valid involved the annihilation of the contract. But it is not valid. The proviso which seeks to work this result, is, so far as all pre-existing contracts are concerned, itself a nullity. It is to them as ineffectual as if it had no existence. Upon the question as thus presented, several eminent State courts have expressed the same views.*

As the case is disclosed in the record we entertain no doubt of the original validity of the note, nor of its validity when the decision before us was made. But as that question was not raised in this case, we deem it unnecessary to remark further upon the subject.

JUDGMENT REVERSED and the case remanded to the Supreme Court of Georgia, with directions to proceed

IN CONFORMITY TO THIS OPINION.

The CHIEF JUSTICE dissented from this judgment. See the next case, and his opinion at page 663, *infra*.

OSBORN *v.* NICHOLSON ET AL.

A person in Arkansas, one of the late slaveholding States, for a valuable consideration, passed in March, 1861, before the rebellion had broken out, sold a negro slave which he then had, warranting "the said negro to be a slave for life, and also warranting the title to him clear and perfect." The 13th amendment to the Constitution, made subsequently (A. D. 1865), ordained that "neither slavery nor involuntary servitude . . . shall exist within the United States, or any place subject to their jurisdiction." *Held*, that negro slavery having been recognized as lawful at the time when and the place where the contract was made, and the contract

* Cooley's Constitutional Limitations, 289.

Statement of the case in the opinion.

having been one which at the time when it was made could have been enforced in the courts of every State of the Union, and in the courts of every civilized country elsewhere, the right to sue upon it was not to be considered as taken away by the 13th amendment above quoted, and passed only after rights under the contract had become vested; destruction of vested rights by implication never being to be presumed.

IN error to the Circuit Court for the District of Arkansas.

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

The case was argued on both sides interestingly, and with ability and learning.

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

The plaintiff in error brought this suit on the 10th of February, 1869, in that court, and declared upon a promissory note made to him by the defendants in error for $1300, dated March 26th, A.D. 1861, and payable on the 26th day of December following, with interest at the rate of ten per cent. from date. The defendants pleaded that the instrument sued upon was given in consideration of the conveyance of a certain negro *slave* for life, and none other; and that at the time of the making of the instrument the plaintiff, by his authorized agent, executed to the defendant a bill of sale, as follows:

"March 20th, 1861.

"For the consideration of $1300 I hereby transfer all the right, title, and interest I have to a negro boy named Albert, aged about twenty-three years. I warrant said negro to be sound in body and mind, and a slave for life; and I also warrant the title to said boy clear and perfect."

And that the said negro soon thereafter, to wit, on the 1st day of January, 1862, was liberated by the United States government, the said slave being then alive, and that the plaintiff ought not therefore to recover. The plaintiff demurred. The court overruled the demurrer, and the plain-

tiff electing to stand by it, the court gave judgment for the defendants. This writ of error has brought the case here for review.

The question presented for our determination is, whether the court erred in overruling the demurrer; or, in other words, whether the facts pleaded were sufficient to bar the action.

We lay out of view *in limine* the constitution of Arkansas of 1868, which annuls all contracts for the purchase or sale of slaves, and declares that no court of the State should take cognizance of any suit founded on such a contract, and that nothing should ever be collected upon any judgment or decree which had been, or should thereafter be, "rendered upon any such contract or obligation." It is sufficient to remark that as to all prior transactions the constitution is in each of the particulars specified clearly in conflict with that clause of the Constitution of the United States, which ordains that "no State shall" . . . "pass any law impairing the obligation of contracts."* Nor do we deem it necessary to discuss the validity of the contract here in question when it was entered into. Being valid when and where it was made, it was so everywhere. With certain qualifications not necessary to be considered in this case, this is the rule of the law of nations. Judge Story says: "The rule is founded not merely on the convenience, but on the necessity of nations; for otherwise it would be impracticable for them to carry on an extensive intercourse and commerce with each other."†

It may be safely asserted that this contract when made could have been enforced in the courts of every State of the Union, and in the courts of every civilized country elsewhere. In the celebrated case of Somerset, Lord Mansfield said: "A contract for the sale of a slave is good here; the

* Von Hoffman *v.* The City of Quincy, 4 Wallace, 535; White *v.* Hart, *supra*, 646.

† Story's Conflict of Laws (Redfield's edition), § 242.

sale is a matter to which the law properly and readily attaches, and will maintain the price according to the agreement. But *here* the *person* of the slave himself, is immediately the object of inquiry, which makes a very material difference."*

Nor is there any question as to an implied warranty, of title or otherwise. There being an express warranty, that must be taken to contain the entire contract on the part of the seller. This warranty embraces four points: that the slave was sound in body; that he was sound in mind; that he was a slave for life; and that the seller's title was perfect.

It is not averred or claimed that the warranty was false when it was given, in either of these particulars. The title to the slave passed at that time, and if the warranty were true then, no breach could be wrought by any after event. Let it be supposed that, subsequently, a lesion of the brain of the slave occurred, and that permanent insanity ensued, or that, from subsequent disease, he became a cripple for life or died, or that, by the subsequent exercise of the power of eminent domain, the State appropriated his ownership and possession to herself, can there be a doubt that neither of these things would have involved any liability on the part of the seller? He was not a perpetual assurer of soundness of mind, health of body, or continuity of title. A change of the ownership and possession of real estate by the process of eminent domain is not a violation of the covenant for quiet enjoyment.† Nor is it such an eviction as will support an action for a breach of the covenant of general warranty. In *Dobbins* v. *Brown*,‡ it was said by the court: "It will scarcely be thought that a covenant of warranty extends to the State in the exercise of its eminent domain. Like any

* 20 Howell's State Trials, 79; see also Madrazo *v.* Willes, 3 Barnewall & Alderson, 353; Santos *v.* Illidge, 98 English Common Law, 861; The Antelope, 10 Wheaton, 66; Emerson *v.* Howland, 1 Mason, 50; Commonwealth *v.* Aves, 18 Pickering, 215; Groves *v.* Slaughter, 15 Peters, 449; and Andrews *v.* Hensler, 6 Wallace, 254.

† Frost *v.* Earnest, 4 Wharton, 86; Ellis *v.* Welch, 6 Massachusetts, 246.

‡ 12 Pennsylvania State, 80.

other covenant it must be restrained to what was supposed to be the matter in view. No grantor who warrants the possession dreams that he covenants against the entry of the State to make a railroad or a canal, nor would it be a sound interpretation of the contract that would make him liable for it. *An explicit covenant against all the world would bind him;* but the law is not so unreasonable as to imply it."

In *Bailey* v. *Miltenberger** it was said: "It has never been supposed that the vendor or vendee contemplated a warranty against the exercise of this power whenever the public good or convenience might require it."

These remarks are strikingly apposite to the point here under consideration. As regards the principle involved we see nothing to distinguish those cases from the one before us. In all of them the property was lost to the owner by the paramount act of the State, which neither party anticipated, and in regard to which the contract was silent. Emancipation and the eminent domain work the same result as regards the title and possession of the owner. Both are put an end to. Why should the seller be liable in one case and not in the other? We can see no foundation, in reason or principle, for such a claim.

It was formerly held that there could be no warranty against a future event. It is now well settled that the law is otherwise.† The buyer might have guarded against his loss by a guaranty against the event which has caused it. We are asked, in effect, to interpolate such a stipulation and to enforce it, as if such were the agreement of the parties. This we have no power to do. Our duty is not to make contracts for the parties, but to administer them as we find them. Parties must take the consequences, both of what is stipulated and of what is admitted. We can neither detract from one nor supply the other.‡

Where an article is on sale in the market, and there is no fraud on the part of the seller, and the buyer gets what he

* 31 Pennsylvania State, 41.

† Benjamin on Sales, 463.

‡ Dermott *v.* Jones, 2 Wallace, 1; Revell *v.* Hussey, 2 Ball & Beatty, 287.

intended to buy, he is liable for the purchase price, though the article turns out to be worthless. Thus, where certain railroad scrip had been openly sold in London for several months, but was subsequently repudiated by the directors of the company as having been signed and issued by the secretary without authority, it was held that the buyer could not set up as a defence a failure of consideration.* These cases go further than it is necessary for us to go in order to sustain the liability of the defendants upon the contract here in question. There, as in this case, the buyer might have protected himself by a proper warranty, but had failed to do so.

But we think the exact point here under consideration was settled by the Court of Queen's Bench in *Mittelholzer* v. *Fullarton*.† That case so far as it is necessary to state it was this: The contract was made at Burbice, in British Guiana. The plaintiff sold to the defendant the services of one hundred and fifty-three apprentice laborers who had been slaves, for £7800, payable in six annual instalments of £1300 each. The defendant paid four instalments. The apprentices were then declared free by the local governor and council. The defendant refused to pay the two last instalments. The suit was brought to recover them. The court held that the plaintiff was entitled to judgment, "though the legislature had determined the apprenticeship before they became due."

Lord Chief Justice Denman said: "My Brother Weightman asked during the argument, what would have been the result, if at the end of a year the services had been determined by the act of God, and to this no sufficient answer was given. . . The plaintiff's right vested when the bargain was made. The subsequent interference of the colonial legislature does not prevent his recovering what was then stipulated for."

Williams, Justice, said: "The whole question is, who shall bear the loss occasioned by a *vis major?* and that de-

* Lambert v. Heath, 15 Meeson & Welsby, 487; see also Lawes v. Purser, 6 Ellis & Blackburne, 930.

† 6 Adolphus & Ellis, 989.

pends much upon the question, *who was the proprietor when that loss was occasioned?* The property in the services of these laborers had been transferred to the defendant. Then the question is analogous to those which often arise in cases of loss by fire; as whether the goods were *in transitu* or the transit was ended. If the property had passed, and the residue of it was destroyed by a *vis major*, the loss must fall upon the proprietor of the thing, namely, of the services during the unexpired term." The other justices expressed themselves to the same effect, and the judgment was unanimously given.

If all the buildings upon leasehold premises be destroyed by fire, the lessee is nevertheless liable for the full amount of the rent during the residue of the term.* And if he has covenanted to repair, he must also rebuild.† So, if a fire occur after the contract of sale, but before the conveyance is executed, the loss must be borne by the buyer.‡

All contracts are inherently subject to the paramount power of the sovereign, and the exercise of such power is never understood to involve their violation, and is not within that provision of the National Constitution which forbids a State to pass laws impairing their obligation. The power acts upon the property which is the subject of the contract, and not upon the contract itself.§

Such also is the rule of the French law and such was the Roman law. The seller is not bound to warrant the buyer against acts of mere force, violence, and casualties, nor against the act of the sovereign.‖ "After the bargain is completed the purchaser stands to all losses."¶ The case is one in which the maxim applies, *Res perit suo domino.***

It has been earnestly insisted that contracts for the pur-

* Baker *v.* Holtzapffell, 4 Taunton, 45.

† Phillips *v.* Stevens, 16 Massachusetts, 238.

‡ Sugden on Vendors, 291.

§ West River Bridge Co. *v.* Dix et al., 6 Howard, 532, 536.

‖ 1 Domat., part 1, book 1, tit. 2, § 10, paragraph 4.

¶ Digest 2, 14, 77, Cooper's Justinian, 615.

** Meredith's Emerigon, 419; Paine *v.* Meller, 6 Vesey, 349.

chase and sale of slaves are contrary to natural justice and right, and have no validity unless sustained by positive law; that the right to enforce them rests upon the same foundation, and that when the institution is abolished all such contracts and the means of their enforcement, unless expressly saved, are thereby destroyed. Slavery was originally introduced into the American Colonies by the mother country, and into some of them against their will and protestations. In most, if not all of them, it rested upon universally recognized custom, and there were no statutes legalizing its existence more than there were legalizing the tenure of any other species of personal property. Though contrary to the law of nature it was recognized by the law of nations. The atrocious traffic in human beings, torn from their country to be transported to hopeless bondage in other lands, known as the slave trade, was also sanctioned by the latter code.*

Where the traffic was carried on by the subjects of governments which had forbidden it, a different rule was applied.† Humane and just sentiments upon the subject were of slow growth in the minds of publicists.‡ The institution has existed largely under the authority of the most enlightened nations of ancient and modern times. Wherever found, the rights of the owner have been regarded there as surrounded by the same sanctions and covered by the same protection as other property.§ The British government paid for the slaves carried off by its troops from this country, in the war of 1812, as they did for other private property in the same category.‖ The Constitution of the United States guaranteed the return of persons "held to service or labor in one State under the laws thereof, escaping into another." "The object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves as property in every State in the Union,

* 1 Wildman's International Law, 70; Dana's Wheaton, 199; The Antelope, 10 Wheaton, 67; Le Louis, 2 Dodson, 210.

† The Amedie, Acton, 240; The Diana, 1 Dodson, 95; The Fortuna, Ib. 81.

‡ 1 Phillmore's Law of Nations, 316.

§ Le Louis, 2 Dodson, 250.

‖ Lawrence's Wheaton, 496.

into which they might escape." Historically it is known that without this provision, the Constitution would not have been adopted, and the Union could not have been formed.*

But without considering at length the several assumptions of the proposition, it is a sufficient answer to say that when the thirteenth amendment to the Constitution of the United States was adopted, the rights of the plaintiff in this action had become legally and completely vested. Rights acquired by a deed, will, or contract of marriage, or other contract executed according to statutes subsequently repealed subsist afterwards, as they were before, in all respects as if the statutes were still in full force. This is a principle of universal jurisprudence. It is necessary to the repose and welfare of all communities. A different rule would shake the social fabric to its foundations and let in a flood-tide of intolerable evils. It would be contrary to "the general principles of law and reason," and to one of the most vital ends of government.† The doctrines of the repeal of statutes and the destruction of vested rights by implication, are alike unfavored in the law. Neither is to be admitted unless the implication is so clear as to be equivalent to an explicit declaration. Every doubt should be resolved against a construction so fraught with mischiefs. There is nothing in the language of the amendment which in the slightest degree warrants the inference that those who framed or those who adopted it intended that such should be its effect. It is wholly silent upon the subject. The proposition, if carried out in this case, would, in effect, take away one man's property and give it to another. And the deprivation would be "without due process of law." This is forbidden by the fundamental principles of the social compact, and is beyond the sphere of the legislative authority both of the States and the Nation.‡ What would be the effect of an amendment of the National Constitution reaching so far—if such a thing

* Prigg *v.* Pennsylvania, 16 Peters, 611.

† Calder *v.* Bull, 3 Dallas, 388.

‡ Taylor *v.* Porter, 4 Hill, 146; Wynehamer *v.* The People, 3 Kernan, 394; Wilkinson *v.* Leland et al., 2 Peters, 658.

should occur—it is not necessary to consider, as no such question is presented in the case before us.

Many cases have been decided by the highest State courts where the same questions arose which we have been called upon to consider in this case. In very nearly all of them the contract was adjudged to be valid, and was enforced. They are too numerous to be named. The opinions in some of them are marked by great ability.

Whatever we may think of the institution of slavery viewed in the light of religion, morals, humanity, or a sound political economy,—as the obligation here in question was valid when executed, sitting as a court of justice, we have no choice but to give it effect. We cannot regard it as differing in its legal efficacy from any other unexecuted contract to pay money made upon a sufficient consideration at the same time and place. Neither in the precedents and principles of the common law, nor in its associated system of equity jurisprudence, nor in the older system known as the civil law, is there anything to warrant the result contended for by the defendants in error. Neither the rights nor the interests of those of the colored race lately in bondage are affected by the conclusions we have reached. This opinion decides nothing as to the effect of President Lincoln's emancipation proclamation. We have had no occasion to consider that subject.

JUDGMENT REVERSED, and the cause remanded to the Circuit Court with directions to proceed

IN CONFORMITY TO THIS OPINION.

The CHIEF JUSTICE dissented in this case and in the preceding one of *White* v. *Hart*, on the grounds:

1st. That contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and without support except in positive law.

2d. That the laws of the several States by which alone slavery and slave contracts could be supported, were annulled by the thirteenth amendment of the Constitution which abolished slavery.

Syllabus.

3d. That thenceforward the common law of all the States was restored to its original principles of liberty, justice, and right, in conformity with which some of the highest courts of the late Slave States, notably that of Louisiana, have decided, and all might, on the same principles, decide, slave contracts to be invalid, as inconsistent with their jurisprudence, and this court has properly refused to interfere with those decisions.

4th. That the clause in the fourteenth amendment of the Constitution which forbids compensation for slaves emancipated by the thirteenth, can be vindicated only on these principles.

5th. That clauses in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the thirteenth and fourteenth amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.

EX PARTE RUSSELL.

1. The words "final disposition" in the 2d section of the act of June 25th, 1868, allowing the Court of Claims "at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the *final disposition* of any such suit or claim, on motion on behalf of the United States, to grant a new trial in any such suit or claim," mean the final determination of the suit on appeal (if an appeal is taken), or if none is taken, then its final determination in the Court of Claims. The Court of Claims has accordingly power to grant a new trial, if the same be done within two years next after the final disposition, although the case may have been decided on appeal in this court, and its mandate have been issued.
2. When the Court of Claims on a motion for a new trial under the 2d section of the act of June 25th, 1868, above referred to, has not reached the consideration of the motion on its merits, but has dismissed it under an assumption that they had no jurisdiction to grant it, *mandamus* directing the court to proceed with the motion is the proper remedy. Appeal is not a proper one.
3. But if the Court of Claims have granted an appeal, mandamus will not lie to cause them simply to vacate the allowance of it.

Statement of the case.

4. *Semble*, however, that it might lie to do so, *and to proceed to the hearing of the motion for a new trial.*

5. The proper course in a case where the Court of Claims, improperly (from supposed want of jurisdiction) refused to grant to the United States a motion for a new trial, made under the act of 1868, above referred to, and the United States *appealed*, stated to be, for one or the other party to move to dismiss the appeal, and then for the United States to ask for a distinct mandamus on the Court of Claims to proceed; this court stating that the motion to dismiss might be made at any time when the court was in session, and that it was not necessary to await the arrival of the term to which the record ought to be returned.

MOTION, *by Mr. William Penn Clarke*, for a writ of mandamus; the case being thus:

The second section of an act of June 25th, 1868, relating to the Court of Claims, thus enacts:

"That the said Court of Claims, at any time while any suit or claim is pending before or on appeal from said court, or within two years next after the *final disposition* of any suit or claim, may, on motion on behalf of the United States, grant a new trial in any such suit or claim, and stay the payment of any judgment therein, upon such evidence (although the same may be cumulative or other) as shall reasonably satisfy said court that any fraud, wrong, or injustice in the premises has been done to the United States; but until an order is made staying the payment of a judgment, the same shall be payable and paid as now provided by law."

It now appeared from the affidavit and exhibits on which this motion was based, that in October, 1867, Russell filed a petition in the Court of Claims to recover from the United States compensation for the use of certain steamboats, and that he obtained a judgment for $41,355 on the 6th of December, 1869, that afterwards an appeal was taken to this court on behalf of the United States, and the judgment of the Court of Claims was affirmed on the 20th of November, 1871,* that, pending the appeal, the counsel for the United States applied to the Court of Claims for a new trial, but the

* See the report of the case, *supra*, p. 623. The case was decided at the close of the last term.

motion was not argued until after the decision of the case here on the appeal, though it was argued before the mandate was issued; that the motion for a new trial failed by an equal division of the court; that the mandate from this court was filed in the Court of Claims on the 12th day of December, 1871, and on the next day that court ordered a rehearing of the motion for a new trial; and that, on the 29th of January, 1872, the Court of Claims dismissed the motion for a new trial as for want of jurisdiction, on the ground that, after it was made, the mandate of the Supreme Court had been filed affirming the judgment, and also on the ground that the motion had failed on the prior hearing by an equal division of the court. From this last decision the counsel for the United States appealed to this court, and the appeal was allowed by the Court of Claims. Thereupon the claimant moved that court to vacate the allowance of the appeal, but the court refused to do so. He now moves this court for a mandamus to compel the Court of Claims to vacate its order allowing the appeal. The grounds on which the application was made were:

First, that an appeal does not lie from an order refusing a new trial, because it is not a final judgment.

Secondly, that the granting of a new trial rests in the discretion of the court.

Thirdly, that the allowance of the appeal was a violation of the mandate of this court.

Mr. Clarke, in support of his motion, argued that the first and second reasons assigned needed no explanation. That the third one was well founded, and that the allowance of the appeal was a violation of the mandate of this court appeared on a right reading of the 2d section of the act of June 25th, 1868, under which the motion for the new trial was made. That section does but extend the time within which the government may exercise the right of appeal. The extension is:

1st. "While any suit or claim is pending before or on appeal from said Court" (of Claims); OR,

Argument against the motion.

2d. "Within two years next after the final disposition of any such suit or claim."

"Final disposition." Where? In the Court of Claims, of course. The act relates only to the Court of Claims, and the limitation is twofold. If the two limitations were united by the conjunction *and*, instead of the preposition "*or*," the section would then bear the construction contended for by the government. The case was *not* "pending on appeal from said court" when the motion for a new trial was argued, and the court properly overruled the motion. Its jurisdiction over the cause terminated when the mandate of this court, showing that the judgment had been affirmed, was filed in that court, except so far as its action was required to carry the judgment into execution. And the cause not being *pending* there, the court had no power to grant the allowance of an appeal. To have done so, would have been to have allowed an appeal to the Court of Claims from this court. Having erred in allowing the appeal, the order should have been vacated on the motion of the claimants.

Mr. W. McMichael, Assistant Attorney-General, and Mr. B. H. Bristow, Solicitor-General:

1. The appeal is not from an interlocutory order, but is the final judgment of the court below in the case.

2. The refusal to grant a new trial was a decision of the case against the United States; it involved not a matter of discretion but one of right. The words "final disposition" in the section under which this motion for a new trial was made do not relate alone to the action of the Court of Claims, but where cases are taken by appeal to the Supreme Court include the disposition of the case by the latter tribunal. A case which is thus taken to the Supreme Court cannot be regarded as finally disposed of until the court has expressed its judgment, and the two years recited in the statute are to be measured from that time. In the present case that limitation had not yet expired, and the motion for a new trial was not only made within it, but also within two years from the judgment of December 6th, 1869, in the Court of Claims.

Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

We think that the Court of Claims erred in dismissing the motion for a new trial as for want of jurisdiction; that the counsel for the United States mistook their remedy in appealing from that decision; and that the claimant has equally mistaken his remedy in applying for a mandamus to vacate the allowance of the appeal.

The difficulty has arisen out of the anomalous provisions of the 2d section of the act of June 25th, 1868. The policy of this act was undoubtedly dictated by the fact that the government agents are at a great disadvantage in defending suits in the Court of Claims on account of their personal ignorance of the facts, and of the witnesses and evidence necessary to rebut the petitioner's case; for all which they have to depend on distant and uninterested parties, or parties whose sympathies and, perhaps, whose interests, are with the claimants, whilst the claimants have had years to prepare and get up their cases and to select the most favorable proofs to sustain them. From these causes, no doubt, the government is often greatly defrauded, and claims are proved and adjudged against it which have really no just grounds, or which have long since been settled and paid. But whatever reason Congress may have had for passing the act, of its right to pass it there is no question. The erection of the Court of Claims itself, and the giving to parties the privilege of suing the government therein, though dictated by a sense of justice and good faith, were purely voluntary on the part of Congress; and it has the right to impose such conditions and regulations in reference to the proceedings in that court as it sees fit.

The section in question was undoubtedly intended to give the government an advantage, which, in respect to its form, is quite unusual, if not unprecedented, but which Congress undoubtedly saw sufficient reason to confer. It authorizes the Court of Claims, on behalf of the United States, at any time while a suit is pending before, or on appeal from, said court, or within two years next after the final disposition of such suit, to grant a new trial upon such evidence as shall

satisfy the court that the government has been defrauded or wronged. The question is, what is meant by the final disposition of the suit from which the two years of limitation is to date. And it seems to us there is hardly room for a doubt. Looking at the words in their collocation with the previous words, it seems evident that the final determination of the suit has reference to its final determination on appeal (if an appeal is taken), or, if none is taken, then to its final determination in the Court of Claims. The natural meaning of the words leads to the same conclusion. The final determination of a suit is the end of litigation therein. This cannot be said to have arrived as long as an appeal is pending. Neither the existence nor the determination of the appeal interferes with the right, on the part of the government, to apply for a new trial; and, of course, the mandate from this court cannot affect it.

It has been objected that the granting of a new trial after a decision by this court is, in effect, an appeal from the decision of this court. This would be so if it were granted upon the same case presented to us. But it is not. A new case must be made; a case involving fraud or other wrong practiced upon the government. It is analogous to the case of a bill of review in chancery to set aside a former decree, or a bill impeaching a decree for fraud.

We are of opinion, therefore, that the Court of Claims had jurisdiction to grant a new trial, notwithstanding the filing of the mandate of this court.

The other ground on which the court dismissed the motion, namely, that on the first hearing the court was equally divided, was no valid reason for not proceeding after an order for a rehearing had been made.

The next question is as to the proper remedy of the counsel for the United States upon the dismissal of their motion. To us it seems clear that they should have applied to this court for a mandamus. An appeal was not the proper remedy. The Court of Claims did not reach the consideration of the motion for a new trial on its merits; but stopped

short of that point by reaching the conclusion that, under the circumstances, they had no jurisdiction to entertain the motion, and therefore they dismissed it. The only proper remedy, therefore, which was left to the United States was to move for a mandamus to direct the court to proceed with the motion. Where a court declines to hear a case or motion, alleging its own incompetency to do so, or that of the party to be heard, mandamus is the proper remedy. A writ of error or appeal does not lie; for what has the appellate court to review where the inferior court has not decided the case, but has refused to hear it? Where a final judgment or decree to which a writ of error or an appeal can be taken is based on a supposed want of jurisdiction, that question, as well as other questions, may be examined by the appellate court. But that, as we have shown, is not the case here.

If this view as to the proper course of proceeding is correct, it follows that the appeal taken by the counsel for the government was not well taken, and that this court would dismiss it upon proper application here.

But we cannot grant a mandamus to the Court of Claims to cause them to vacate their allowance of the appeal. That would be to use the writ for the purpose of compelling the inferior court to decide a case or question in a particular manner. If we should grant a mandamus in the case at all, it would be adverse to the claimants, namely, a mandamus to vacate the allowance of the appeal, and to proceed with the hearing of the motion for a new trial. Perhaps, on the principle of going back to the first error, we might do this; especially, as by their appeal, the defendants, though not in the proper mode, have asked us to do substantially the same thing by reversing the order dismissing their motion for new trial.

However, since the appeal has been actually allowed, and the court below has thus lost possession of the case, and as it is now within the control of this court, we think the more orderly and proper course would be for one or the other party to move to dismiss the appeal, and for the counsel of the United States, if they see fit, to move for a distinct

mandamus to require the Court of Claims to proceed. A motion to dismiss the appeal where it has been improperly allowed is an adequate remedy, and this is an additional reason why a mandamus commanding the court below to vacate the allowance thereof should not be granted.

It is suggested that a party wishing to move the dismissal of an appeal is obliged to await the arrival of the term to which the record ought to be returned, which occasions great delay. But as the case is virtually in the possession and subject to the control of this court as soon as the appeal is effectively taken, we see no reason why the appellee should not at any time when the court is in session, apply to have the appeal dismissed, provided the question can be properly presented to the court. Of course the court would not hear the motion without having the record before it; but that could be procured and presented by the appellee as is done where the appellant has failed to have the record filed in due time. In many cases the court might decline to hear the motion until the record were printed; but that could also be done by the appellee, if he desired to have a speedy hearing of the matter. Unless some unforeseen inconvenience should arise from the practice, we shall not refuse to hear a motion to dismiss before the term to which, in regular course, the record ought to be returned. It would be likely to prevent great delays and expense, and further the ends of justice.

The motion for mandamus must be

DENIED.

If the counsel for the United States desire to dismiss their appeal and ask for a mandamus to the Court of Claims to proceed with the motion for a new trial, it will be granted. But probably counsel will be able, in view of the suggestions now made, to come to some mutual arrangement by which further process or delay may be avoided.

The CHIEF JUSTICE, with whom concurred CLIFFORD, J., dissented from the opinion of the court because

they thought that the act of Congress did not warrant the granting of a new trial on a petition filed subsequent to an appeal and the return of the mandate from the court.

INSURANCE COMPANY *v.* THWING.

1. Merchandise, carried under bill of lading and paying freight is cargo and not dunnage, although stowed as dunnage would be stowed for the purpose of protecting the rest of the cargo from wet, and put on board by the shipper with knowledge that it would be so stowed.
2. A warranty in a ship's policy "not to load more than her registered tonnage," will be broken by carrying more cargo in weight than such tonnage, though the excess be used as dunnage; whilst, if such excess had been mere dunnage, and not cargo, the warranty would not have been broken.

IN error to the Circuit Court of the United States for the District of Massachusetts.

This was an action of assumpsit for money had and received, brought by The Great Western Insurance Company, of New York, against W. Thwing, a citizen of Massachusetts, to recover certain insurance money which the company had paid to him in ignorance (as they alleged) of a breach of warranty by him. They had made him a policy on his ship Alhambra, on a voyage from Liverpool to San Francisco, which policy was dated the 6th of October, 1863, and contained, amongst other things, this clause:

"Warranted not to load more than her registered tonnage with lead, marble, coal, slate, copper ore, salt, stone, bricks, grain, or iron, either or all, on any one passage."

The registered tonnage was 1285 tons, and the vessel took on board at Liverpool, among other things, 1064 tons of iron, 6 tons of brick, and 238 tons of cannel coal, being an excess over the registered tonnage of 23 tons. The ship having sustained a partial loss on the voyage, the insurance company paid the money in question in ignorance of the amount

of cargo, and based their claim to recover it back on the ground that the payment was made under a mistake of fact.

The defence set up was, that the 238 tons of cannel coal was not cargo, but dunnage.

The defendant showed a charter-party with James Starkie, of Liverpool, by which the charterer was to have the full reach of the vessel's hold, and was to pay 51 shillings for every ton of freight put on board; that the master agreed with the charterer, in addition to the agreement in the charter-party, that the latter should furnish 250 tons of cannel coal for dunnage of the ship for the voyage, and that under this agreement he received the said 238 tons as dunnage, and that it was used and placed along the ship's bottom, fore and aft, as dunnage; that the captain signed a bill of lading for it; that it was on his freight list; that he collected freight, 51 shillings per ton, for it, and delivered it in San Francisco the same as he did the rest of his cargo; that it was better for dunnage than plank. The defendant also offered evidence of experts to show that a cargo was not properly stowed unless properly dunnaged, and that in cargoes from Liverpool cannel coal is frequently used for dunnage, and, when so used for certain cargoes, is liable to be crushed; that when cannel coal is received for cargo it is usually, though not always, stowed in a different manner from what it is when used as dunnage, and that it is sometimes taken as dunnage on ship's account, and then is sold at the port of discharge on ship's account.

Upon this testimony the plaintiffs' counsel asked the court to instruct the jury that, if freight was received and paid for this coal, it came within the warranty, although used as dunnage. The court declined so to rule; but ruled that if the jury believed, from the evidence, that the cannel coal was received and used as dunnage, and not as cargo, it would not amount to a loading under the clause of the policy referred to, and the plaintiffs could not recover. Under this ruling the jury found for the defendant. The bill of exceptions brought up the question as to the correctness of this ruling.

The case was very well argued; orally by Mr. R. H. Dana (briefs of Messrs. M. E. Ingalls and C. L. Woodbury being filed), and by Mr. Sydney Bartlett on a brief, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

There is considerable analogy between dunnage and ballast. The latter is used for trimming the ship, and bringing it down to a draft of water proper and safe for sailing. Dunnage is placed under the cargo to keep it from being wetted by water getting into the hold, or between the different parcels to keep them from bruising and injuring each other. Webster's definition of dunnage is "fagots, boughs, or loose materials of any kind, laid on the bottom of a ship to raise heavy goods above the bottom, to prevent injury by water in the hold; also, loose articles of merchandise wedged between parts of the cargo to prevent rubbing, and to hold them steady." Lord Tenterden says: "It is, in all cases, the duty of the master to provide ropes, &c., proper for the actual reception of the goods in the ship. . . . The ship must also be furnished with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality."*

It seems to be conceded by the plaintiffs that if the cannel coal can be regarded as dunnage, there was no breach of the warranty. In other words, it is conceded that when the assured warranted "not to load more than her registered tonnage," ballast and dunnage were not included in the warranty. And it is not pretended that the cannel coal used on this occasion was more than was proper for dunnage. Had some useless articles been employed for that purpose, such as chips or blocks of wood, though weighing precisely what this coal weighed, and had no freight been paid for it, the insurance company could not have complained.

It is the master's duty to provide both ballast and dunnage when necessary for the safe and proper transportation of his

* Abbott on Shipping, Pt. IV, c. 5, § 1.

cargo. And it has been held that, in selecting materials for these purposes, even when he has chartered the entire capacity of his ship for articles which require ballast or dunnage, he is not precluded from taking articles on which he can realize freight. Thus, in the case of *Towse* v. *Henderson*,* where, upon a charter-party, it was agreed that the vessel should proceed from Singapore to Whampoa, and there load from the agents of the affreighters a full and complete cargo of tea, and the master took in as ballast eighty tons of antimony ore, for which he received freight as merchandise, it was held that, if it occupied no more space than ballast would have done, he was entitled to do it. In that case a full cargo of tea (which was all that the charterer stipulated for) still needed ballast, which it was the duty of the ship-master to supply. Hence it could make no difference to the charterer what material was used for ballast, if it did not encroach upon the loading capacity of the vessel for tea.

The question still recurs, however, whether merchandise used for the purpose of ballasting a ship, or for the purpose of dunnage, and paying freight as merchandise, can be considered as part of the ship's loading within the meaning of a warranty against an excess of loading beyond a limited amount, it being conceded that an equal quantity of ballast or dunnage proper would not be so regarded? Has the court a right to import into the contract an implied qualification that a reasonable amount of merchandise proper for ballast or dunnage shall not be reckoned as loading within the meaning of the contract? It is clear that the law does make the implied qualification that ballast and dunnage shall not be regarded as loading within the contract. Is it reasonable to extend that qualification to merchandise used as ballast or dunnage? If so, then, in the case of a cargo consisting of only one article, which needed no ballast or dunnage, the ship-owner would be entitled to deduct a reasonable amount for those purposes; and if there were a government regulation, that no ship should carry more cargo in

* 4 Exchequer, 890.

weight than the amount of her registered tonnage, she would on the same principle be entitled not only to carry ballast and dunnage (properly such) in addition to her legal amount of cargo, but, where ballast and dunnage could be dispensed with, she would be entitled to carry an additional amount of cargo, beyond the legal allowance, equivalent to reasonable ballast and dunnage.

Such a construction could not be a sound one. It would be an arbitrary modification of the words of a law or contract. If the legislature in the one case, or the parties in the other, were willing that such a qualification should be made, it would always be very easy to make it in express terms. It would seem to be a dangerous practice for the court to make it for them.

It is not every cargo that requires ballast. Many cargoes will themselves sufficiently ballast the ship. Cargo may be so assorted that certain portions of it may act as ballast. And where a ship is doing a miscellaneous carrying business, it would seem to be the dictate of sound business judgment so to assort and arrange the cargo (if practicable) as to dispense with the use of ballast properly so called. For by this means the whole carrying capacity of the ship is saved for cargo. And when this idea is acted on, those portions of the cargo which are selected and used for trimming and settling the ship, may, in a loose and popular sense, be called ballast. But, nevertheless, they are not ballast in a legal or proper sense. They remain cargo.

Precisely the same may be said with regard to dunnage. Many kinds of cargo require no dunnage whatever. They are composed of articles which will not be injured by water, nor by contact with each other. A cargo may be so assorted that some portions of it may be placed so as to keep the other portions dry, or prevent them from coming into mutual collision. It is manifest in this case, as in that of ballast, that a prudent and skilful master of a vessel will (if practicable) so assort and arrange his cargo as to dispense with dunnage proper. And yet, in a loose sense, the articles of merchandise which he uses to perform the office of dun-

nage, may be called dunnage. Still they are not legally nor properly such. If they are merchandise, they are cargo, and form part of the vessel's lading. They will be subject to duties, and they will be covered by insurance on the cargo.

It is true that ballast or dunnage, even when clearly such, as shingle from the beach, wooden slabs, chips, or brush, may be sold for some small sum after the voyage is ended; but that will not make it any the less ballast or dunnage as contradistinguished from merchandise. No person of ordinary intelligence would find any difficulty in making the distinction. Had such articles been used in the case before us, though of the same weight as the cannel coal, the insurance company could not have complained; for it would not have been cargo. But when merchandise is used in lieu of dunnage, or to perform the office of dunnage, it does not lose its character as cargo; and the insurance company have the right to treat it as cargo. And it is evident that no form of words which the captain and the charterer might use on the subject can affect the rights of the insurance company. It would be *res inter alios acta*.

In view of these considerations it seems to us that the charge of the court was calculated to mislead the jury on the question at issue. It was "that if they believed that the coal was *received and used as dunnage, and not as cargo*, it would not amount to a loading under the warranty of the policy."

The evidence justified and required the instruction asked by the plaintiffs, namely, that if freight was received and paid for the coal, it *was* cargo, and came within the warranty. Here was an admitted fact, which gave character to the article, stamping it as merchandise. Freight is never paid for mere dunnage, any more than for the sails and rigging of the ship.

The argument that it made no difference to the insurance company whether coal or any other article was used as dunnage, is unsound. It does make this difference: if coal paying freight is merchandise, it is within the warranty; if mere dunnage were used, it would not be within the warranty. And the company were entitled to the benefit of those re

sults which the mutual self-interest of the parties would lead them to adopt. The company made their contract in view and in anticipation of all these considerations.

Our attention has been called to another case between the same parties on the same policy of insurance, decided by the Supreme Court of Massachusetts, and reported in 103 Massachusetts Reports, p. 401, in which a decision was made adverse to the views which we have expressed. With all due respect for that intelligent and learned tribunal, and after giving full consideration to the views presented in the opinion given in that case, we cannot bring ourselves to a different conclusion from that to which we have come.

JUDGMENT REVERSED, with instructions to issue a

VENIRE DE NOVO.

Mr. Justice CLIFFORD, with whom concurred the CHIEF JUSTICE and Mr. Justice SWAYNE, dissenting.

Unable to concur in the views of the majority of the court in this case, and regarding the question presented as one of considerable practical importance, I deem it proper to state very briefly the grounds of my dissent.

Insurance was obtained by the defendant on his ship Alhambra, from Liverpool to San Francisco; she received injuries by perils of the sea during the voyage, and the plaintiffs, as insurers, paid the loss under protest and brought this suit to recover back the amount. The policy contained the warranty described in the opinion of the court, and the claim to recover back the amount paid for the loss is based solely upon the fact that the ship took on board twenty-three tons of the excepted articles mentioned in the warranty, in excess of her registered tonnage. Two hundred and thirty-eight tons of the loading consisted of cannel coal, which the proofs showed was often used as dunnage, and that much more in quantity of the coal than the excess mentioned was used for dunnage on this occasion. Dunnage is required in every case, and it is not shown nor pretended that any more was used in loading the cargo than was necessary for the purpose.

Deduct from the loading the amount of the coal used as dunnage, and it is conceded that the loading of the ship did not exceed her registered tonnage, and the jury have found that the excess beyond her registered tonnage was used as dunnage, and I have no doubt it was properly so used.

Beyond doubt the ship-owner in ballasting his chartered vessel may take freight-paying merchandise for that purpose, provided the merchandise occupies no more space than the ballast would have done if ordinary ballast had been used instead of merchandise paying freight, and I am of the opinion that the same rule should be applied in respect to the dunnage used in stowing the cargo.* Such was also the opinion of the Supreme Court of Massachusetts in a suit between these same parties which arose out of an insurance on the same voyage.†

Much discussion of the question is unnecessary, as the views which I entertain and the authorities to support them are very fully given in that opinion and in the opinion of the district judge, in which I also concur.

WATSON *v.* JONES.

1. When in courts of concurrent jurisdiction, the pendency of a suit in one is relied on to defeat a second suit in the other, the identity of the parties, of the case made, and of the relief sought, should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication.
2. In such cases, the proceedings in an appellate court are part of the proceedings in the first court, and orders made by it to be enforced by the court of primary jurisdiction are, while unexecuted, a part of the case in the first suit, which may be relied on as *lis pendens* in reference to the second suit.
3. Hence an unexecuted order of this kind, made by a State court to restore possession to the parties who had been deprived of it by a decree which had been reversed, cannot be interfered with by another court by way of injunction, especially by a court of the United States, by reason of the act of Congress of March 2d, 1793. (1 Stat. at Large, 334, § 5.)

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* Towse *v.* Henderson, 4 Exchequer, 890.

† Thwing *v.* Great Western Insurance Co., 103 Massachusetts, 401.

Syllabus.

4. But the nature and character of the possession so decreed to be delivered may be inquired into by another court, and if it was of a fiduciary character, and the trust was not involved in the first suit, a second suit may be sustained in any court of competent jurisdiction, to declare, define, and protect the trust, though the first suit may be still pending.
5. Controversies in the civil courts concerning property rights of religious societies are generally to be decided by a reference to one or more of three propositions:

   (1st.) Was the property or fund which is in question, devoted by the express terms of the gift, grant, or sale by which it was acquired, to the support of any specific religious doctrine or belief, or was it acquired for the general use of the society for religious purposes, with no other limitation?

   (2d.) Is the society which owned it of the strictly congregational or independent form of church government, owing no submission to any organization outside the congregation?

   (3d.) Or is it one of a number of such societies, united to form a more general body of churches, with ecclesiastical control in the general association over the members and societies of which it is composed?
6. In the first class of cases the court will, when necessary to protect the trust to which the property has been devoted, inquire into the religious faith or practice of the parties claiming its use or control, and will see that it shall not be diverted from that trust.
7. If the property was acquired in the ordinary way of purchase or gift, for the use of a religious society, the court will inquire who constitute that society, or its legitimate successors, and award to them the use of the property.
8. In case of the independent order of the congregation, this is to be determined by the majority of the society, or by such organization of the society, as by its own rules constitute its government.
9. In the class of cases in which property has been acquired in the same way by a society which constitutes a subordinate part of a general religious organization with established tribunals for ecclesiastical government, these tribunals must decide all questions of faith, discipline, rule, custom, or ecclesiastical government.
10. In such cases where the right of property in the civil court is dependent on the question of doctrine, discipline, ecclesiastical law, rule, or custom, or church government, and that has been decided by the highest tribunal within the organization to which it has been carried, the civil court will accept that decision as conclusive, and be governed by it in its application to the case before it.
11. The principles which induced a different rule in the English courts, examined and rejected as inapplicable to the relations of church and state in this country, and an examination of the American cases found to sustain the principle above stated.

APPEAL from a decree of the Circuit Court for the District of Kentucky, made May 11th, 1869.

Statement of the case.

This was a litigation which grew out of certain disturbances in what is known as the "Third or Walnut Street Presbyterian Church," of Louisville, Kentucky, and which resulted in a division of its members into two distinct bodies, each claiming the exclusive use of the property held and owned by that local church. The case was thus:

The Presbyterian Church in the United States is a voluntary religious organization, which has been in existence for more than three-quarters of a century. It has a written Confession of Faith, Form of Government, Book of Discipline, and Directory for Worship. The government of the church is exercised by and through an ascending series of "judicatories," known as Church Sessions, Presbyteries, Synods, and a General Assembly

The Church Session, consisting of the pastor and ruling elders of a particular congregation, is charged with maintaining the spiritual government of the congregation, for which purpose they have various powers, among which is the power to receive members into the church, and to concert the best measures for promoting the spiritual interests of the congregation.* This body, which thus controls in each local church, is composed of the pastor and ruling elders. The number of elders is variable, and a majority of the Session governs. It acts, however, but as representing the congregation which elects it. The elders, so far as the church edifice is concerned, have no power to dispose of its use except as members of the Session.

Connected with each local church, and apparently without any functions in essence ecclesiastical, are what are called the "Trustees;" three persons usually, in whom is vested for form's sake, the legal title to the church edifice and other property; the equitable power of management of the property being with the Session. These Trustees are usually elected biennially; they are subject to the Session, and may be removed by the congregation.

The Presbytery, consisting of all the ministers and one

* Form of Government, chap. 9, § 6.

ruling elder from each congregation within a certain district, has various powers, among them the power to visit particular churches for the purpose of inquiring into their state, and redressing the evils which may have arisen in them; to ordain, and install, remove, and judge ministers; and, in general, power to order whatever pertains to the spiritual welfare of the churches under their care.*

The Synod, consisting of all the ministers and one ruling elder from each congregation in a larger district, has various powers, among them the power to receive and issue all appeals from Presbyteries; to decide on all references made to them; to redress whatever has been done by Presbyteries contrary to order; and generally to take such order with respect to the Presbyteries, Sessions, and people under their care as may be in conformity with the word of God and the established rules, and which tend to promote the edification of the church.†

The General Assembly, consisting of ministers and elders commissioned from each Presbytery under its care, is the highest judicatory of the Presbyterian Church, representing in one body all the particular churches of the denomination. Besides the power of receiving and issuing appeals and references from inferior judicatories, to review the records of Synods, and to give them advice and instruction in all cases submitted to them in conformity with the constitution of the church, it is declared that it "shall constitute the bond of union, peace, correspondence, and mutual confidence among all our churches."‡ "To the General Assembly also belongs the power of deciding in all controversies respecting doctrine and discipline; of reproving, warning, or bearing testimony against any error in doctrine or immorality in practice, in any Church, Presbytery, or Synod; . . . of superintending the concerns of the whole church; . . . of suppressing schismatical contentions and disputations; and, in general, of recommending and attempting reformation of

* Form of Government, chap. 10, § 8.

† Ib., chap. 11, § 4.

‡ Ib., chap. 12, §§ 1, 2, and 3.

manners, and the promotion of charity, truth, and holiness through all the churches under their care."*

The Walnut Street Presbyterian Church, of which we have spoken, was organized about 1842, under the authority and as a part of the Presbyterian Church in the United States, and, with the assent of all its members, was received into connection with and under the jurisdiction of the Presbytery of Louisville and the Synod of Kentucky. It remained in such connection and under such jurisdiction, without any disturbance among its members, until the year 1865, when certain events took place in Kentucky which will be stated presently.

After the organization, to wit, in 1853, the said local church purchased a lot of ground in Louisville, and a conveyance was made to the church's trustees to have and to hold to them, and to their successors, to be chosen by the congregation.

In 1854 the trustees of the church were incorporated with power to hold any real estate then owned by it; the property to pass to them and their successors in office. By the act it was declared that the trustees, to be elected by the members of the congregation, should continue in office two years, and until their successors were elected, "unless they shall sooner resign, or refuse to act, or cease to be members of the said church." The trustees were charged by the act with the duty of providing for the comfort and convenience of the congregation, the preservation of the property, and passing such regulations relative to the government and control of the church property as they might think proper, not inconsistent with the Constitution of the United States and the laws of Kentucky.

Though neither the deed nor charter said this in terms, it was admitted that both contemplated the connection of the local church with the general Presbyterian one, and subjected both property and trustees alike to the operation of its fundamental laws.

* Form of Government, chap. 12, § 5.

We now pass to some history of the disturbances to which we have referred as matter to be related.

With the outbreak of the war of the insurrection, and the action of it upon the subject of slavery, a very excited condition of things, originating with and influenced by that subject, manifested itself in the Walnut Street Church. One of the earliest exhibitions of the matter was in reference to the re-engagement as minister of a certain Reverend *Mr. McElroy*. The members of the church were asked by a majority of the Session, at this time composed of three persons, named *Watson*, *Galt*, and Avery,* to make a call upon *Mr. McElroy* to become the pastor, but at a congregational meeting the majority of the members declined to make the call. The majority of the Session (that is to say, *Watson* and *Galt*) renewed, notwithstanding, the engagement of *Mr. McElroy* for six months. In August, 1865, the majority of the congregation asked the Session that on the expiration of the then current six months of *Mr. McElroy's* engagement no further renewal thereof should be made. In connection with these efforts of the majority of the Session (*Watson* and *Galt*) to maintain *Mr. McElroy* as preacher, charges were preferred against three members of the congregation, named B. F. Avery, T. J. Hackney, and D. McNaughtan, who had co-operated with the majority of it in the movements to obtain another minister. And about the same time, by way of counteraction, apparently, charges were preferred by some of the majority against *Watson* and *Galt*. While these troubles were existing, some of the members of the church appealed to the Synod of Kentucky, which body, on the 20th of October, 1865, appointed a committee to visit the congregation, "with power to call a congregational meeting for the purpose of electing *additional* ruling elders, calling a

* To assist the reader, as far as possible, in a controversy and case perplexed by a multitude of names, to keep in his mind a distinct conception of who were on one s'de and who on the other, the Reporter, all through his statement of the case, has put the names of those who were on one side (and which for mere convenience may be distinguished as the pro-slavery or conservative side), in *italic* letter, and those on the other in Roman.

pastor, or choosing a stated supply, and doing any other business competent to a congregational meeting that may appear to them, the said congregation, necessary for their best interests." The synodical committee thus appointed called a congregational meeting for the purpose of the election, in January, 1866. *Watson* and *Galt* refused to open the church for the meeting, but the majority organizing themselves on the sidewalk, elected a certain J. A. Leach, with B. F. Avery and D. McNaughtan (which last two names have already appeared in our history), additional ruling elders, who went through what they deemed a valid process of ordination and instalment. The other admitted elders were *Watson*, *Galt*, and Hackney. The trustees of the church were *Henry Farley*, *George Fulton*, and B. F. Avery, and they had the actual possession of the church property. *Fulton* and *Farley*, uniting with *Watson* and *Galt*, denied the validity of the election of Avery, Leach, and McNaughtan, and refused to allow them any participation *as elders* in the control of the church property. Hackney admitted the validity of such election, and recognized Avery, Leach, and McNaughtan as lawful elders.

In this state of things, Avery and his associates filed a bill, on the 1st of February, 1866, in the Louisville Chancery Court, against *Watson*, *Galt*, *Fulton*, and *Farley*, for the purpose of asserting the right of Avery, Leach, and McNaughtan, *as elders*, to participate with the other elders in the management of the church property for purposes of religious worship.

In the progress of that case the three trustees, *Farley*, *Fulton*, and Avery, were appointed, on the 20th of March, 1866, receivers "to take charge of the church building, and all property belonging to the said church," during the pendency of the suit, or until the further order of the court; and they were "ordered to keep and preserve the said property, and keep it in repair to the best of their ability, and to open the various portions of the building ready for worship, and other services of said church, according to the laws and usages of the Presbyterian Church; and not to prevent any

part of the congregation from attendance upon the meetings of said church, and enjoying the use thereof according to their rights and privileges as members thereof."

At a subsequent date—June 15th, 1866—the chancellor delivered an opinion recognizing Avery, Leach, and McNaughtan as elders, and entered an order that the trustees, *Farley*, *Fulton*, and Avery, now receivers, open the church for divine worship and congregational meetings whenever ordered to do so by the Session of the church, constituted of the said Avery, Hackney, and McNaughtan, Leach, *Watson*, and *Galt*, or a majority thereof.

The execution of this order was, apparently, so far interfered with by *Watson*, *Galt*, *Fulton*, and *Farley* as practically to prevent religious services in the church edifice. At all events, on the 23d of July, 1866, it was ordered:

"That the MARSHAL OF THIS COURT do take possession of the church property until the further order of the court, and that the same be opened: 1. For Sunday-schools and other like purposes. 2. For the meeting of the Session when notified thereof. 3. For public worship, and such using of the pulpit and the house generally as the Session shall order. And it is ordered that he be respectful to the order of the Session, as this court said on the 15th of June. The Session, according to the decision of the General Assembly, at Peoria, Illinois, has control of the church buildings, &c. The keys of the church, &c., are ordered to be delivered to the marshal."

The marshal took possession by virtue of this order. Thenceforward *Watson*, *Galt*, *Fulton*, and *Farley* abandoned connection with the property and participation in its control.

Thus matters stood, so far as the church property was concerned, up to the final decree in *Avery et al.* v. *Watson et al.*, made May 7th, 1867, when it was decreed that Leach, Avery, and McNaughtan, *with* Hackney, *Watson*, and *Galt*, were ruling elders that constituted the Session of the Walnut Street Church, and the management of the said property for the purpose of worship and other religious service *was committed to their care, under the regulations of the Presbyterian Church in the United States of America*; and it was ordered

that the defendants, *Watson* and *Galt*, pay to the plaintiffs their costs.

It will be observed that the marshal was not, by the terms of the decree, directed to give up his possession; nor was any motion or order afterwards made requiring him to give up or discharging him as receiver. Nor did he, *in fact*, so far as appeared from the record, ever *abandon possession*, although the property continued, as it had been since July 23d, 1866, subject to the exclusive *control* of Avery and his associates.

From this final decree an appeal was taken to the Court of Appeals of Kentucky, but *Watson and his friends* did not supersede that decree, nor take other step to prevent its immediate execution.

The decree of the chancellor was reversed by the Court of Appeals of Kentucky.* The language of the order of reversal was thus:

"And the judgment of the chancellor, *which commits the management and control of said church property* to said Avery, McNaughtan, and Leach, in conjunction with said *Watson*, *Galt*, and Hackney, is therefore deemed erroneous. Wherefore the judgment is reversed, and the cause remanded for proper corrective proceedings respecting the possession, control, and use of the church property, and for final judgment in conformity to this opinion."

As to the nature of the issues in this case of *Avery* v. *Watson*, the Court of Appeals of Kentucky said:†

"As suggested in the argument, and apparently conceded on both sides, this is *not* a case of *division or schism in a church*, nor *is there any question as to which of* TWO BODIES *should be recognized as the Third or Walnut Street Presbyterian Church;* nor is there any controversy as to the authority of *Watson* and *Galt* to act as ruling elders; but the *sole* inquiry to which we are *restricted*, as we conceive, is whether Avery, McNaughtan, and Leach are ALSO ruling elders, and therefore members of the Session of the church."

* 2 Bush, 365.

† Ib. 346.

Statement of the case.

On the 21st of February, 1868, the opinion and mandate of the Court of Appeals was filed in the Louisville Chancery Court, and the defendants moved the court "to restore to them, and those entitled under the said opinion, the possession, use, and control of the church building and property, which was taken from them by the marshal of the court, under orders of court, during the pendency of the action, and to dismiss the plaintiffs' petition with costs."

On the 28th of February, 1868, the complainants in the case of *Avery* v. *Watson* filed a petition in equity against the defendants, and moved the court for an injunction "enjoining them from any further prosecution of their said motion made on the 21st of February, 1868, and from all proceeding by motion, suit, or otherwise to obtain possession, control, or use of the property of the Walnut Street Presbyterian Church of Louisville."

The petition in equity thus presented averred that subsequent to the original decree of the chancellor, *Watson, Galt, and the others adhering to them*, had voluntarily withdrawn from the Walnut Street Presbyterian Church, and from the Presbyterian Church in the United States of America, and had thereby ceased to be members of the said church, or to have any interest in the property held by that church; that the plaintiffs in that injunction suit, together with those united in interest with them, constituted at that time the only beneficiaries of the trust property; and that therefore the attempt of *Watson and his friends*, under a mere order of *restitution*, based upon the reversal by the appellate court of the chancellor's decree, to obtain the possession of the property, *as elders and trustees*, was a fraud upon the rights of the beneficiaries of the property. And it charged that *Watson and his friends* intended to use the property as the property exclusively of their party and to deny the rights of all others as members.

On the 20th day of March, 1868, the chancellor granted upon this petition an injunction against the defendants in the action, enjoining them from any further proceeding on their motion made on February 21st, 1868; the former de-

cree being at the same time so far reversed that *the original petition was dismissed*, and costs awarded to the defendants.

Watson and his friends now obtained from the Court of Appeals of Kentucky a summons against the chancellor of the Louisville Chancery Court "to appear and show cause why he has refused to carry into effect the mandate of said court," and the chancellor having appeared, an opinion upon the rule was delivered.*

In the last-named case it was decided:

1. That the opinion and mandate in the previous decision in the appellate court,† imported a direction to restore to the defendants such rights of possession, control, and use of the property as the former judgment had erroneously taken or withheld from them.

2. That "no undecided question was reserved for further litigation in the court below."

3. That the Chancery Court must enter the proper order directed by the Court of Appeals; and "if there be any equitable reason for not coercing the order or decree for *restitution*, it should be made available as a ground for *enjoining*, and not for preventing or modifying, the *order of restitution*."

4. That the petition in equity of Avery and others, although intended to operate both as a written defence to the action of the court sought by the defendants in the old suit, and at the same time as the initial pleading in a new one, was to be regarded, so far as the action of the chancellor was concerned, as a response of the plaintiffs, interposed to prevent the rendering of a judgment in conformity to the decision and mandate of this court.

5. That if any equitable reasons existed for not enforcing restitution, they should be asserted in a *new suit*, enjoining the enforcement of the order of restitution after such order had been entered.

Accordingly the Court of Appeals, June 26th, 1868, on this rule against the chancellor, ordered that the latter make an

* 3 Bush, 646. † 2 Id. 348.

order "restoring the possession, use, and control of the church building and property to the parties entitled thereto *according to the said opinion*, and so far as they were deprived thereof by the marshal of the Chancery Court under its orders."

The parties in whose favor, according to the opinion, the order of restitution was to be made were of course *Watson*, *Galt*, and Hackney, ELDERS, and *Fulton*, *Farley*, and Avery, TRUSTEES.

After this last decision of the Kentucky Court of Appeals, the petition for injunction filed in the Louisville Chancery Court on the 28th of February, 1868, was, on *the motion of those who filed it*, dismissed without prejudice.

The present suit in the Circuit Court was begun July 17th, 1868.

Subsequently, on the 18th of September, 1868, the chancellor directed the marshal of the Chancery Court "to restore the possession, use, and control of the church building and property . . . to *Farley*, *Fulton*, and Avery, or a majority of them, *as trustees*, and to *Watson*, *Galt*, and Hackney, or a majority of them, as *ruling elders* of the said church, and to report how he had executed the order;" reserving the case for such further order as might be necessary to enforce full obedience.

Thus far as to the controversy in the Walnut Street Church, involved in the particular case of *Watson* v. *Avery*, in the State courts of Kentucky.

We have already adverted to the war of the insurrection, its action on the subject of slavery, and the feeling engendered by this action in the special congregation of the Walnut Street Church.

We now speak of the same subject of the war, of slavery, &c., in its more general relation with the judicatories above that local church, and of the way in which this local church was affected by and identified itself with the action of the more general church. From the beginning of the war to its close, the General Assembly of the Presbyterian Church at its annual meetings expressed in Declaratory Statements

or Resolutions, its sense of the obligation of all good citizens to support the Federal government in that struggle; and when, by the proclamation of President Lincoln, emancipation of the slaves of the States in insurrection was announced, that body also expressed views favorable to emancipation, and adverse to the institution of slavery. At its meeting in Pittsburg in May, 1865, instructions were given to the Presbyteries, the Board of Missions, and to the Sessions of the churches, that when any person from the Southern States should make application for employment as missionary or for admission as members, or ministers of churches, inquiry should be made as to their sentiments in regard to loyalty to the government and on the subject of slavery; and if it was found that they had been guilty of voluntarily aiding the war of the rebellion, or held the doctrine announced by the large body of the churches in the insurrectionary States which had organized a new General Assembly, that "the system of negro slavery in the South is a divine institution, and that it is the peculiar mission of the Southern church to conserve that institution," they should be required to repent and forsake these sins before they could be received.

In the month of September thereafter the Presbytery of Louisville, under whose immediate jurisdiction was the Walnut Street Church, adopted and published in pamphlet form, what it called "*A Declaration and Testimony against the erroneous and heretical doctrines and practices which have obtained and been propagated in the Presbyterian Church of the United States during the last five years.*" This Declaration denounced, in the severest terms, the action of the General Assembly in the matters we have just mentioned, declared an intention to refuse to be governed by that action, and invited the co-operation of all members of the Presbyterian Church who shared the sentiments of the Declaration, in a concerted resistance to what they called "the usurpation of authority" by the Assembly.

The General Assembly of 1866, denounced in turn the Declaration and Testimony and declared that every Pres-

bytery which refused to obey its order should be *ipso facto* dissolved, and called to answer before the next General Assembly; giving the Louisville Presbytery an opportunity for repentance and conformity. The Louisville Presbytery divided, and the adherents of the Declaration and Testimony sought and obtained admission, in 1868, into "the Presbyterian Church of the Confederate States," a body which had several years previously withdrawn from the General Assembly of the United States and set up a new organization.

In January, 1866, the congregation of the Walnut Street Church became divided in the manner stated above, each asserting that *it* constituted the church, although the issue as to membership was not distinctly made in the chancery suit of *Avery* v. *Watson* already so fully described. Both parties at this time recognized the same superior church judicatories.

On the 19th June, 1866, the Synod of Kentucky became divided, the opposing party in each asserting respectively that *it* constituted the true Presbytery and the true Synod; each meanwhile recognizing and professing to adhere to the same General Assembly. Of these contesting bodies *Watson and his party* adhered to one, those whom he opposed to the other. The Presbytery and Synod to which these last, that is to say, Avery or Hackney and his party, adhered, being known respectively as the McMillan Presbytery and the Lapsley Synod.

On the 1st of June, 1867, the Presbytery and Synod recognized by *Watson and his party*, were declared by the General Assembly to be "in no sense a true and lawful Synod and Presbytery in connection with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America;" and were permanently excluded from connection with or representation in the Assembly. By the same resolution the Synod and Presbytery adhered to by those whom *Watson and his party* opposed were declared to be the true and lawful Presbytery of Louisville, and Synod of Kentucky.

The Synod of Kentucky thus excluded, by a resolution adopted the 28th June, 1867, declared "that in its future action it will be governed by this recognized sundering of all its relations to the aforesaid revolutionary body (the General Assembly) by the acts of that body itself." The Presbytery took substantially the same action.

In this final severance of Presbytery and Synod from the General Assembly, *Watson and his friends* on the one side, and those whom he opposed on the other, continued to adhere to those bodies at first recognized by them respectively. This latter party now included, among many others, a certain William Jones, with his wife, and one Eleanor Lee, who had been admitted into membership by the Hackney, &c., Session.

The reader will now readily perceive, if he have not done so before, how in the earliest stages of this controversy it was found that a majority of the members of the Walnut Street Church concurred with the action of the General Assembly, while *Watson* and *Galt* as ruling elders, and *Fulton* and *Farley* as trustees, constituting in each case a majority of the Session and of the trustees, with *Mr. McElroy* the pastor, sympathized with the party of the Declaration and Testimony of the Louisville Presbytery. And how this led to efforts by each party to exclude the other from participation in the Session of the church and the use of the church property; as well as to all that followed.

The grounds on which the Court of Appeals reversed the chancellor's decision were, of course, that the General Assembly, Synod, and Presbytery of the Presbyterian Church, were all subject, in the exercise of their functions, to Constitutions (the standards mentioned at the beginning of this report); that when they violated these, their acts were beyond their jurisdiction and void; that whether they had violated them or not, was a matter which the civil courts, on an examination of the Constitutions, could properly pass on; and deciding further and finally as fact, after an examination by the court itself of these standards, that in their Declaratory Statements and Resolutions and other

deliverances enforcing loyalty, they had violated them; and that their acts were accordingly void.

Thus things stood in July, 1868; and the term for which the old trustees had, in more peaceful times, been elected having expired, the persons worshipping in the Walnut Street Church and so in possession, elected as new ones three persons whose names now first figure on our report. These persons were named McDougall, McPherson, and Ashcraft.

The newly elected elders and the majority of the congregation adhered to and had been recognized by the General Assembly as the regular and lawful Walnut Street Church and officers. *Galt* and *Watson*, *Fulton* and *Farley*, and a minority of the members, had cast their fortunes with those who adhered to the party of the Declaration and Testimony.

In this state of things, Jones, his wife, and Lee, *on the 21st July*, 1868, *three months before the mandate of September 18th to the Chancery Court*, mentioned at page 690, filed a bill in chancery in the Circuit Court of the United States for the District of Kentucky against *Watson* and *Galt*,* *Fulton*, *Farley*,† and Avery, the church corporation, and McDougall, McPherson, and Ashcraft, as trustees. The complainants alleged that they were citizens of Indiana; and that each of the natural persons already named were residents of Louisville and citizens of Kentucky, and that the church corporation was a corporation created by Kentucky and doing business in that State. They alleged further that they were members in good and regular standing of the said church, attending its religious exercises under the pastorship of the Rev. J. S. Hays, and that the defendants, *Fulton* and *Farley*, who pretended without right to be trustees of the church, supported and recognized as such by the defendants, *Watson* and *Galt*, who also pretended without right to be ruling elders, were threatening, preparing, and about to take unlawful posses-

* Watson and Galt, the reader will remember, had been declared by the Court of Appeals of Kentucky elders of the church.

† The same court had declared these two persons to be trustees.

sion of the house of worship and grounds belonging to the church and to prevent Hays, who was the rightful pastor, from ministering therein, refusing to recognize him as pastor, and to recognize as ruling elder, Hackney, who was the sole lawful ruling elder; and that when they should obtain such possession they would oust Hays and Hackney, and those who attended their ministrations, among whom the complainants represented themselves to be.

They further alleged that Hackney, whose duty it was as elder, and McDougall, McPherson, and Ashcraft, whose duty it was as trustees to protect the rights thus threatened, by such a proceeding in the courts as would prevent the execution of the threats and designs of the other defendants, refused to take any steps to that end.

They further alleged that the Walnut Street Church, of which they were members, now formed and had ever since its organization in the year 1842, formed a part of the Presbyterian Church of the United States of America, known as the Old School, which was governed by a written constitution that included the Confession of Faith, Form of Government, Book of Discipline, and Directory for Worship; and that the governing bodies of the general church above the Walnut Street Church, were, in successive order, the Presbytery of Louisville, the Synod of Kentucky, and the General Assembly of the Presbyterian Church of the United States; that while the complainants and about 115 members who worshipped with them, and Mr. Hays (the pastor), Hackney (the ruling elder), and McDougall, McPherson, and Ashcraft (the trustees), were now in full membership and relation with the lawful General Presbyterian Church aforesaid, *Watson* and *Galt*, *Fulton* and *Farley*, with about 30 persons formerly members of the said church, worshipping under one *Dr. Yandell* as pastor, had seceded and withdrawn themselves from the Walnut Street Church, and from the General Presbyterian Church in the United States, and had voluntarily connected themselves with and were now members of another religious society, and that they had repudiated and did now repudiate and renounce the authority

and jurisdiction of the various judicatories of the Presbyterian Church of the United States and acknowledge and recognize the authority of other church judicatories which were disconnected from the Presbyterian Church of the United States and from the Walnut Street Church. And they alleged that *Watson* and *Galt* had been, by the order of the General Assembly of the said church, dropped from the roll of elders in said church for having so withdrawn and renounced its jurisdiction, and that the Assembly had declared the organization to which the plaintiffs adhered as the true and only Walnut Street Presbyterian Church of Louisville.

The prayer of the bill was that "*Watson*, *Galt*, *Fulton*, and *Farley* be restrained by an injunction issuing out of the Circuit Court, from taking, or attempting to take, possession of the house of worship and other property of the Walnut Street Church, and from interfering with REV. J. S. HAYS PREACHING IN SAID HOUSE OF WORSHIP; also that *Watson* and *Galt* be restrained in like manner from controlling, or attempting to control or manage, the said property in the capacity of elders of the church; also, that *Fulton* and *Farley* be restrained in like manner from controlling, or attempting to control or manage, the said property as trustees of said church; . . . and that the complainants have generally *such other and further relief as the nature of their case required.*"

The answer having alleged that pending the final process in the Chancery Court two persons, named Heeter and Given, had been elected additional ruling elders, and that one Polk had been elected trustee, in the place of Avery, the complainants amended their bill accordingly, and by agreement the answer of the original defendants was made the answer of the new parties.

The defendants, Hackney, McDougall, McPherson, and Ashcraft, answered, admitting the allegations of the bill, and that though requested they had refused to prosecute legal proceedings in the matter, because as they thought any effort to that end in the courts of the State of Kentucky would prove useless.

Statement of the case.

The defendants *Watson* and *Galt*, *Fulton* and *Farley*, answered, and after declaring their belief that the complainants were lately citizens of Kentucky and that their citizenship in Indiana was merely for the purpose of filing this bill in the Federal court, denied almost every allegation of the bill. They set up that though they had been deprived of their former actual possession of the church edifice and property by the illegal and now overruled decree of the Louisville Chancery Court, they had nevertheless maintained and kept up a regular and valid organization of the Walnut Street Presbyterian Church—the only regular and valid organization that had been kept up; that *they* were the lawful officers of that church, and that they and those whom they represented were its true members. They denied having withdrawn from either the local or the general church, and denied that the action of the General Assembly cutting them off was within its constitutional authority. They represented that the plaintiffs were not and never had been lawfully admitted to membership in the Walnut Street Church, and had no such interest in it as would sustain this suit, and they set up and relied upon the suit in the Chancery Court of Louisville, which they represented was still pending, and which they stated involved the same subject-matter, and was between the same parties in interest as the present one. They alleged that in that suit they had been decreed to be the only true and lawful trustees and elders of the Walnut Street Church, and that an order had been made to place them in possession of the church property, which order remained unexecuted, and that the property was still in the possession of the marshal of that court as its receiver. These facts were relied on in bar to the present suit.

The case coming on to be heard, the Circuit Court declared that it seemed to it that the complainants were members of the Third or Walnut Street Presbyterian Church in Louisville, and as such had a beneficial interest in the church building and other property in the pleadings mentioned.

That the Reverend J. S. Hays was pastor; Hackney, Avery, McNaughtan, and Leach, ruling elders; and McDou-

gall, McPherson, and Ashcraft, trustees; and that they were respectively entitled to exercise whatever authority in the said church, or over its members or property, rightfully belonged to pastor, elders, and trustees, respectively, in churches in connection with "The Presbyterian Church in the United States of America," Old School, and according to the regulations and usages of that church.

That McDougall, McPherson, and Ashcraft, trustees, were in regular succession from the trustees named in the deed of conveyance of the church property in 1853, and likewise in regular succession from the trustees named in the act of incorporation, and that as such trustees they were entitled to the exclusive control of the church building and other property of said church for the purposes of worship by the members of the said church, in accordance with the regulations and usages of the Presbyterian Church in the United States.

That those only were to be recognized as members of the Walnut Street Church who adhered to and recognized the authority of the Presbyterian Church in the United States of America, and the various church judicatories which submit to its jurisdiction; and in determining what was the true Presbytery of Louisville, and true Synod of Kentucky, having jurisdiction over the said Walnut Street Presbyterian Church, its officers and members, *this court and all other civil tribunals were concluded by the action of the General Assembly of said Presbyterian Church in the United States of America.*

That those members of the Walnut Street Church who worshipped statedly at the church edifice [position in the city of Louisville described], in said city, who had as their pastor the Reverend J. S. Hays, and who recognized Hackney, Avery, Leach, and McNaughtan as ruling elders, and McDougall and McPherson as trustees, including all those connected with them, who had been received into said church since January 1st, 1866, under Hackney, Avery, Leach, and McNaughtan as elders, or under the ministration of Hays as pastor, constituted the Third or Walnut Street Presbyterian Church in Louisville, and the sole benefici-

aries for whose use the property mentioned in the pleadings was dedicated; and that the said persons, together with their pastor, elders, and trustees, had the exclusive right to use the same according to the regulations and usages of the Presbyterian Church of the United States of America.

It seemed further to the court that the *Rev. Dr. Yandell* was not pastor of the said Third or Walnut Street Presbyterian Church, nor were *Galt*, *Watson*, *Heeter*, and *Given*, or either of them, elders in the said church. And that *Fulton*, *Farley*, and *Polk* were not trustees.

That all those persons who pretended to be members of the said church, but who did not recognize Hays as pastor, or Hackney, Avery, Leach, and McNaughtan as elders, or McDougall, McPherson, and Ashcraft as trustees, and who recognized *Watson*, *Galt*, *Given*, and *Heeter* as elders, and *Fulton*, *Farley*, and *Polk* as trustees, and worshipped separately and apart from those hereinbefore declared to be the sole beneficiaries of said property, and who denied the authority of Hays as pastor, and also the ecclesiastical authority of the McMillan Presbytery of Louisville, and of the Lapsley Synod of Kentucky, did not have any connection with, nor were they members of, the Third or Walnut Street Presbyterian Church, for whose use the property in question was conveyed and dedicated, nor had the said persons, or any of them, any beneficial interest in it, nor were they entitled to the use of it in any way whatever as members of the said church.

It was thereupon decreed:

1st. That the defendants, *Heeter*, *Given*, and *Polk*, be enjoined from taking possession of, and from using or controlling the church edifice and other property of the Walnut Street Church, except as they, or any one of them, may choose to attend religious worship, or other religious exercises, in the same manner as other persons not officers or members of said church.

2d. That the defendants *Watson*, *Galt*, *Fulton*, *Heeter*, *Given*, *Polk*, *Farley*, and all others, be enjoined from so using or controlling the said church edifice, or other property of the

church, as in any wise to interfere with the ministrations therein of Hays as pastor, or with the exercise by him and by Hackney, and others, recognized as elders in the said church by those herein declared to be sole beneficiaries of said property, of any authority in the said church or over its property or members which rightfully belongs to the pastors and elders of the churches in connection with and according to the usages of the Presbyterian Church of the United States of America.

3d. That the defendants *Watson*, *Galt*, *Heeter*, *Given*, *Fulton*, *Farley*, and *Polk*, and all others, be enjoined from using or controlling the church edifice and property in any other manner than as the property exclusively of the persons hereinbefore declared to be the Third or Walnut Street Presbyterian Church of Louisville, and the sole beneficiaries of said property, having Hays as pastor, and recognizing Hackney, Avery, Leach, and McNaughtan as elders, and McDougall, McPherson, and Ashcraft as trustees. And that they, and all others, be enjoined from interfering in any manner with the use of the said property by the members of the said church hereinbefore declared to be such, and by such as might be hereafter admitted into said church according to its forms, and who are or might become connected with and under the care and authority of the General Assembly of the Presbyterian Church in the United States of America, and the several judicatories which submit to the authority of said Assembly; and from hindering or preventing any one from worshipping in said church, or participating in any of its religious exercises according to the usages of said church.

From this decree *Watson and the other defendants* appealed.

Mr. T. W. Bullitt, for the appellants:

I. The Circuit Court had no jurisdiction, because,

1. The complainants had no such interest in the subject of litigation as would enable them to maintain the suit. Membership in the Walnut Street Church is of course essential to give the requisite interest. But they are not mem-

bers. By the constitution of the Presbyterian Church the Session admits to membership. In *Avery* v. *Watson* the direct issue was whether Avery, Leach, and McNaughtan were elders; and it was decided that they were not. The body which, if they *had* been elders, would have been a Session, was, from the fact that they were not elders, not a Session.

But the Circuit Court had no jurisdiction, because,

2. The Louisville Chancery Court had exclusive jurisdiction over the property in controversy, and over the present parties. A series of cases involving the relations of State and Federal courts have established this rule, to wit: that where property has been once lawfully taken possession of under process of a court, such court has exclusive jurisdiction over the *thing*, and that this jurisdiction extends to every question or claim of title, interest or use touching such property, of whatever nature or origin, *or in whose hands soever it may subsist.* It is not material that such claim be wholly different from or that it is prior or subsequent in date, or even paramount to any or all the claims pending before the court. The jurisdiction is exclusive over the thing itself, and such claim must be asserted, if at all, in the court having such possession and jurisdiction. Conceding that the matters alleged in the present bill constitute a controversy different from and subsequent in date to that made before the chancellor, yet, so long as the chancellor's possession or exclusive jurisdiction of the property or *thing in controversy continued*, any decree by the Circuit Court touching that property was without authority and void. Any alleged claims touching that property should have been asserted before the chancellor or their assertion delayed, until by execution of final process he had voluntarily and completely yielded up his jurisdiction over it.

In *Hagan* v. *Lucas*,* the claim asserted by the claimant in the Federal court was wholly different from and independent of the controversy pending in the State court. In *Peck* v. *Jenness*,† the case was similar. In *Taylor* v. *Carryl*,‡ the

* 10 Peters, 402. † 7 Howard, 624. ‡ 20 Id. 594.

plaintiffs claimed under a *maritime lien* for seamen's wages. The claims were not only asserted by strangers, but were conceded by this court to be paramount to all claims pending before the State court; and yet, in each case, by reason of the possession of the State court through its officers, it was declared to have exclusive jurisdiction of the thing, capable alone of entertaining any question touching its possession, title, or use, and that the process of the Federal court was void. *Freeman* v. *Howe** is in coincidence with all these cases.

But independently of this, the delivery to the trustees and elders of the body of which the Avery or Jones party are members, of the possession of the church building cannot be granted in this suit, nor can the other side be enjoined from taking possession as prayed for in the bill, because the property is in the actual possession of the marshal of the Louisville Chancery Court as its receiver, and because there is an unexecuted decree of that court ordering him to deliver the possession to the defendants.

The marshal did never in form or fact abandon his possession. The only argument could be that his possession was that of a receiver, and that his appointment was superseded by the final decree. But it is text-book law that a receiver is never discharged by final decree.† It is unimportant, however, whether the marshal did or did not either under order of court or otherwise abandon his possession. The just construction of the rule we conceive to be, that property once taken possession of by a court, and disposed of under its order, remains in custody of the law, subject to the exclusive jurisdiction of the court (into whose hands soever it may pass), until by the execution of its final decree, the jurisdiction of the court is completely exhausted.

II. We come then to the great question of the case; one touching the character and extent of jurisdiction vested by our law in those voluntary associations sometimes called

* 24 Howard, 450.

† Daniel's Chancery Practice, 2003.

ecclesiastical courts, and how far they are independent of control by the civil,—a question of magnitude every way; one which determines the relations of the church to the state in this country, and whether the church in relation to its civil interests is organized under the authority of law or above it.

The case shows two contesting organizations, each asserting itself to be the true Walnut Street Church mentioned in the deed and charter. The question for decision, therefore, is strictly one of identity and of lawful organic succession.

A number of cases of church litigation are reported in New York and New England; but they are inapplicable to the questions arising herein, because in New England the cases refer to congregational or independent churches, and in New York to incorporated religious *societies*, wherein the whole body of the congregation, whether *members of the church* or not, are members of the corporation; and where disputed questions touching property or other rights are determined strictly on the principles applicable to corporations.*

The Pennsylvania cases of *Presbyterian Congregation* v. *Johnston*, and *Commonwealth* v. *Green*,† present some points of contrast with the questions in this cause, especially the latter, which relates mainly to questions of property held by the governing body as distinguished from that of a congregation part of a larger organization.

In Kentucky, *Gibson* v. *Armstrong*,‡ gives a case which assists us. *Shannon* v. *Frost*,§ is inapplicable in this cause, by reason of the *congregational* character of the Baptist Church in which it arose.

The great field for litigation of this nature has undoubtedly been Scotland, the native home of the Presbyterian faith and form of church government.

Prior to about the year 1813 the courts seemed not to

* See Petty *v.* Tooker, 21 New York, 267; Burrell *v.* Associated Ref. Synod, 44 Barbour, 282; Robertson *v.* Bullions, 9 Id. 64.

† 1 Watts & Sergeant, 37 4 Wharton, 603.

‡ 7 B. Monroe, 481.

§ 3 Id. 256.

have settled upon any definite rule by which church controversies were to be adjudged. Their unwillingness, however, coupled with doubts as to their power to handle ecclesiastical matters inclined them generally to refer every question involving such matters exclusively to the decision of the Church itself. But there were difficulties in the application of the principle, and a confused idea that in case of schism the organic *succession* necessarily remained with the majority of the local society, counterbalanced by the idea that its *identity* could not be preserved except in connection with the general body of which it formed a part, caused a singular vacillation in judicial decision. The earlier decisions, accepting as a conclusive test of right the action of a majority of the local congregation, afforded an easy and simple rule, so long as applied to independent churches; but when it came to be applied to societies organized as a part of larger bodies, where the majorities in the local and general organizations might be different, it was found not to be founded on just or practicable principles. For a time the courts vacillated in its application, as their views happened to lean most strongly towards congregational independence or towards ecclesiastical connection and subordination. Finally, about the year 1813, came up the case of *Craigdallie* v. *Aikman*,* a case bearing in some points a striking analogy to the present. In it both of these conceptions were brought out at different times; and an appeal to the House of Lords drew from Lord Eldon an announcement of the principle which was at once recognized and has since been uniformly accepted as the true governing rule in all cases of this nature.

In the case we speak of, property had been acquired and was held in trust for a congregation forming part of a larger body known as Burgher Seceders, the highest judicatory in the church being the Synod. That body having passed certain resolutions alleged to be a departure from one of the articles of their confession, a minority protested, congregations became divided, and among other cases, the question

* 2 Bligh, 529; 1 Dow., 1.

arose as to which of the two parties in this congregation was entitled to its property. It was made a test case and received the most careful consideration. Upon its first hearing in the Scotch Court of Session, the "majority (in interest) in the congregation" were held to be entitled. But under the forms of their proceeding the cause came again before the court, and some of the judges being changed, it was now declared that the property was held for a "society of persons, . . . such persons *always . . . continuing in communion with and subject to the ecclesiastical discipline* of a body of dissenting Protestants calling themselves the Associate Presbytery and Synod of Burgher Seceders." The effect of these decisions was to make the question of identity or organic succession, in the one case to attach solely to a majority of the local congregation, in the other to depend upon a continued connection with the general body. On appeal to the House of Lords both of these views were rejected and the following principle, first announced by Lord Eldon, was adopted, viz.: That property conveyed for the use of a society for purposes of religious worship, is a *trust*, which is to be enforced *for the purpose of maintaining that religious worship for which the property was devoted*, and in the event of schism (the deed making no provision for such case), its uses are to be enforced, not in behalf of a majority of the congregation, nor yet exclusively in behalf of the party adhering to the general body, but in favor of that part of the society *adhering to and maintaining the original principles upon which it was founded.*

This case, followed and recognized by that of *Attorney-General* v. *Pearson*,* has been accepted in all cases of this nature in England, Scotland, and America.

The principle of this case, so simple and just in itself, was yet not so fully or clearly expressed as to remove all difficulty in its application. Several important questions were at once presented; and,

1. To the maintenance of which of the various principles

* 3 Merivale, 353.

of the society does the implied trust especially refer? Does it relate mainly to the fundamental doctrines of religious truth, the standards of faith, or does it embrace equally all the principles of doctrine, form, and order? Does it bind the society permanently and exclusively to the same principles and to the same connections with and relations to other societies which existed at the date of conveyance, or does it recognize the right of change inherent in the body by general consent, or perhaps incorporated as an original principle in the fundamental law of the organization? Does it recognize that by unforeseen events beyond the control of the society, its original connections may be changed or broken up without its own act or assent? All of these questions under varying forms and circumstances have been presented, and discussed, and adjudged; and this general principle may be considered as settled, viz.: That where property is conveyed "for the use" or "benefit" of a designated "church," or "religious society" (the deed containing no special limitations), such property, by operation of the law of trusts, is held for the use of such society, *subject to the entire body or system* of doctrines, rules, or principles, whether of faith, form, or order, held and recognized by the society at the time of conveyance; that it binds such society to a permanency of religious faith and a continuance of subsisting connections, or recognizes a right of change in doctrine, or a lawful severance of its connections, *so far and no farther* than it is bound to or released from such permanent or continuing state, by or in accordance with the fundamental laws of the organization; that wherever the use or control of property depends upon adherence to or a change from original doctrines, or upon a continuance or severance of connections with a particular judicatory, or upon an alleged title to office in the church, or upon any act, judgment, or proceeding of an ecclesiastical tribunal, in every case the exclusive standard by which the conflicting claims are to be judged is the CONSTITUTION of the church itself.

These views are recognized and brought out with force in

the American cases of *Gibson* v. *Armstrong* and *Sutter* v. *The First Reformed Church.**

2. Another question, more serious and difficult than the last, remained in determining the application of this rule of the law of trusts, viz.: In these matters of religious doctrine, discipline, and church order, who is to be the judge? Who has the right to say conclusively, in case of controversy, that one or the other party has departed from the doctrines of the church? Who shall determine upon the validity of an act or judgment of a church court; upon the status of a member or officer; upon the legality or otherwise of a voluntary or enforced severance of a part from the body of the general organization?

This question was promptly raised upon the earliest application of the principle stated by Lord Eldon, and has been decided with a frequency and uniformity rarely met with upon any important question. Yet the court below assumed that these matters, being of an ecclesiastical nature or arising upon a construction of the law of the church, are subject to exclusive cognizance and jurisdiction by the ecclesiastical courts, whose judgments thereon must be accepted as conclusive by the civil courts. The position assumed does not stop with asserting that, *if* the decision of the question in controversy has been committed by the constitution of the church to a particular tribunal, or *if* the act or judgment in question has been performed by such tribunal in pursuance of a power vested in it by the constitution, *in such case* the act or judgment is conclusive on the civil court. It asserts an exclusive right in the General Assembly to determine conclusively the extent of its own powers and duties under the constitution; to determine in every case, whether it has itself violated the constitution or abandoned the principles of the faith. It asserts that the announcement of a particular doctrine or the imposition of a duty on the church, or

* *Supra*, 703. To the same effect, see Smith *v.* Nelson, 18 Vermont, 511; Kniskern *v.* Lutheran Church, 1 Sandford's Chancery, 439; Miller *v.* Gable, 2 Denio, 492.

the performance, rendering, or approval of an act or judgment by the General Assembly, is itself a conclusive evidence, *probatio probata*, that such doctrine or duty, act or judgment, has been imposed, rendered, or performed, in accordance with the constitution of the church; and that the church itself and the civil courts have no power to examine or question what has been so settled by the supreme tribunal of the church.

If the principle of the decree herein is affirmed, it sweeps away all limitations imposed upon church courts by their fundamental laws and renders it impossible that churches can be organized under rules or limitations which shall bind the judicatories of their own creation.

Hitherto the question has received but one solution. It devolves upon this court authoritatively to settle it. Let us examine the history of judicial decision.

In *Galbraith* v. *Smith** (the first case coming before the Scotch Court of Session after the judgment of the House of Lords in *Craigdallie* v. *Aikman*), the position contended for by the appellees was accepted and announced from the bench. Lord Meadowbank, construing that judgment, said that it would have been competent for the party adhering to the Synod to have shown as matter of fact that it having been a fundamental rule of the sect that in the supreme judicatory alone was vested the power of determining all questions of doctrine and discipline, so the judgment of the Synod was to be received as *probatio probata* of their adherence to their original principles; it being incompetent for the civil court to review the decisions in such matters of the ecclesiastical judicatories. He then stated as a general proposition, that

"It is a legal object of such a trust, that it may profess to be constituted with a view to perpetuity, even by placing in the hands of a recognized body the right of controlling and modifying those rules and regulations in conformity with the fundamental principles of the sect of dissenting Christians to which

* 15 Shaw, 808, decided A.D. 1837.

those constituting the trust may have professed to adhere; and that the civil court will not take cognizance of the proceedings and determinations of those judicatories, as they may be termed, upon matters of doctrine and discipline, but hold them to be *probatio probata* of the principles of the sect."

This was manifestly throwing the question back upon the doctrine of the second judgment in the Craigdallie case. Accordingly, on the next occasion calling for a review of the principle by the Court of Session, the view taken in *Galbraith* v. *Smith* was overruled. The court say that the principle of the judgment of the House of Lords had been "wholly misunderstood;" that Lord Meadowbank's view "takes adherence to the Synod as *conclusive* and *excludes* inquiry into the original opinions or doctrines, if opposed to the declaration made by the Synod, as to what those doctrines are, and is precisely the error in the Craigdallie case again brought out and in more absolute terms." The error, the court say, was "founded on the assumption that connection with a dissenting Synod was as decisive a criterion by which to determine property and civil rights as adherence to the established church. The mistake consisted in taking as decisive what was only one element, and it might be an element of no importance in the inquiry, what was the original trust and which party maintains the principles;" and in answer to the suggestion that "submission to the judicatories may be one of the original principles," the court say "then you must prove that. It is not *probatio probata*. It is not even a presumption of law."*

The cases above referred to, relate especially to the power of the civil courts, to examine and decide (as matter of fact) upon questions of *doctrinal differences* where rights of property depend upon adherence to doctrines. But the great contest for complete ecclesiastical independence and exclusive jurisdiction was made upon another point, viz.: as to the right of the civil court to examine and pass directly upon the title of persons claiming *official status* in the church, or

* Craigie *v.* Marshall, 12 Dunlop, 523, A.D. 1850.

upon the validity of proceedings in church courts, where civil rights may depend on such status, or may be affected by such proceedings. This contest, beginning about the year 1838, in the Scotch Court of Session, several times brought before the House of Lords, may be considered as terminating in the celebrated Cardross Case.* Its great importance and the deep interest excited by it, occasioned the most profound investigation into the principles which should regulate civil courts in their relations to the churches; and the results have been valuable to the law. An examination of them will show these general principles to have been settled:

i. That the church (non-established) stands before the law, in relation to all civil interests acquired or claimed by it, precisely as every other voluntary society for moral or scientific or other purposes, subject in the same manner and extent to the jurisdiction of civil authority.

ii. That in so far as the law can regard them, the powers of the church judicatories are derived solely from the consent of the members of the church, as expressed in their fundamental law; that they are not "courts" and have no "jurisdiction" in the strict sense of the terms—these terms necessarily implying the existence of a power conferred by and vested in functionaries of the state. They are not "courts" except of the parties' own choosing.

iii. That in so far as the fundamental laws of the church confer powers on its tribunals, the civil courts will recognize them, and where civil rights are involved, will give effect to their exercise without inquiring into the motives or grounds of action of the ecclesiastical tribunal; and will enforce with the same respect the action of the inferior tribunal acting within its sphere, as they will that of the supreme court of the church.

iv. That the jurisdiction of civil courts being confined to "civil actions," they may not take cognizance of purely spiritual or ecclesiastical questions, *as such;* just as they may not take cognizance of any moral or scientific questions for the purpose of determining upon their abstract truth; but that in every case

* See McMillan *v.* General Assembly of the Presbyterian Church, 22 D. 270, decided 23d Dec., 1859.

of controversy, where a right of property depends upon an adherence to religious doctrine, or is affected by an act or judgment of an ecclesiastical tribunal, the civil court will *examine* into such doctrine *as matter of fact*, for the purpose of determining which party maintains the original principles of the society, and will examine into the act or judgment of the ecclesiastical court, for the purpose of determining whether it is in *contravention* of the fundamental law of the church, or without authority from it; in which latter case, such act or judgment will be esteemed void and be disregarded. In these several cases the exclusive standard of judgment is the CONSTITUTION of the church itself.

These principles, first announced with reference to the high claims of the Established Church of Scotland, were afterwards repeated with equal deliberation in reference to the Free Church, which having withdrawn from the Establishment on account of these decisions, reasserted in its voluntary character its claim to ecclesiastical independence. A reference to the Cardross Case will show how it was presented, and met. A Presbytery having tried a minister for misconduct, adjudged (partially) against him; and the Synod on appeal reversed its action. Upon appeal to the General Assembly, that body took up the case *de novo* and passed a sentence more extensive than that of the Presbytery. The minister, whose civil rights were affected by this judgment, applied to the civil court for its "*reduction*," on the ground that the Assembly being confined to an appellate power by the constitution of the church, had transcended its authority by passing an original sentence upon him. The General Assembly among others filed the following pleas:

1st. "That the sentences complained of, being spiritual acts, done in the ordinary course of discipline of a Christian Church tolerated and protected by law, it is not competent for the civil court to reduce them, and the actions should therefore be dismissed."

2d. "As the actions, so far as they conclude for a reduction of the sentences complained of, do not relate to any question of civil right, they cannot be maintained."

Upon argument and a full review of all the cases, both of these pleas were overruled. The cause did not reach a hearing upon the pleas touching the actual powers of the Assembly under the constitution; but those decided are alone important in this discussion.*

If then the controlling principles of law touching this matter have been correctly stated, it follows in this Walnut Street Church case, that if it shall appear that the majority have abandoned, while the minority adhere to the original principles of the society, the judgment must go in favor of the minority.

The General Assembly is not excepted from the obligation of the rule. If a doubt upon this point should otherwise exist, it would be removed by a consideration of the *commission* under which alone its members act and hold their places, and by which they are severally restricted to sit, consult, vote, and determine, on all things that may come before that body "according to the principles and constitution of this church, and the word of God." Even those general clauses in the Form of Government touching the powers of Assembly to "decide controversies," and to "suppress schismatical contentions and disputations," are to be exercised not wantonly, but in accordance with the fixed provisions elsewhere stated. They contemplate controversies, contentions, and disputations, to which there may be *parties* and *proceedings*, by which these matters may be constitutionally brought before the Assembly.

[The learned counsel then having stated in detail the particulars of the schisms in the Presbyterian Church, set

* For a continuous history of this controversy, see Earl of Kinnoul *v.* Presbytery of Auchterarder (Feb. 27th, 1838), 16 Shaw, 661; McLean & Robinson, 320; Clark *v.* Sterling (June 14th, 1839), 1 D. 955; Dunlap, 330; Presbytery of Strathbogie (1839 and 1840), 2 D. 258, 585, 1047, 1380; 15 F. 605, 1478; Dunlap, 64, 330; Edwards *v.* Cruikshank (December, 1840), 3 Dunlap, 283; Presbytery of Strathbogie (May, 1842), and other cases occurring near the same period in reference to the Established Church. Also Dunbar *v.* Skinner (March 3d, 1849), 11 D. 945; Long *v.* Bishop of Capetown, Ecclesiastical Judgments of Privy Council, 310; Murray *v.* Burger's Ib. (February 6th, 1867); Forbes *v.* Eden, 38 Jurist, 98.

out generally in the Reporter's statement of the case, went into a very interesting examination of the constitution and fundamental principles of that church, and sought to show that those Declaratory Statements or Resolutions "whereby the church had pledged herself, in her ecclesiastical capacity, to an unabated loyalty to the civil government, and one great section of the church was prejudged as traitors," were in violation of its fundamental principles; and a departure from those sacred standards which declare that the "visible church, which is also catholic or universal (and *not confined to one nation* as before, under the law), consists of all those throughout the world that profess the true religion" whereof "there is no other head but the Lord Jesus Christ;"* that the Assembly in making such a departure had imposed upon ministers, members, and judicatories, the duty of resistance to its edicts; and that the Presbytery of Louisville, in its "Declaration and Testimony"—its Declaration against the principle of these deliverances; its Testimony of *refusal* to "sustain or in any manner assist in the execution" of them, stood immovably on the constitution.

The conclusion to which this court arrived, as to its competence to pass in this case on such questions, renders that able argument, so interesting in some aspects, comparatively without interest here, on which account it is omitted.]

Messrs. B. H. Bristow and J. M. Harlan, contra.

The case having been held under advisement since the last term, when the argument was had,

Mr. Justice MILLER now delivered the opinion of the court.

This case belongs to a class, happily rare in our courts, in which one of the parties to a controversy, essentially ecclesiastical, resorts to the judicial tribunals of the State for the maintenance of rights which the church has refused to acknowledge, or found itself unable to protect. Much as such dissensions among the members of a religious society should

* Confession of Faith, chapter 25.

be regretted, a regret which is increased when passing from the control of the judicial and legislative bodies of the entire organization to which the society belongs, an appeal is made to the secular authority; the courts when so called on must perform their functions as in other cases.

Religious organizations come before us in the same attitude as other voluntary associations for benevolent or charitable purposes, and their rights of property, or of contract, are equally under the protection of the law, and the actions of their members subject to its restraints. Conscious as we may be of the excited feeling engendered by this controversy, and of the extent to which it has agitated the intelligent and pious body of Christians in whose bosom it originated, we enter upon its consideration with the satisfaction of knowing that the principles on which we are to decide so much of it as is proper for our decision, are those applicable alike to all of its class, and that our duty is the simple one of applying those principles to the facts before us.

The first of the points arising in the case concerns the jurisdiction of the Circuit Court, which is denied; first, on the ground that the plaintiffs have no such interest in the subject of litigation as will enable them to maintain the suit, and, secondly, on matters arising out of the alleged proceedings in the suit in the Chancery Court of Louisville.

The allegation that the plaintiffs are not lawful members of the Walnut Street Church is based upon the assumption that their admission as members was by a pastor and elders who had no lawful authority to act as such. As the claim of those elders to be such is one of the matters which this bill is brought to establish, and the denial of which makes an issue to be tried, it is obvious that the objection to the interest of the plaintiffs must stand or fall with the decision on the merits, and cannot be decided as a preliminary question. Their right to have this question decided, if there is no other objection to the jurisdiction, cannot be doubted. Some attempt is made in the answer to question the good faith of their citizenship, but this seems to have been abandoned in the argument.

Opinion of the court.

In regard to the suit in the Chancery Court of Louisville, which the defendants allege to be pending, there can be no doubt but that that court is one competent to entertain jurisdiction of all the matters set up in the present suit. As to those matters, and to the parties, it is a court of concurrent jurisdiction with the Circuit Court of the United States, and as between those courts the rule is applicable that the one which has first obtained jurisdiction in a given case must retain it exclusively until it disposes of it by a final judgment or decree.

But when the pendency of such a suit is set up to defeat another, the *case* must be the same. There must be the same parties, or at least such as represent the same interest, there must be the same rights asserted, and the same relief prayed for. This relief must be founded on the same facts, and the title or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter between the same parties.

In the case of *Barrows* v. *Kindred*,* which was an action of ejectment, the plaintiff showed a good title to the land, and the defendant relied on a former judgment in his favor, between the same parties for the same land; the statute of Illinois making a judgment in such an action as conclusive as in other personal actions, except by way of new trial. But this court held that as in the second suit the plaintiff introduced and relied upon a new and different title, acquired since the first trial, that judgment could be no bar, because that title had not been passed upon by the court in the first suit.

But the principles which should govern in regard to the identity of the matters in issue in the two suits to make the pendency of the one defeat the other, are as fully discussed, in the case of *Buck* v. *Colbath*,† where that was the main question, as in any case we have been able to find. It was

* 4 Wallace, 399.

† 3 Id. 334.

an action of trespass, brought in a State court, against the marshal of the Circuit Court of the United States for seizing property of the plaintiff, under a writ of attachment from the Circuit Court. And it was brought while the suit in the Federal court was still pending, and while the marshal held the property subject to its judgment. So far as the *lis pendens* and possession of the property in one court, and a suit brought for the taking by its officer in another, are concerned, the analogy to the present case is very strong. In that case the court said: "It is not true that a court, having obtained jurisdiction of a subject-matter of suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instances requiring the decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits." And it might have been added, to the facts on which the claim for relief is founded. "A party," says the court by way of example, "having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment for possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt secured by the mortgage. But, as the relief sought is different, and the mode of proceeding different, the jurisdiction of neither court is affected by the proceedings in the other." This opinion contains a critical review of the cases in this court of *Hagan* v. *Lucas*,* *Peck* v. *Jenness*,† *Taylor* v. *Carryl*,‡ and *Freeman* v. *Howe*,§ cited and relied on by counsel for the appellants; and we are satisfied that it states the doctrine correctly.

The limits which necessity assigns to this opinion forbid

* 10 Peters, 402. † 7 Howard, 624. ‡ 20 Id. 594. § 24 Id. 450.

our giving at length, the pleadings in the case in the Louisville Chancery Court. But we cannot better state what is, and what is not, the subject-matter of that suit or controversy, as thus presented and as shown throughout its course, than by adopting the language of the Court of Appeals of Kentucky, in its opinion delivered at the decision of that suit, in favor of the present appellants. "As suggested in argument," says the court, "and apparently conceded on both sides, this is not a case of division or schism in a church; nor is there any question as to which of two bodies should be recognized as the Third or Walnut Street Presbyterian Church. Neither is there any controversy as to the authority of Watson and Galt to act as ruling elders; but the sole inquiry to which we are restricted in our opinion is, whether Avery, McNaughtan, and Leach are also ruling elders, and therefore members of the session of the church."

The pleadings in the present suit show conclusively a different state of facts, different issues, and a different relief sought. This *is* a case of a division or schism in the church. It *is* a question as to which of two bodies shall be recognized as the Third or Walnut Street Presbyterian Church. There *is* a controversy as to the authority of Watson and Galt to act as ruling elders, that authority being denied in the bill of the complainants; and, so far from the claim of Avery, McNaughtan, and Leach to be ruling elders being the sole inquiry in this case, it is a very subordinate matter, and it depends upon facts and circumstances altogether different from those set up and relied on in the other suit, and which did not exist when it was brought. The issue here is no longer a mere question of eldership, but it is a separation of the original church members and officers into two distinct bodies, with distinct members and officers, each claiming to be the true Walnut Street Presbyterian Church, and denying the right of the other to any such claim. This brief statement of the issues in the two suits leaves no room for argument to show that the pendency of the first cannot be pleaded either in bar or in abatement of the second.

The supplementary petition filed by the plaintiffs in that

case, after the decree of the Chancery Court had been reversed on appeal, and which did contain very much the same matter found in the present bill, was, on motion of the plaintiffs' counsel, and by order of the court, dismissed, without prejudice, before this suit was brought, and of course was not a *lis pendens* at that time.

It is contended, however, that the delivery to the trustees and elders of the body of which the plaintiffs are members, of the possession of the church building cannot be granted in this suit, nor can the defendants be enjoined from taking possession as prayed in the bill, because the property is in the actual possession of the marshal of the Louisville Chancery Court as its receiver, and because there is an unexecuted decree of that court ordering the marshal to deliver the possession to defendants.

In this the counsel for the appellants are, in our opinion, sustained, both by the law and by the state of the record of the suit in that court.

The court, in the progress of that suit, made several orders concerning the use of the church, and finally placed it in the possession of the marshal as a receiver, and there is no order discharging his receivership; nor does it seem to us that there is any valid order finally disposing of the case, so that it can be said to be no longer in that court. For, though the Chancery Court did, on the 20th March, 1868, after the reversal of the case in the Court of Appeals, enter an order reversing its former decree and dismissing the bill, with costs, in favor of the defendants, the latter, on application to the appellate court, obtained another order dated June 26th. By this order, or mandate to the Chancery Court, it was directed to render a judgment in conformity to the opinion and mandate of the court, restoring possession, use, and control of the church property to the parties entitled thereto, according to said opinion, and so far as they were deprived thereof by the marshal of the Chancery Court under its order.

In obedience to this mandate the Chancery Court, on the 18th September, three months after the commencement of

this suit, made an order that the marshal restore the possession, use, and control of the church building to Henry Farley, George Fulton, B. F. Avery, or a majority of them, as trustees, and to John Watson, Joseph Galt, and T. J. Hackney, or a majority of them, as ruling elders, and to report how he had executed the order, and reserving the case for such further order as might be necessary to enforce full obedience.

It is argued here by counsel for the appellees that the case was, in effect, disposed of by the orders of the Chancery Court, and that nothing remained to be done which could have any practical operation on the rights of the parties.

But if the Court of Appeals, in reversing the decree of the chancellor in favor of the plaintiffs, was of opinion that the defendants should be restored to the position they occupied in regard to the possession and control of the property before that suit began, we have no doubt of their right to make such order as was necessary to effect that object; and as the proper mode of doing this was by directing the chancellor to make the necessary order, and have it enforced as chancery decrees are enforced in his court, we are of opinion that the order of the Court of Appeals, above recited, was in essence and effect, a decree in that cause for such restoration, and that the last order of the Chancery Court, made in accordance with it, is a valid subsisting decree, which, though final, is unexecuted.

The decisions of this court in the cases of *Taylor* v. *Carryl*,* and *Freeman* v. *Howe*,† and *Buck* v. *Colbath*,‡ are conclusive that the marshal of the Chancery Court cannot be displaced as to the mere actual possession of the property, because that might lead to a personal conflict between the officers of the two courts for that possession. And the act of Congress of March 2d, 1793,§ as construed in the cases of *Diggs* v. *Wolcott*,‖ and *Peck* v. *Jenness*,¶ are equally conclusive against any injunction from the Circuit Court, forbidding the defend-

* 20 Howard, 594.
§ 1 Stat. at Large, 334, § 5.
† 24 Id. 450.
‖ 4 Cranch, 179.
‡ 3 Wallace, 334.
¶ 7 Howard, 625.

ants to take the possession which the unexecuted decree of the Chancery Court requires the marshal to deliver to them.

But, though the prayer of the bill in this suit does ask for an injunction to restrain Watson, Galt, Fulton, and Farley from taking possession, it also prays such other and further relief as the nature of the case requires, and especially that said defendants be restrained from interfering with Hays, as pastor, and plaintiffs in worshipping in said church. Under this prayer for general relief, if there was any decree which the Circuit Court could render for the protection of the right of the plaintiffs, and which did not enjoin the defendants from taking possession of the church property, and which did not disturb the possession of the marshal of the Louisville chancery, that court had a right to hear the case and grant that relief. This leads us to inquire what is the nature and character of the possession to which those parties are to be restored.

One or two propositions which seem to admit of no controversy are proper to be noticed in this connection. 1. Both by the act of the Kentucky legislature creating the trustees of the church a body corporate, and by the acknowledged rules of the Presbyterian Church, the trustees were the mere nominal title-holders and custodians of the church property, and other trustees were, or could be elected by the congregation, to supply their places once in every two years. 2. That in the use of the property for all religious services or ecclesiastical purposes, the trustees were under the control of the church session. 3. That by the constitution of all Presbyterian churches, the session, which is the governing body in each, is composed of the ruling elders and pastor, and in all business of the session the majority of its members govern, the number of elders for each congregation being variable.

The trustees obviously hold possession for the use of the persons who by the constitution, usages, and laws of the Presbyterian body, are entitled to that use. They are liable to removal by the congregation for whom they hold this trust, and others may be substituted in their places. They

have no personal ownership or right beyond this, and are subject in their official relations to the property, to the control of the session of the church.

The possession of the elders, though accompanied with larger and more efficient powers of control, is still a fiduciary possession. It is as a session of the church alone that they could exercise power. Except by an order of the session in regular meeting they have no right to make any order concerning the use of the building; and any action of the session is necessarily in the character of representatives of the church body by whose members it was elected.

If then, this true body of the church, the members of that congregation, having rights of user in the building, have in a mode which is authorized by the canons of the general church in this country elected and installed other elders, it does not seem to us inconsistent or at variance with the nature of the possession which we have described, and which the Chancery Court orders to be restored to the defendants, that they should be compelled to recognize these rights, and permit those who are the real beneficiaries of the trust held by them, to enjoy the uses, to protect which that trust was created. Undoubtedly if the order of the Chancery Court had been executed, and the marshal had delivered the key of the church to the defendants, and placed them in the same position they were in before that suit was commenced, they could in any court having jurisdiction and in a case properly made out, be compelled to respect the rights we have stated, and be controlled in their use of the possession by the court, so far as to secure those rights.

All that we have said in regard to the possession which the marshal is directed to deliver to the defendants, is equally applicable to the possession held by him pending the execution of that order. His possession is a substitute for theirs, and the order under which he received that possession, which we have recited, shows this very clearly.

The decree which we are now reviewing seems to us to be carefully framed on this view of the matter. While the rights of the plaintiffs and those whom they sue for, are ad-

mitted and established, the defendants are still recognized as entitled to the possession which we have described; and while they are not enjoined from receiving that possession from the marshal, and he is not restrained from obeying the Chancery Court by delivering it, and while there is no order made on the marshal at all to interfere with his possession, the defendants are required by the decree to respect the rights of the plaintiffs, and to so use the possession and control to which they may be restored as not to hinder or obstruct the true uses of the trust, which that possession is intended to protect.

We are next to inquire whether the decree thus rendered is based upon an equally just view of the law as applied to the facts of this controversy.

The questions which have come before the civil courts concerning the rights to property held by ecclesiastical bodies, may, so far as we have been able to examine them, be profitably classified under three general heads, which of course do not include cases governed by considerations applicable to a church established and supported by law as the religion of the state.

1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

3. The third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some su-

preme judicatory over the whole membership of that general organization.

In regard to the first of these classes it seems hardly to admit of a rational doubt that an individual or an association of individuals may dedicate property by way of trust to the purpose of sustaining, supporting, and propagating definite religious doctrines or principles, provided that in doing so they violate no law of morality, and give to the instrument by which their purpose is evidenced, the formalities which the laws require. And it would seem also to be the obvious duty of the court, in a case properly made, to see that the property so dedicated is not diverted from the trust which is thus attached to its use. So long as there are persons qualified within the meaning of the original dedication, and who are also willing to teach the doctrines or principles prescribed in the act of dedication, and so long as there is any one so interested in the execution of the trust as to have a standing in court, it must be that they can prevent the diversion of the property or fund to other and different uses. This is the general doctrine of courts of equity as to charities, and it seems equally applicable to ecclesiastical matters.

In such case, if the trust is confided to a religious congregation of the independent or congregational form of church government, it is not in the power of the majority of that congregation, however preponderant, by reason of a change of views on religious subjects, to carry the property so confided to them to the support of new and conflicting doctrine. A pious man building and dedicating a house of worship to the sole and exclusive use of those who believe in the doctrine of the Holy Trinity, and placing it under the control of a congregation which at the time holds the same belief, has a right to expect that the law will prevent that property from being used as a means of support and dissemination of the Unitarian doctrine, and as a place of Unitarian worship. Nor is the principle varied when the organization to which the trust is confided is of the second or associated form of church government. The protection which the law

throws around the trust is the same. And though the task may be a delicate one and a difficult one, it will be the duty of the court in such cases, when the doctrine to be taught or the form of worship to be used is definitely and clearly laid down, to inquire whether the party accused of violating the trust is holding or teaching a different doctrine, or using a form of worship which is so far variant as to defeat the declared objects of the trust. In the leading case on this subject, in the English courts, of the *Attorney-General* v. *Pearson*,* Lord Eldon said, "I agree with the defendants that the religious belief of the parties is irrelevant to the matters in dispute, except so far as the King's Court is called upon to execute the trust." That was a case in which the trust-deed declared the house which was erected under it was for the worship and service of God. And though we may not be satisfied with the very artificial and elaborate argument by which the chancellor arrives at the conclusion, that because any other view of the nature of the Godhead than the Trinitarian view was heresy by the laws of England, and any one giving expression to the Unitarian view was liable to be severely punished for heresy by the secular courts, at the time the deed was made, that the trust was, therefore, for Trinitarian worship, we may still accept the statement that the court has the right to enforce a trust clearly defined on such a subject.

The case of *Miller* v. *Gable*† appears to have been decided in the Court of Errors of New York on this principle, so far as any ground of decision can be gathered from the opinions of the majority of the court as reported.

The second class of cases which we have described has reference to the case of a church of a strictly congregational or independent organization, governed solely within itself, either by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government; and to property held by such a church, either by way of purchase or donation, with no other specific

* 3 Merivale, 353.

† 2 Denio, 492.

trust attached to it in the hands of the church than that it is for the use of that congregation as a religious society.

In such cases where there is a schism which leads to a separation into distinct and conflicting bodies, the rights of such bodies to the use of the property must be determined by the ordinary principles which govern voluntary associations. If the principle of government in such cases is that the majority rules, then the numerical majority of members must control the right to the use of the property. If there be within the congregation officers in whom are vested the powers of such control, then those who adhere to the acknowledged organism by which the body is governed are entitled to the use of the property. The minority in choosing to separate themselves into a distinct body, and refusing to recognize the authority of the governing body, can claim no rights in the property from the fact that they had once been members of the church or congregation. This ruling admits of no inquiry into the existing religious opinions of those who comprise the legal or regular organization; for, if such was permitted, a very small minority, without any officers of the church among them, might be found to be the only faithful supporters of the religious dogmas of the founders of the church. There being no such trust imposed upon the property when purchased or given, the court will not imply one for the purpose of expelling from its use those who by regular succession and order constitute the church, because they may have changed in some respect their views of religious truth.

Of the cases in which this doctrine is applied no better representative can be found than that of *Shannon* v. *Frost*,* where the principle is ably supported by the learned Chief Justice of the Court of Appeals of Kentucky.

The case of *Smith* v. *Nelson*,† asserts this doctrine in a case where a legacy was left to the Associate Congregation of Ryegate, the interest whereof was to be annually paid to their minister forever. In that case, though the Ryegate

* 3 B. Monro, 253.

† 18 Vermont, 511.

congregation was one of a number of Presbyterian churches connected with the general Presbyterian body at large, the court held that the only inquiry was whether the society still exists, and whether they have a minister chosen and appointed by the majority and regularly ordained over the society, agreeably to the usage of that denomination. And though we may be of opinion that the doctrine of that case needs modification, so far as it discusses the relation of the Ryegate congregation to the other judicatories of the body to which it belongs, it certainly lays down the principle correctly if that congregation was to be treated as an independent one.

But the third of these classes of cases is the one which is oftenest found in the courts, and which, with reference to the number and difficulty of the questions involved, and to other considerations, is every way the most important.

It is the case of property acquired in any of the usual modes for the general use of a religious congregation which is itself part of a large and general organization of some religious denomination, with which it is more or less intimately connected by religious views and ecclesiastical government.

The case before us is one of this class, growing out of a schism which has divided the congregation and its officers, and the presbytery and synod, and which appeals to the courts to determine the right to the use of the property so acquired. Here is no case of property devoted forever by the instrument which conveyed it, or by any specific declaration of its owner, to the support of any special religious dogmas, or any peculiar form of worship, but of property purchased for the use of a religious congregation, and so long as any existing religious congregation can be ascertained to be that congregation, or its regular and legitimate successor, it is entitled to the use of the property. In the case of an independent congregation we have pointed out how this identity, or succession, is to be ascertained, but in cases of this character we are bound to look at the fact that the local congregation is itself but a member of a much

larger and more important religious organization, and is under its government and control, and is bound by its orders and judgments. There are in the Presbyterian system of ecclesiastical government, in regular succession, the presbytery over the session or local church, the synod over the presbytery, and the General Assembly over all. These are called, in the language of the church organs, "judicatories," and they entertain appeals from the decisions of those below, and prescribe corrective measures in other cases.

In this class of cases we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them.

We concede at the outset that the doctrine of the English courts is otherwise. In the case of the *Attorney-General* v. *Pearson*, cited before, the proposition is laid down by Lord Eldon, and sustained by the peers, that it is the duty of the court in such cases to inquire and decide for itself, not only what was the nature and power of these church judicatories, but what is the true standard of faith in the church organization, and which of the contending parties before the court holds to this standard. And in the subsequent case of *Craigdallie* v. *Aikman*,* the same learned judge expresses in strong terms his chagrin that the Court of Sessions of Scotland, from which the case had been appealed, had failed to find on this latter subject, so that he could rest the case on religious belief, but had declared that in this matter there was no difference between the parties. And we can very well understand how the Lord Chancellor of England, who is, in his office, in a large sense, the head and representative of

* 2 Bligh, 529.

the Established Church, who controls very largely the church patronage, and whose judicial decision may be, and not unfrequently is, invoked in cases of heresy and ecclesiastical contumacy, should feel, even in dealing with a dissenting church, but little delicacy in grappling with the most abstruse problems of theological controversy, or in construing the instruments which those churches have adopted as their rules of government, or inquiring into their customs and usages. The dissenting church in England is not a free church in the sense in which we apply the term in this country, and it was much less free in Lord Eldon's time than now. Laws then existed upon the statute-book hampering the free exercise of religious belief and worship in many most oppressive forms, and though Protestant dissenters were less burdened than Catholics and Jews, there did not exist that full, entire, and practical freedom for all forms of religious belief and practice which lies at the foundation of our political principles. And it is quite obvious, from an examination of the series of cases growing out of the organization of the Free Church of Scotland, found in Shaw's Reports of Cases in the Court of Sessions, that it was only under the pressure of Lord Eldon's ruling, established in the House of Lords, to which final appeal lay in such cases, that the doctrine was established in the Court of Sessions after no little struggle and resistance. The full history of the case of *Craigdallie* v. *Aikman*, in the Scottish court, which we cannot further pursue, and the able opinion of Lord Meadowbank in *Galbraith* v. *Smith*,* show this conclusively.

In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of

* 15 Shaw, 808.

any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.

Nor do we see that justice would be likely to be promoted by submitting those decisions to review in the ordinary judicial tribunals. Each of these large and influential bodies (to mention no others, let reference be had to the Protestant Episcopal, the Methodist Episcopal, and the Presbyterian churches), has a body of constitutional and ecclesiastical law of its own, to be found in their written organic laws, their books of discipline, in their collections of precedents, in their usage and customs, which as to each constitute a system of ecclesiastical law and religious faith that tasks the ablest minds to become familiar with. It is not to be supposed that the judges of the civil courts can be as competent in the ecclesiastical law and religious faith of all these bodies as the ablest men in each are in reference to their own. It would therefore be an appeal from the more learned tribunal in the law which should decide the case, to one which is less so.

We have said that these views are supported by the preponderant weight of authority in this country, and for the reasons which we have given, we do not think the doctrines of the English Chancery Court on this subject should have with us the influence which we would cheerfully accord to it on others.

We have already cited* the case of *Shannon* v. *Frost*, in which the appellate court of the State where this controversy originated, sustains the proposition clearly and fully. "This court," says the Chief Justice, "having no ecclesiastical jurisdiction, cannot revise or question ordinary acts of church discipline. Our only judicial power in the case arises from the conflicting claims of the parties to the church property and the use of it. We cannot decide who ought to be members of the church, nor whether the excommunicated have been justly or unjustly, regularly or irregularly cut off from the body of the church."

In the subsequent case of *Gibson* v. *Armstrong*,† which arose out of the general division of the Methodist Episcopal Church, we understand the same principles to be laid down as governing that case, and in the case of *Watson* v. *Avery*,‡ the case relied on by the appellants as a bar, and considered in the former part of this opinion, the doctrine of *Shannon* v. *Frost* is in general terms conceded, while a distinction is attempted which we shall consider hereafter.

One of the most careful and well-considered judgments on the subject is that of the Court of Appeals of South Carolina, delivered by Chancellor Johnson in the case of *Harmon* v. *Dreher*.§ The case turned upon certain rights in the use of the church property claimed by the minister notwithstanding his expulsion from the synod as one of its members. "He stands," says the chancellor, "convicted of the offences alleged against him, by the sentence of the spiritual body of which he was a voluntary member, and whose proceedings he had bound himself to abide. It belongs not to the civil power to enter into or review the proceedings of a spiritual court. The structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of the civil authority. The judgments, therefore, of

* *Supra*, p. 725.

† 7 B. Monro, 481.

‡ 2 Bush, 332.

§ 2 Speer's Equity, 87.

religious associations, bearing on their own members, are not examinable here, and I am not to inquire whether the doctrines attributed to Mr. Dreher were held by him, or whether if held were anti-Lutheran; or whether his conduct was or was not in accordance with the duty he owed to the synod or to his denomination. . . . When a civil right depends upon an ecclesiastical matter, it is the civil court and not the ecclesiastical which is to decide. But the civil tribunal tries the civil right, and no more, taking the ecclesiastical decisions out of which the civil right arises as it finds them." The principle is reaffirmed by the same court in the *John's Island Church Case.**

In *Den* v. *Bolton*,† the Supreme Court of New Jersey asserts the same principles, and though founding its decision mainly on a statute, it is said to be true on general principles.

The Supreme Court of Illinois, in the case of *Ferraria* v. *Vasconcelles*,‡ refers to the case of *Shannon* v. *Frost* with approval, and adopts the language of the court that "the judicial eye cannot penetrate the veil of the church for the forbidden purpose of vindicating the alleged wrongs of excised members; when they became members they did so upon the condition of continuing or not as they and their churches might determine, and they thereby submit to the ecclesiastical power and cannot now invoke the supervisory power of the civil tribunals."

In the very important case of *Chase* v. *Cheny*, recently decided in the same court, Judge Lawrence, who dissented, says, "We understand the opinion as implying that in the administration of ecclesiastical discipline, and where no other right of property is involved than loss of the clerical office or salary incident to such discipline, a spiritual court is the exclusive judge of its own jurisdiction, and that its decision of that question is binding on the secular courts." And he dissents with Judge Sheldon from the opinion because it so holds.

* 2 Richardson's Equity, 215. † 7 Halstead, 206. ‡ 23 Illinois, 456.

In the case of *Watson* v. *Farris*,* which was a case growing out of the schism in the Presbyterian Church in Missouri in regard to this same Declaration and Testimony and the action of the General Assembly, that court held that whether a case was regularly or irregularly before the Assembly was a question which the Assembly had the right to determine for itself, and no civil court could reverse, modify, or impair its action in a matter of merely ecclesiastical concern.

We cannot better close this review of the authorities than in the language of the Supreme Court of Pennsylvania, in the case of the *German Reformed Church* v. *Seibert*:† "The decisions of ecclesiastical courts, like every other judicial tribunal, are final, as they are the best judges of what constitutes an offence against the word of God and the discipline of the church. Any other than those courts must be incompetent judges of matters of faith, discipline, and doctrine; and civil courts, if they should be so unwise as to attempt to supervise their judgments on matters which come within their jurisdiction, would only involve themselves in a sea of uncertainty and doubt which would do anything but improve either religion or good morals."

In the subsequent case of *McGinnis* v. *Watson*,‡ this principle is again applied and supported by a more elaborate argument.

The Court of Appeals of Kentucky, in the case of *Watson* v. *Avery*, before referred to, while admitting the general principle here laid down, maintains that when a decision of an ecclesiastical tribunal is set up in the civil courts, it is always open to inquiry whether the tribunal acted within its jurisdiction, and if it did not, its decision could not be conclusive.

There is, perhaps, no word in legal terminology so frequently used as the word jurisdiction, so capable of use in a general and vague sense, and which is used so often by men learned in the law without a due regard to precision in its application. As regards its use in the matters we have

* 45 Missouri, 183. † 3 Barr, 291. ‡ 41 Pennsylvania State, 21.

been discussing it may very well be conceded that if the General Assembly of the Presbyterian Church should undertake to try one of its members for murder, and punish him with death or imprisonment, its sentence would be of no validity in a civil court or anywhere else. Or if it should at the instance of one of its members entertain jurisdiction as between him and another member as to their individual right to property, real or personal, the right in no sense depending on ecclesiastical questions, its decision would be utterly disregarded by any civil court where it might be set up. And it might be said in a certain general sense very justly, that it was because the General Assembly had no jurisdiction of the case. Illustrations of this character could be multiplied in which the proposition of the Kentucky court would be strictly applicable.

But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them,—becomes the subject of its action. It may be said here, also, that no jurisdiction has been conferred on the tribunal to try the particular case before it, or that, in its judgment, it exceeds the powers conferred upon it, or that the laws of the church do not authorize the particular form of proceeding adopted; and, in a sense often used in the courts, all of those may be said to be questions of jurisdiction. But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we

have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

And this is precisely what the Court of Appeals of Kentucky did in the case of *Watson* v. *Avery*. Under cover of inquiries into the jurisdiction of the synod and presbytery over the congregation, and of the General Assembly over all, it went into an elaborate examination of the principles of Presbyterian church government, and ended by overruling the decision of the highest judicatory of that church in the United States, both on the jurisdiction and the merits; and, substituting its own judgment for that of the ecclesiastical court, decides that ruling elders, declared to be such by that tribunal, are not such, and must not be recognized by the congregation, though four-fifths of its members believe in the judgment of the Assembly and desired to conform to its decree.

But we need pursue this subject no further. Whatever may have been the case before the Kentucky court, the appellants in the case presented to us have separated themselves wholly from the church organization to which they belonged when this controversy commenced. They now deny its authority, denounce its action, and refuse to abide by its judgments. They have first erected themselves into a new organization, and have since joined themselves to another totally different, if not hostile, to the one to which they belonged when the difficulty first began. Under any of the decisions which we have examined, the appellants, in their present position, have no right to the property, or to the use of it, which is the subject of this suit.

The novelty of the questions presented to this court for the first time, their intrinsic importance and far-reaching influence, and the knowledge that the schism in which the case originated has divided the Presbyterian churches throughout Kentucky and Missouri, have seemed to us to justify the careful and laborious examination and discussion which we

have made of the principles which should govern the case. For the same reasons we have held it under advisement for a year; not uninfluenced by the hope, that since the civil commotion, which evidently lay at the foundation of the trouble, has passed away, that charity, which is so large an element in the faith of both parties, and which, by one of the apostles of that religion, is said to be the greatest of all the Christian virtues, would have brought about a reconciliation. But we have been disappointed. It is not for us to determine or apportion the moral responsibility which attaches to the parties for this result. We can only pronounce the judgment of the law as applicable to the case presented to us, and that requires us to affirm the decree of the Circuit Court as it stands.

DECREE AFFIRMED.

The CHIEF JUSTICE did not sit on the argument of this case, and took no part in its decision.

Mr. Justice CLIFFORD, with whom concurred Mr. Justice DAVIS, dissenting.

I dissent from the opinion and decree of the court in this case, and inasmuch as the case presents an important question of jurisdiction, I deem it proper to state in a few words the grounds of my dissent.

Before this suit was commenced, a suit in respect to the same subject-matter and substantially between the same parties had been instituted in the Chancery Court of Louisville, by parties representing the same interests as those prosecuted in this case by the appellees, and they obtained a final decree in their favor against the respondents therein, representing the same interests as those defended by the present appellants. Whereupon the respondents in that suit appealed to the Court of Appeals of that State, where the decree of the Chancery Court was in all things reversed and the cause remanded for proper corrective proceedings respecting the possession, control, and use of the property

in controversy, and for final judgment in conformity with the opinion of the appellate court.*

On the twenty-first of February, 1868, the present appellants filed in the Chancery Court the mandate of the Court of Appeals, together with a copy of the opinion of the appellate court, and moved that an order issue for the restitution of the property and for judgment in conformity with the opinion of the court. Pending the consideration of that motion the defeated party filed an original bill in equity against the then appellants, praying that they be restrained from all further prosecution of their motion for restitution and from all proceedings, by action, suit, or otherwise, to obtain possession or control of the property in controversy, and the chancellor, instead of executing the mandate of the appellate court, granted the injunction prayed by the losing party in the original case. Feeling aggrieved by that proceeding the then appellants applied to the Court of Appeals for a rule to compel the chancellor to carry the mandate of the appellate court into effect, and upon that hearing the Court of Appeals decided that the chancellor had exceeded his jurisdiction in granting the injunction prior to the entry of their mandate, and rendering a final decree in conformity therewith, and peremptorily required him to render a judgment of restitution of the property to the appellants, in so far as they had been deprived thereof by his previous orders.†

Those orders of the appellate court were not executed, but the unsuccessful party immediately dismissed their bill of complaint to enjoin the appellants from executing the decree of the Court of Appeals, and on the twenty-first of the same month filed in the Circuit Court of the United States the bill of complaint in this case, before the second mandate of the appellate court commanding the chancellor to execute the first mandate was filed in the subordinate court.

Beyond all question jurisdiction was assumed by the Circuit Court in this case by virtue of the fact that the parties are citizens of different States, in which case the Judiciary Act provides that the Circuit Courts shall have original cog-

* Watson et al. *v.* Avery et al., 2 Bush, 332. † 3 Id. 635.

nizance concurrent with the several States. Indeed, jurisdiction in the case is claimed solely upon the ground that the Circuit Court of the United States possesses concurrent and co-ordinate jurisdiction with the State court in such a controversy.

In view of these considerations, as more fully set forth in the record and in the opinions given in this case by the Court of Appeals, I am of the opinion that the Circuit Court had no jurisdiction to hear and determine the matter in controversy, as there were two courts of common law exercising the same jurisdiction between the same parties in respect to the same subject-matter, within the same territorial limits, and governed by the same laws.

Neither court had any peculiar jurisdiction over the property in question nor of any peculiar right or lien upon it claimed by either party. Originally the State court had the same power with the Circuit Court to hear and decide any and every question that might arise as to the rights of property of either party in the course of the litigation. State courts and Circuit Courts in such cases are courts of concurrent and co-ordinate jurisdiction, in respect to which the principle is that "whenever property has been seized by an officer of the court, or put in his custody by the process of the court, the property will be considered as in the custody of the court and under its control for the time being, and that no other court has a right to interfere with that possession, unless it be some court which may have a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises."* Decided cases asserting that principle and enforcing it are very numerous in the reported decisions of this court, and also in the reported decisions of other courts of the highest respectability.†

* Buck *v.* Colbath, 3 Wallace, 341.

† Hagan *v.* Lucas, 10 Peters, 400; Taylor *v.* Carryl, 20 Howard, 594; Freeman *v.* Howe, 24 Id. 450; Payne *v.* Drewe, 4 East, 523; Peck *v.* Jenness, 7 Howard, 612; Evelyn *v.* Lewis, 3 Hare, 472; Noe *v.* Gibson, 7 Paige, 513; Russell *v.* East Anglian Railway Co., 3 McNaughton & Gordon, 104.

Statement of the case.

Remarks to show that the suit in the State court was pending and undisposed of when the bill was filed in the Circuit Court are unnecessary, as the fact is admitted, and in view of that fact I am of the opinion that the Circuit Court had no jurisdiction of the case.

Being of the opinion that the case ought to be reversed and dismissed for the want of jurisdiction, I do not think it necessary or proper to express any opinion upon the merits of the case.

THE MABEY.

A commission from this court to take testimony refused, on an appeal in a collision case in admiralty, where the party moving had in the District Court the same witnesses whom he proposed to examine here, and did not examine them only because he had agreed with a co-defendant (who was apparently as between themselves alone liable—he, the co-defendant, having led the other defendant into the fault for which the libel had been filed,—) that he, the *co*-defendant, would manage the whole case and pay the sums awarded by any decree (the purpose of this agreement having apparently been to keep from the court below a full knowledge of the case), and where especially the party now moving did not appeal from the decree of the District Court.

ON motion. The owners of the Chapman had libelled in the District Court at New York, the steamtug Mabey and the sailing vessel Cooper, which the tug had been towing out to sea, for injuries caused to the Chapman by collision on the way out. The owners of both the tug and sailing vessel appeared in the District Court with their witnesses, but the owners of the tug soon withdrew from court, and gave no evidence in defence of the tug. This course, it appeared, had been done upon a written agreement between the owners of the tug and sailing vessel, that the owner of the tug should take no active part in the conduct of the suit; that no evidence should be offered in behalf of the tug, and that the owners of the sailing vessel would assume the whole defence for both, and would pay whatever damages should be awarded against either or both; for the performance of

which agreement the owners of the sailing vessel entered into bond of $10,000 to the owners of the tug, with two sureties, whose solvency was *then* unquestioned. The District Court decreed heavy damages against both tug and sailing vessel; and an appeal was taken to the Circuit Court, where the decree was affirmed.

The case was now brought here.

Being here, *Mr. W. W. Goodrich in behalf of the owners of the tug*, moved that a commission issue to take the testimony of certain witnesses named. The grounds of the motion were the fact of the agreement above set forth; that the sureties in the bond had now become insolvent, and that four witnesses whose names were given, and whom it was proposed to examine, were "material witnesses in behalf of the appellants, without whose testimony they could not safely proceed." There was no statement of what facts it was, that the persons proposed to be examined could probably prove.

A counter affidavit stated that the answer of the owners of the tug alleged that before taking the sailing vessel in tow, the master of the tug informed the agents of the sailing vessel that it was not safe to proceed to sea in the then condition of the weather and tide, and that the agents told the master to proceed, and that their owners would assume all risks and pay all damages. It represented further that the witnesses in behalf of the tug had been brought into the District Court, and had abundant opportunity to testify, and had been sent away, on the agreement, and because the owners of the tug and sailing vessel "combined to keep from the knowledge of the court evidence which would have tended more clearly to establish the right of the libellants to recover, and in the hope, by doing so, to throw upon the libellants the whole of the damage;" that the witnesses now proposed to be examined were entirely within the control of the owners of the tug at the hearing in the District Court and that the testimony proposed to be taken was no more important now than it had been then; and that the owners of the tug had not appealed from the decree of the District Court.

Mr. E. C. Benedict opposed the motion, as one very plainly improper to be granted even on the case presented by the party making it.

Mr. Justice CLIFFORD delivered the opinion of the court.*

Damages were claimed by the owners of the ship Isaac F. Chapman for injuries which the ship received in a collision that occurred between the ship while she was lying at a dock in the port of New York, and the steamtug R. S. Mabey and the ship Helen R. Cooper, which, at the time of the collision, was in tow of the steamtug, as more fully set forth in the libel filed in the District Court. Serious injury resulted to the ship of the libellants, and they alleged that the steamtug and the ship Helen R. Cooper were both in fault. Separate answers were filed by the claimants of the tug and tow, and both, it seems, made preparation for defence, but before the day for the hearing arrived they entered into the following stipulation, which is an exhibit in the motion before the court. Omitting the names of the parties to the suit and the signatures of the proctors, the stipulation reads as follows:

"It is hereby stipulated by and between the parties representing the claimants of the vessels respondent in the above action, that said ship, Helen R. Cooper, shall and does hereby assume the conduct of the defence, and that all and any judgment ordered against the said vessels, or either of them, shall be assumed and paid by said ship Helen R. Cooper."

Application for the same purpose as that described in the motion was made to this court by the appellants on a prior occasion during the present term of the court, but it was refused, as no excuse was shown, in the petition or accompanying papers, why the witnesses were not examined either in the District or Circuit Courts, and the court said some ex-

* This case was decided at the last term.

cuse should be shown satisfactory to this court for the failure to examine them in the courts below—such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpœnaed and failed to appear and could not be reached by attachment, and the like.

Commissions for such a purpose cannot be allowed as of course, under the twelfth rule, as it would afford an inducement to parties to keep back their testimony in the subordinate courts, and the effect would be to convert this court into a court of original jurisdiction. Admonished to that effect by the prior decision of this court the parties have filed with the present application an affidavit as a compliance with that requirement. Unsettled, as the practice was prior to that decision, the parties are right in supposing that this court would entertain a second application in the same case.

Governed by these views the court has examined the affidavit and the reasons given why the testimony was not taken prior to the hearings in one of the subordinate courts, but the court is constrained to say that the reasons given are not satisfactory, as they show that the witnesses were in court and that they were not examined because the party now asking for the commission agreed that they would not introduce any testimony in the case, and the affidavit shows that they did not introduce any in the District Court and did not appeal from the decree, and of course they did not and could not introduce any in the Circuit Court, as it is well-settled law that the losing party in the subordinate court cannot be heard in the appellate court in opposition to the decree in the subordinate court unless he himself also appealed from the decree.* Instead of being satisfactory, the reasons set forth in the affidavit why the testimony was not introduced in the trials below, are persuasive and convincing that the motion ought not to be granted. Having accepted the bond

* The William Bagaley, 5 Wallace, 412; The Maria Martin, 12 Id. 31.

of indemnity and failed to make any defence the risk as to the sufficiency of the sureties was upon the present appellants, and the fact that they misjudged or are disappointed in that behalf furnishes no reason for the motion before the court.

MOTION DENIED.

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ABANDONED AND CAPTURED PROPERTY. See *Captured and Abandoned Property.*

ABANDONED LANDS.

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District courts sitting in, have jurisdiction under the act of March 3d, 1851, limiting the liability of shipowners, and may administer the law as provided in the 4th section of the act. *Norwich Company* v. *Wright*, 104.

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CALIFORNIA. See *Tax Sales.*

1. Prefects in California had no power after the conquest of the country by the United States, to make grants of the common or unappropriated lands of the pueblos within their jurisdiction. *Alexander* v. *Roulet*, 386.
2. When Spanish or Mexican grants of land in, do not identify the tract granted, the title is imperfect, and needs action from the government of the United States. *Carpentier* v. *Montgomery*, 480.
3. Effect of a "confirmation" of a Spanish or Mexican grant of land in, stated; declared analogous to that of the grant of a patent. *Ib.*
4. Hence it does not cut off equities under the same title. *Ib.*
5. These equitable interests are enforceable in chancery only; not at law. *Ib.*

CAPTURE. See *Prize Money.*

CAPTURED AND ABANDONED PROPERTY. See *Constitutional Law*, 4; *Evidence*, 2; *Pardon.*

1. The act of March 12th, 1863, to provide for the collection of, does not confiscate or in any case absolutely divest the property of the original owner, even though disloyal. Its meaning and effect stated. *United States* v. *Klein*, 128.
2. By virtue of the act of 17th July, 1862, authorizing the President to

CAPTURED AND ABANDONED PROPERTY (*continued*).

offer pardon on such conditions as he might think advisable, and the proclamation of 8th December, 1863, which promised a restoration of all rights of property, except as to slaves, on condition that the prescribed oath be taken and kept inviolate, the persons who had faithfully accepted the conditions offered became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war. *Ib.*

3. The proviso (sometimes called "the Drake Amendment") in the appropriation act of July 12th, 1870, is unconstitutional and void. *Ib.*

4. In a claim by an administrator of a deceased person, against the United States, under the act of March 12th, 1863, relating to, which makes proof that the owner never gave aid or comfort to the rebellion a condition precedent to recovery, it is no bar that the *decedent* gave such aid or comfort, the property having been taken after the decedent's death and from the administrator, and not from *him*. *Carroll* v. *United States*, 151.

CAVEAT EMPTOR.

Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, the purchaser cannot say, in impeachment of the sale, that he was deceived by the vendor's misrepresentations. *Slaughter's Administrator* v. *Gerson*, 379.

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CHARGE, JUDGE'S. See *Court and Jury*.

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CODE OF PROCEDURE. See *New York Code of Procedure*.

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injuries to other vessels by means of, as well as injuries to cargo on board the offending vessel. *Norwich Company* v. *Wright*, 104.

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I. FEDERAL AND STATE COURTS.

1. The Circuit Courts of the United States have no power to issue writs of mandamus to State courts, by way of original proceeding merely. *Bath County* v. *Amy*, 244; *Watson* v. *Jones*, 679.

II. FEDERAL AND STATE GOVERNMENTS. See *Constitutional Law.*

III. STATE COURTS AND FEDERAL GOVERNMENT.

2. A State judge has no jurisdiction to issue a writ of *habeas corpus*, or to continue proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of the authority, of the United States by an officer of that government. *Tarble's Case*, 397.

CONSTITUTIONAL LAW. See *Imports; Pilotage*, 1.

1. A statute does not necessarily impair the obligation of a contract because it may affect it retrospectively, or because it enhances the difficulty of performance to one party or diminishes the value of the performance to the other, provided that it leave the obligation of performance in full force. *Curtis* v. *Whitney*, 68.
2. The power of Congress over the public lands and the effect of its grants cannot be interfered with by State legislation. *Gibson* v. *Chouteau*, 92.
3. Whenever a general rule as to property or personal rights, or injuries to either, is established by State legislation, its enforcement by a Federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to State limitation. *Railway Company* v. *Whitton*, 271.
4. The proviso (sometimes called "the Drake Amendment") in the appropriation act of July 12th, 1870, whose substance is that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, is unconstitutional and void. It invades the powers

CONSTITUTIONAL LAW (*continued*).

both of the judicial and of the executive departments. *United States* v. *Klein*, 128.

5. It is not necessary that property should be absolutely *taken*, in the narrowest sense of that word, to bring the case within the protection of those provisions of the Constitution of the United States and of the several States which declare that private property shall not be taken for public use without just compensation. Such serious interruption to the common and necessary use of property as is *equivalent* to a taking, will bring the case within the meaning of the Constitution. *Pumpelly* v. *Green Bay Company*, 166.

6. Lands sold by the United States with no reservation, though bordering on a navigable stream, are as much within the protection of the constitutional principle awarding compensation as other private property. *Ib.*

7. Whenever a State, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the Constitution, and to that extent void. *White* v. *Hart*, 646.

8. A charter granted in 1865 by Pennsylvania to two ancient colleges, situated in different places in the State, and previously chartered, by which with their common assent the two were consolidated, and the funds of each vested in the new one; the old college buildings in each place being left alone, and it being prescribed that part of the college course should be pursued in one place and part in another, was held not to be violated by a subsequent statute, which authorized the trustees to locate the whole college at either place or anywhere within the commonwealth; the constitution of Pennsylvania (one adopted in 1857, and existing in 1865 when the consolidation was made) allowing the legislature of the State "to alter, revoke, or annul any charter of incorporation thereafter granted, whenever in their opinion it may be injurious to the citizens, ... in such manner, however, that no injustice shall be done to the corporators" being in force. *Pennsylvania College Cases*, 190.

9. A charter to a railroad company containing an exemption of all its property from taxation, is a contract; and a law subsequently passed, laying a tax on the company's franchise, rolling stock, or real property, violates the obligation of the contract, and is void. *Wilmington Railroad* v. *Reid*, 264.

10. But "bounty laws"—laws encouraging persons to engage in particular trades by bounties, drawbacks, or other advantages—do not constitute contracts. *Salt Company* v. *East Saginaw*, 373.

11. The manner and conditions upon which the judicial power of the United States shall be exercised, except as the original or appellate character of the jurisdiction is specially designated in the Constitution, are mere matters of legislative discretion. *Railway Company* v. *Whitton*, 270.

CONTRACT. See *Caveat Emptor*; *Constitutional Law*, 1, 7–10; *Public War*; *Statutes of Limitations*.

CONTRACT (*continued*).

1. A contract to pay for slaves sold (slavery being at the time when, and the place where, the contract was made, lawful) is valid, and may be enforced though slavery be afterwards abolished, and dealing in slaves so become unlawful. *White* v. *Hart*, 647.
2. When the government during the rebellion contracted for the purchase of horses on a large scale, there being at the time certain general regulations as to the right of the government to examine into the soundness of the animals, *held*, that the dealer could not throw up his contract and claim damages from the government, because between the time of the contract and the time appointed for examination of the horses the government adopted certain new regulations, better calculated to protect it against fraud present and future, to which regulations it insisted that these horses should be subjected. *United States* v. *Wormer*, 25.
3. A charter to a railroad company which exempts all its property from taxation is a contract, and a law subsequently passed laying a tax on its franchise, rolling stock, or real property, violates the obligation of a contract. *Wilmington Railroad* v. *Reid*, 264.
4. What misrepresentation will vitiate a contract of sale and prevent equity from enforcing it. *Slaughter's Administrator* v. *Gerson*, 379.
5. A contract to reimburse is implied when the government takes private property for public use. *United States* v. *Russell*, 623.

CONTRACTOR. See *Contract*, 2.

COPYRIGHT. See *Equity*, 2.

By what language a full right of property in a manuscript passes. *Paige* v. *Banks*, 608.

CORPORATION.

1. To be considered, for purposes of jurisdiction, a citizen of the State creating it. *Railroad Company* v. *Whitton*, 270.
2. Will be presumed to have power to hold land when bearing such a title as "Sulphur Spring *Land* Company." *Myers* v. *Croft*, 291.

COURT AND BAR.

Relative obligations and rights of, to each other, fully set forth. *Bradley* v. *Fisher*, 336.

COURT AND JURY.

1. Where there are no disputed facts in a case, the court may tell the jury in an absolute form how they should find. *Bevans* v. *United States*, 57.
2. Where a patent of prior date is offered in evidence in an action at law, as covering an invention described in the plaintiff's patent, on a charge of infringement, the question of the identity of the two instruments or machines, must be left to the jury, if there is so much resemblance as raises the question at all. *Tucker* v. *Spalding*, 453.

COURT OF CLAIMS.

1. A rule of the, requiring parties to present their claims to an executive department before suing in that court, is, under the statutory law con-

COURT OF CLAIMS (*continued*).
stituting and regulating that court, unauthorized and void. *Clyde* v. *United States*, 38.
2. Its jurisdiction to pass on claims against the United States growing out of the destruction, or appropriation of, or damage to property by the army or navy engaged in the suppression of the rebellion, how far taken away by the act of July 4th, 1864. *United States* v. *Russell*, 624; *Pugh* v. *United States*, 633.
3. The jurisdiction thus taken away not restored by the joint resolution of 23d December, 1869. *United States* v. *Kimball*, 636.
4. Proper mode of proceeding in certain cases under the 2d section of the act of June 25th, 1868, allowing the court "at any time while any suit or claim is pending before or on appeal from the said court, or within two years next after the *final disposition* of any such suit or claim, on motion on behalf of the United States, to grant a new trial in any such suit or claim." *Ex parte Russell*, 664.

"COURTS OF THE UNITED STATES." See *Practice*, 9; *Utah*.
What properly constitutes this class of courts. Not all courts created by acts of Congress such in all meanings of the terms. Distinguished from the legislative courts of Territories. *Clinton* v. *Englebrecht*, 434.

COVENANTS FOR TITLE.
1. A covenant to "warrant and defend" property for which a quit-claim deed is executed "against all claims, the United States excepted," only applies to claims from other sources than the United States. *Davenport* v. *Lamb*, 418.
2. A covenant that if the grantors "obtain the fee simple" to property conveyed "from the government of the United States they will convey the same" to the grantee, his heirs, or assigns, "by deed of general warranty" only takes effect in case the grantors acquire the title *directly* from the United States. *Ib.*

CUSTOMS OF THE UNITED STATES.
1. Goods imported from a foreign country, upon which the duties at the custom-house have been paid, are not subject to State taxation whilst remaining in the original cases, unbroken and unsold, in the hands of the importer, whether the tax be imposed upon the goods as imports, or upon the goods as part of the general property of the citizens of the State, which is subjected to an *ad valorem* tax. *Low* v. *Austin*, 29.
2. Under the second section of the act of March 3d, 1823, amendatory of the act regulating the entry of merchandise imported into the United States from any adjacent Territory, a civil action of debt will lie, at the suit of the United States, to recover the forfeitures or penalties incurred under this section. *Stockwell* v. *United States*, 531.
3. The section is remedial, and not strictly penal in its character. *Ib.*
4. It applies to illegal importers as well as to accessories after the illegal importation. *Ib.*
5. The penalty of this section is not repealed by the act of July 18th, 1866; the purpose of this latter act having been to punish as a crime that which before had subjected its perpetrator to civil liability. *Ib*

CUSTOMS OF THE UNITED STATES (*continued*).
6. "Birds" held not to be included within the words "other live animals" in one statute, on a reading of it by the light of a previous one. *Reiche* v. *Smythe*, 162.

DEBT.
When the action of, lies. *Stockwell* v. *United States*, 531.

DEMAND AND NOTICE. See *Negotiable Paper*.

DEPARTMENTAL ASSEMBLIES, THE
Had no power under the laws of Mexico to give the public domain away, except for the purposes of settlement or cultivation. *United States* v. *Vigil*, 449.

"DESTRUCTION OR APPROPRIATION OF OR DAMAGE TO." See *Court of Claims*, 2, 3.

DIRECTORY AND MANDATORY. See *Tax Sales*.
Requirements in statutes, when one and when the other. *French* v. *Edwards*, 506.

DISTRICT OF COLUMBIA. See *Landlord and Tenant*.
The act of June 21st, 1870, changing the independent character of the Criminal Court of, did not alter the original character of its previous orders. *Bradley* v. *Fisher*, 335.

DONATION ACT.
Of Oregon, passed 27th September, 1850, construed in connection with the act of May 20th, 1836, authorizing the issue of patents in the names of deceased parties. *Davenport* v. *Lamb*, 418.

"DRAKE AMENDMENT, THE." See *Pardon*, 4.
Or proviso to the Appropriation Act of July 12th, 1870, unconstitutional. *United States* v. *Klein*, 128.

DUNNAGE. See *Insurance*, 2.
Merchandise carried under bill of lading and paying freight is cargo and not dunnage, although stowed as dunnage would be stowed for the purpose of protecting the rest of the cargo from wet, and put on board by the shipper with knowledge that it would be so stowed. *Insurance Company* v. *Thwing*, 672.

ECCLESIASTICAL AND CIVIL COURTS.
How far in the United States these last regard themselves bound by decisions of the former. *Watson* v. *Jones*, 679.

EMINENT DOMAIN, RIGHT OF. See *Constitutional Law*, 5, 6.

"EMPLOYÉS."
Meaning of the term within the Joint Resolution of February 28th, increasing by 20 per cent. the pay of certain. *Twenty per Cent. Cases*, 568.

EQUITY. See *California*, 3–5; *Land Department*.
1. How far it will correct mistakes in the issuing of patents by the Land Department, by which through an improper construction of acts of

EQUITY (*continued*).

Congress regulating the public lands, a legal title is vested through the patent in one person, when on a proper construction of them the equitable and true title is in another. *Johnson* v. *Towsley*, 72.

2. Effect of non-assertion, for a long term of time, by an author, of any copyright as against his publishers, in a case where the language of a transfer of the right apparently indicated an intent to part with it absolutely, considered on a bill by the author's representatives against the publishers for profits. *Paige* v. *Banks*, 608.
3. Bill to deliver up an instrument which strong evidences showed had been fraudulently obtained, refused, suit at law having been brought on the instrument after the bill filed, and an opportunity being thus given to set up the fraud as a defence at law. *Insurance Company* v. *Bailey*, 616.

ESTOPPEL. See *Res Judicata*.

1. A grantor not having perfect title who conveys for full value is estopped, both himself and others claiming by subsequent grant from him, against denying title; a perfect title afterwards coming to him. *Myers* v. *Croft*, 291.
2. Circumstances stated under which a municipal corporation issuing bonds which it had authority to issue only on certain conditions, precedent, may be estopped against asserting that the conditions were not fulfilled. *Pendleton County* v. *Amy*, 298.

EVIDENCE. See *Court and Jury*, 2; *Insurance; Marshal's Bond; Minnesota; Patent.*

1. What constitutes *Res Gestæ*, illustrated. *Norwich Transportation Company* v. *Flint*, 3.
2. The President's proclamation of the 25th December, 1868, granting "unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offence of treason against the United States, &c.," is a public act, which all courts of the United States are bound to take notice of and give effect to. *Armstrong* v. *United States*, 154.
3. In a suit against an insurance company, where the defence is that certain representations were false, it is no violation of the rule which prevents the reception of verbal testimony to contradict a written contract to show that in fact the representations, though apparently those of the party assured, were made by the agent soliciting the insurance, and who received the answers to the usual interrogatories put. *Insurance Company* v. *Wilkinson*, 222.
4. Of usage, admissible to give precision to an agreement on an important point, where, by its terms, it had been left undefined. *Robinson* v. *United States*, 363.
5. A usage *may* be established by a single witness, if testifying fully, and without being contradicted. *Ib.*
6. In actions for fraud, large latitude given to the admission of, *Ex. Gr.*— If a motive exist prompting to a particular line of conduct, and it

EVIDENCE (*continued*).
be shown that in pursuing that line a defendant has deceived and defrauded one person, it may be inferred that similar conduct towards another, at about the same time and in relation to a like subject, was actuated by the same spirit. *Butler* v. *Watkins*, 457.
7. When strong evidence tends to show that a collision was owing to the failure of the "lookout" of the vessel libelled, the vessel on which the lookout was must exculpate herself by conclusive evidence. *The Ariadne*, 475.
8. The recitals in a deed of a sheriff as to the manner in which he executed a judgment directing the sale of property are evidence against the grantee and parties claiming under him. *French* v. *Edwards*, 506.

"FINAL DECREE." See *Jurisdiction*, 4.
1. A decree which in the absence of a later decree, in form, might be held a "final decree," dismissed as not being so, the decree being finally entered in form at a later date. *Wheeler* v. *Harris*, 51.
2. The court approves the practice of entering decrees in form, before taking appeals to this court. *Ib.*

"FINAL DISPOSITION."
Meaning of the words in the act of June 25th, 1868, relative to the power of the Court of Claims to grant a new trial after appeal, &c. *Ex parte Russell*, 664.

FRANCHISE
Of a railroad corporation is part of its "property" as well as its real estate and stock. *Wilmington Railroad* v. *Reid*, 264.

FRAUD.
In actions for, large latitude given to the admission of evidence. *Butler* v. *Watkins*, 456.

FRAUDULENT TRANSFER.
In contravention of the Bankrupt Act. What constitutes. *Toof* v. *Martin*, 40.

GEORGIA.
1. The constitution of, adopted by it A.D. 1868, is to be regarded by courts as having been voluntarily adopted. *White* v. *Hart*, 646.
2. Had no effect on a contract made previously to its adoption to pay for slaves sold. *Ib.*

"GERMAN JOBBER AND IMPORTER." See *Insurance*,

GOLD COIN.
Gold coin in packages, and not used for travelling expenses, was merchandise in 1864, and was within the mischief to be remedied by the non-intercourse acts of July 13th, 1861, and May 20th, 1862. *Gay's Gold*, 358.

GOVERNMENT CONTRACTOR. See *Contract*, 2.

HABEAS CORPUS. See *Conflict of Jurisdiction*, 2.

HALF PILOTAGE. See *Pilotage*.

IMPLIED CONTRACT,
To reimburse, exists when the government takes private property for public use. *United States* v. *Russell*, 623.

IMPORTS. See *Customs of the United States.*
Goods imported do not lose their character as imports, and become incorporated into the mass of property of the State until they have passed from the control of the importer, or been broken up by him from their original cases. *Low* v. *Austin*, 29.

INDEBITATUS ASSUMPSIT. See *Implied Contract.*

INDORSER. See *Accommodation Paper; Negotiable Paper.*

INSOLVENCY.
Within the meaning of the Bankrupt Act defined. *Toof* v. *Martin*, 40.

INSURANCE. See *Agency; Evidence*, 3; *Life Insurance; Subrogation*, 2.
1. On a policy of insurance requiring, though in a printed part, that fire *works* should be specially written in it, and which added 50 cents on the $100 as premium for insuring them, *held*, that evidence was rightly refused to prove that they constituted "an article in the line of a German jobber and importer," the stock of which sort of dealer by a *written* description had been insured, with a privilege to keep fire *crackers*. *Steinbach* v. *Insurance Company*, 183.
2. A warranty in a ship's policy "not to load more than her registered tonnage," will be broken by carrying more cargo in weight than such tonnage, though the excess be used as dunnage. *Insurance Company* v. *Thwing*, 672.

JUDGES
Of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. The duties and rights of court and bar stated. *Bradley* v. *Fisher*, 336.

JUDICIAL COMITY. See *Commissioner of the General Land Office; Land Department; Res Judicata.*
1. How far prevailing and how far limited in the action of the courts supervising and correcting the action of the Land Department. *Johnson* v. *Towsley*, 72.
2. The cases stated in which the civil courts will receive as conclusive the judgment of church judicatories, and distinguish from those in which they will examine into matters of a religious nature, for themselves. *Watson* v. *Jones*, 679.
3. The construction of a State law upon a question affecting the titles to real property in the State, by its highest court, is binding upon the Federal courts. *Williams* v. *Kirtland*, 306.

JURORS. See *Practice*, 8, 9.

JURISDICTION. See *Appeal; Corporation*, 1; *Court of Claims*, 2, 8; *Final Decree*, 1; *Mandamus*, 1; *Practice*, 1, 9.

JURISDICTION (*continued*).

I. OF THE SUPREME COURT OF THE UNITED STATES.

(*a*) It HAS jurisdiction—

1. Under the 25th section of the Judiciary Act, when the record shows no other reason why the highest court of a State sustained a demurrer to a plea of tender in Legal Tender notes of the United States, of the amount due on a promissory note, than the fact that it was so made. *Dooley* v. *Smith*, 604.

(*b*) It has NOT jurisdiction—

2. Where the judgment of a State court might have been based either upon a State law repugnant to the Constitution or laws of the United States, or upon some other independent ground, and it appears that the court did, in fact, base it upon the latter ground; and so, also, where it does not appear on which of the two grounds the judgment was, in fact, based, if the independent ground was a good and valid one of itself to support the judgment. *Klinger* v. *State of Missouri*, 257; *West Tennessee Bank* v. *Citizens' Bank*, 432.
3. Nor of a writ of error to a joint judgment against several where there has been no summons and severance, or other equivalent proceeding. *Hampton* v. *Rouse*, 187.
4. Nor (as not being a "final judgment") of a decree of the highest court of a State affirming an order of an inferior court, by which a motion to set aside a sheriff's return to an execution was allowed and an *alias* execution awarded. *Wells* v. *McGregor*, 188.
5. Nor of writs of error from this court not tested by the Chief Justice. *Ib.*
6. Nor of a division of opinion under the Judiciary Act of 1802 on a motion to quash an indictment. *United States* v. *Avery*, 251.
7. Nor of writs of error taken to the action of an inferior court in granting or refusing a new trial. *Insurance Company* v. *Barton*, 603.

II. OF THE CIRCUIT COURTS OF THE UNITED STATES.

(*a*) They HAVE jurisdiction—

8. Of a suit by a person as administrator, who, being a citizen of the State where his decedent lived, took out letters of administration there, and then removing to and becoming a citizen of another State sues a person, the citizen of the State where he previously lived and took out the letters *Rice* v. *Houston*, 66.

(*b*) They have NOT jurisdiction—

9. Of bills in equity against collectors and the Commissioner of Internal Revenue, the pleadings not showing the citizenship required by the Judiciary Act; and the bills having been all filed subsequently to the 13th July, 1866. *Mason* v. *Rollins*, 602.

III. OF THE DISTRICT COURTS OF THE UNITED STATES.

10. These courts, sitting in admiralty, have jurisdiction of cases arising under the act of March 3d, 1851, limiting the liability of ship-owners. *Norwich Company* v. *Wright*, 104.

JURY. See *Court and Jury; Practice*, 1, 8, 9; *Utah.*

LAND DEPARTMENT.

1. Although the action of the Land Department in issuing a patent is

LAND DEPARTMENT (*continued*).

conclusive in all courts, and in all proceedings where by the rules of law the legal title must prevail, yet after the title has passed from the government to individuals, courts of equity may examine whether the land office has been imposed on by fraud, false swearing, mistake, or otherwise, and whether the party vested with the legal title does not thus hold but in trust for another. If the claimant has established his right to the land to the satisfaction of the land department on a true construction of acts of Congress, but the patent has issued, owing to a wrong construction of them, to another person, equity will correct the mistake. *Johnson* v. *Towsley*, 72.

2. It will equally relieve in a similar case where no patent has actually issued. *Samson* v. *Smiley*, 91.

LANDLORD AND TENANT.

In the District of Columbia a landlord has a tacit lien for his rent on the chattels of his tenant on the demised premises, from the time the chattels are placed therein until the expiration of three months after the rent becomes due; which lien has priority over a mortgage on the chattels given after they are placed on the premises. *Webb* v. *Sharp*, 14.

LEGAL TENDER. See *Pleading*, 5.

A tender of what are known as "Legal Tender Notes of the United States," in payment of a note payable in dollars, and made before the passage of the Legal Tender acts, is a good tender. *Dooley* v. *Smith*, 604.

LIEN.

The lien for supplies furnished to a ship in a foreign port and necessary to enable her to complete her voyage and actually so used by her constitute a lien of so high a character, that when once inferred, it is only to be removed by proof which actually displaces it. The principle applied in a case calculated to test it. *The Patapsco*, 329.

LIFE INSURANCE. *See Agency; Evidence*, 3.

In an action on a policy of life insurance, where the defence set up is previous serious personal injury to the assured, not truly represented, the question of such injury is not to be determined exclusively by the impressions of the matter at the time. Its more or less prominent influence on the health, strength, and longevity of the party is to be taken into account, and the jury are to decide from these and the nature of the injury whether it was so serious as to make its non-disclosure avoid the policy. The *criteria* of such injury considered. *Insurance Company* v. *Wilkinson*, 222.

LIS PENDENS.

1. What characteristics are requisite in the suit set up to defeat the second suit. *Watson* v. *Jones*, 679.
2. Proceedings of an appellate court, part of proceedings in primary court set up as defence. *Ib.*
3. But where a trust is involved in the second suit, none having been in

LIS PENDENS (*continued*).
the suit set up as a defence, the second suit may be sustained to declare, define, and protect the trust, though the first suit be still pending. *Ib.*

"LOOKOUTS." See *Evidence*, 7.
On crowded waters and powerful vessels, bound to sleepless vigilance and indefatigable care. *The Ariadne*, 475.

MANDAMUS.
1. The Circuit Courts of the United States have no power to issue writs of, to State courts by way of original proceeding merely. *Bath County* v. *Amy*, 244; *Watson* v. *Jones*, 679.
2. To the Secretary of the Treasury to deliver a warrant under the act of July 27th, 1861, to refund expenses incurred by any State in raising troops to suppress the rebellion, refused in a particular case, as not made in time. *Commonwealth* v. *Boutwell*, 526.

MANDATORY AND DIRECTORY. See *Tax Sales.*
Requirements of statutes, when the former and when the latter. *French* v. *Edwards*, 506.

MARGINAL MEMORANDUM. See *Bill of Lading.*

MARSHAL'S BOND.
When alleged payments, or set-offs claimed, are admissible under the act of March 3d, 1797. *Halliburton* v. *United States*, 63.

MATERIAL-MEN. See *Lien.*

MEXICO. See *Departmental Assemblies, The.*

MINNESOTA.
The effect of its statute of March 12th, 1862, declaring that tax-deeds, &c., should be *primâ facie* evidence of a good title in the grantee, was but to shift the burden of proof of performance of all the requirements prescribed by law for the sale of the land from the party claiming under the deed to the party attacking it. *Williams* v. *Kirtland*, 306.

MISTAKE OF LAW.
What constitutes as distinguished from a mistake of fact. *Railroad Company* v. *Soutter*, 517.

MUNICIPAL BONDS. See *Estoppel*, 2.

NEGLIGENCE. See *Railway Corporations; Receiver of Public Moneys.*

NEGOTIABLE PAPER.
When an indorser of a matured note, not knowing whether demand has or has not been made of the maker, writes to the holder, stating that the maker is unable to pay, and promising, himself, to pay, such indorser will be held to have waived proof of demand and notice, and will be liable as indorser, although without reference to his letter no demand of payment was made or notice of dishonor given. *Yeager* v. *Farwell*, 6.

NEW TRIAL. See *Court of Claims*, 4; *Final Disposition; Jurisdiction*, 7

NEW YORK CODE OF PROCEDURE.

1. Assignee of bond and mortgage held as collateral security, may, under 111th and 113th sections of, sue without making assignor a party. *Chew* v. *Brumagen*, 497.
2. And if on such suit the debtor seeks to recoup and judgment goes for less than the amount of the original debt, assignor cannot sue for any balance, being concluded by the former proceeding. *Ib.*

OREGON.

The act of 27th September, 1850, called the Donation Act of, construed in connection with the act of May 20th, 1836, authorizing the issue of patents for land in the name of deceased parties. *Lamb* v. *Davenport*, 419.

PANEL, CHALLENGE TO. See *Practice*, 8, 9.

PARDON. See *Captured and Abandoned Property*, 2, 3.

1. Granted on conditions, blots out the offence if proof is made of compliance with the conditions. *United States* v. *Klein*, 128.
2. The President's proclamation of 25th December, 1868, granting unconditionally and without reservation full pardon and amnesty to every person who had participated in the rebellion, dispenses with "proof that the claimant had never given aid or comfort to the rebellion" in a proceeding to recover captured and abandoned property under the act of 12th March, 1863, which act makes such proof a prerequisite to recovery. *Armstrong* v. *United States*, 154; *Pargoud* v. *Same*, 156.
3. But it was limited to persons "who participated in the late insurrection or rebellion," and to the offence of "treason against the United States, or adhering to their enemies during the late civil war." *Gay's Gold*, 358.
4. The proviso (sometimes called "the Drake Amendment") in the appropriation act of July 12th, 1870, in substance that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred by it, is unconstitutional and void. *United States* v. *Klein*, 128.

PAROL EVIDENCE.

When allowable to explain written contracts. *Robinson* v. *United States*, 363.

PATENT. See *Appeal; Land Department.*

1. In ejectment in Federal courts, conclusive evidence of legal title in the patentee. Its effect not impaired by counter occupation previous to its issue, under State laws. *Gibson* v. *Chouteau*, 92.
2. In a suit at law where a patent of prior date is offered in evidence as covering the plaintiff's invention, it is no ground for rejecting the prior patent that it does not profess to do the same things that the second patent does. If what it performs is essentially the same, and its structure and action suggest to the mind of an ordinarily skilful mechanic its adaptation to the same use as the second patent, by the same means, this adaptation is not a new invention, and is not patentable. *Tucker* v. *Spalding*, 453.

PILOTAGE.

1. The statutes of the several States regulating the subject of, are to be regarded as constitutionally made until Congress by its own acts supersedes them. *Ex parte McNeil*, 236.
2. The half pilotage given by statute is a compensation, not a penalty. *Ib.*

PLEADING. See *Lis Pendens.*

1. Though statutes oblige receivers of public money to pay over when required by the Secretary of the Treasury, a declaration, stating that the receiver had been often requested to pay is enough after verdict, there having been general regulations in force at the time the suit was brought, requiring receivers to pay at stated times. *Boyden* v. *United States*, 17.
2. Where a plea relies on a statute authority as a defence, it must allege the facts which it asserts to be so authorized, and cannot plead generally that it complied with the statute. *Pumpelly* v. *Green Bay Company*, 166.
3. Where a declaration charges a defendant with overflowing the plaintiff's land by raising the water in the lake, a plea containing neither a denial of what is alleged nor authority for doing it is bad. *Ib.*
4. A plea which is a traverse of a material allegation of the declaration, must, on *general* demurrer, be held good, though it may be faulty as argumentative. *Pendleton County* v. *Amy*, 298.
5. A plea which states that the sum due on a promissory note is a certain amount, on a certain day, and avers a tender on that day of the sum due in legal tender notes of the United States, is a good plea of tender. *Dooley* v. *Smith*, 604.

PRACTICE. See *Bill of Exceptions; Charge, Judge's; Court and Jury*, 1; *Court of Claims*, 1, 4; *Constitutional Law*, 11; *Final Decree; Jurisdiction*, 3-7; *Utah.*

I. In the Supreme Court.

(*a*) *In cases generally.*

1. Under the act of March 3d, 1835, authorizing the trial of facts by the Circuit Courts, the court must, itself, find the facts in order to authorize a writ of error. *Bethell* v. *Mathews*, 1.
2. Where in a case tried under that act the record presents a judgment rendered on a general verdict in favor of the defendant in error, without any question arising on the pleadings or any ruling against the plaintiff in error, the judgment will be affirmed. *Ib.*
3. The court approves the practice of entering decrees in form before taking appeals to this court. *Wheeler* v. *Harris*, 51.
4. Plaintiff in error cannot take advantage of exceptions in his own favor. *Bethell* v. *Mathews*, 1.

(*b*) *In admiralty.*

5. It will reverse in admiralty appeals where, after examination, its conviction is that both courts below were wrong. *The Ariadne*, 475.
6. It will not issue commissions in them to take new testimony except upon good cause shown. What does not constitute such cause. *The Mabey*, 738.

PRACTICE (*continued*).

II. In Circuit and District Courts.

7. Where there are no disputed facts in a case the court may tell the jury in an absolute form how they should find. *Bevans* v. *United States*, 56.
8. The effort of a defendant to secure, so far as he can, by peremptory challenges and challenges for cause, a fair trial of his case, does not waive an inherent and fatal objection to the entire panel. *Clinton* v. *Englebrecht*, 434.
9. Jurors summoned into the legislative courts of the Territory, under the acts of Congress, applicable only to the courts of the United States—*i. e.*, courts established under the article of the Constitution which relates to the Judicial power—are wrongly summoned. Judgment on their verdict may be set aside. *Ib.*

III. In District Courts.

10. The proper mode of proceeding in admiralty, under the act of March 3d, 1851, limiting the liability of ship-owners, pointed out. *Norwich Company* v. *Wright*, 104.

IV. In the Court of Claims. See *Court of Claims*, 4.

PRE-EMPTOR. See *Commissioner of the General Land Office; Constitutional Law*, 2; *Land Department.*

1. The 4th section of the act of March 3d, 1843, concerning two "declaratory statements" of the same pre-emptor, is confined to pre-emptions of land subject to private entry. And under the 5th section, a declaratory statement on such land is valid if made at any time before another party commences a settlement or files a declaration. *Johnson* v. *Towsley*, 72.
2. Under the 12th section of the act of September, 1841, "to appropriate the proceeds of the sales of public lands and to grant pre-emption rights"—a pre-emptor who has entered the land, and at the time is owner in good faith and had done nothing inconsistent with the provisions of the law on the subject, may sell even though he has not yet obtained a patent. *Myers* v. *Croft*, 291.

PREFERENCE.

In fraud of the Bankrupt Act, what constitutes. *Toof* v. *Martin*, 40.

PRESIDENT'S PROCLAMATION. See *Pardon*, 2.

Of December 25th, 1868, granting pardon and amnesty unconditionally, &c., is a public act, which all courts of the United States are bound to take notice of and give effect to. *Armstrong* v. *United States*, 154.

PRESUMPTION.

1. A court will presume that a corporation entitled the Sulphur Spring *Land* Company was entitled to hold land. *Myers* v. *Croft*, 291.
2. When it will presume that a county having a right to issue bonds only on conditions precedently fulfilled, has fulfilled them. *Pendleton County* v. *Amy*, 298.

PRIZE-MONEY

1. If no act of Congress sanctions it, vessels of the navy of the United

PRIZE-MONEY (*continued*).

States have no right to it. Comes only in virtue of grant or permission from the United States. *The Siren*, 389.

2. No such act gives it to the navy in cases of joint capture by the army and navy. *Ib.*

3. In cases of such capture, the capture enures exclusively to the benefit of the United States. *Ib.*

PUBLIC LANDS. See *Commissioner of the General Land Office; Constitutional Law*, 2; *Land Department; Pre-emptor.*

PUBLIC WAR. See *Statutes of Limitations.*

In the case of a contract followed by a war—the contract containing a proviso that omission to bring suit within a certain time after an alleged cause of action occurs, shall be deemed conclusive evidence that no cause of action exists—the disability to sue imposed by the war relieves the plaintiff from the consequences of failing to bring suit within twelve months after the alleged cause of action accrued. *Semmes* v. *Hartford Insurance Company*, 158.

RAILWAY CORPORATIONS.

The respective obligations of railway companies running locomotives through cities, and of persons crossing the tracks in such places, stated. *Railway Company* v. *Whitton*, 270.

REBELLION, THE. See *Mandamus*, 2; *Georgia; Slaves; Treasury Regulation.*

At no time during the rebellion were the rebellious States out of the pale of the Union. Their constitutional duties and obligations remained unaffected by the rebellion. *White* v. *Hart*, 646.

RECEIPT.

Receiving payment of a sum of money for a disputed claim against the government and giving a receipt in full therefor, will, in the absence of proof of any mistake, be deemed a satisfaction of the claim *United States* v. *Clyde*, 35.

RECEIVERS OF PUBLIC MONEYS.

1. Bound to higher obligations for payment over than ordinary bailees. Their liability not discharged by their being forcibly robbed. *Boyden* v. *United States*, 17.

2. Nor by causes which might perhaps discharge it, when the money taken from them by superior force would not have been in their hands at all to be so taken, had they not kept it in their hands in violation of statutes which made it their duty to pay it over to the government. *Bevans* v. *United States*, 56; *Halliburton* v. *Same*, 63.

RECITALS. See *Evidence*, 8.

RELATION, DOCTRINE OF.

A fiction of law adopted by courts for the purposes of justice and not operating against strangers. Its operation explained and limited. *Gibson* v. *Chouteau*, 92.

REMOVAL OF CAUSES. See *Constitutional Law*, 11.

The act of March 2d, 1867, amending that of July 27th, 1866, "for the removal of causes in certain cases from State courts," is valid. *Railway Company* v. *Whitton*, 270.

RES GESTÆ.

What constitutes, illustrated. *Norwich Transportation Company* v. *Flint*, 3.

RES JUDICATA. See *New York Code of Procedure.*

A grant of letters of administration by a court having sole and exclusive power of granting them, and which by statute is obliged to grant them "to the relatives of the deceased, who would be entitled to succeed to his personal estate," is conclusive in other courts on a question of legitimacy; the grant having been made on an issue raised on the question of legitimacy alone, and there having been no question of minority, bad habits, alienage, or other disqualification simply personal. *Caujolle* v. *Ferrié*, 465.

SECRETARY OF THE TREASURY. See *Mandamus*, 2.

SHERIFF'S DEED. See *Evidence*, 8.

SHIP-OWNERS. See *Admiralty; Jurisdiction*, 10; *Lien; Practice*, 10.

1. The limitation of their liability for injuries from collision given by the act of March 3d, 1851, includes injuries to other vessels by collision as well as injuries to cargo on the offending vessel. *Norwich Company* v. *Wright*, 104.
2. Mode in which this limited liability may be discharged, stated. *Ib.*

SLAVES.

A note of which the consideration is a slave, slavery being at the time lawful by the law of the place where the note was given, is valid; though before the note became due, slavery be abolished and made unlawful. *White* v. *Hart*, 647; *Osborn* v. *Nicholson*, 654.

STATUTES. See *Tax Sales.*

Directions of, when to be considered mandatory and when directory only. *French* v. *Edwards*, 506.

STATUTES OF LIMITATION. See *Public War.*

1. Of a State do not apply to the United States, nor run against the State unless designated or of necessity. *Gibson* v. *Chouteau*, 92.
2. A condition in a contract of insurance that no suit or action shall be sustainable unless commenced within the *time of twelve months next after the loss shall occur*, and in case such action shall be commenced after the expiration of twelve months *next after such loss*, that the lapse of time shall be deemed conclusive evidence against the validity of the claim, does not operate in case of a war between the countries of the contracting parties, as does a *statute* of limitations in like case; that is to say, the term of twelve months, does not open and expand itself so as to receive within it the term of legal disability created by the war and then close at each end of that period so as to complete itself, as though the war had never occurred. *Semmes* v. *Hartford Insurance Company*, 158.

STATUTES OF LIMITATION (*continued*).

3. Are to be enforced, not explained away. *United States* v. *Wilder*, 254
When a debtor admits a certain sum to be due by him and denies that a larger sum claimed is due, a payment of the exact amount admitted cannot be converted by the creditor into a payment on account of the larger sum denied, so as to take the claim for such larger sum out of the statute *Ib.*

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, and construed.

August 7, 1789. *Pilotage.*
September 24, 1789. *Jurisdiction*, 1–5; 7–9; *Mandamus.*
March 3, 1797. *Marshal's Bond.*
May 10, 1800. *Receivers of Public Moneys.*
April 29, 1802. *Jurisdiction*, 6.
March 3, 1823. *Customs of the United States*, 2–5.
May 20, 1836. *Oregon.*
March 2, 1837. *Pilotage.*
September 4, 1841. *Pre-emptor*, 2.
March 3, 1843. *Pre-emptor*, 1.
August 6, 1846. *Receiver of Public Moneys.*
September 27, 1850. *Oregon.*
March 3, 1851. *Admiralty; Jurisdiction*, 10; *Practice*, 10; *Ship-owners.*
August 30, 1852. *Pilotage.*
March 3, 1855. *Practice*, 1.
March 3, 1857. *Receivers of Public Moneys.*
June 12, 1858. *Commissioner of the General Land Office.*
March 2, 1861. *Customs of the United States*, 6.
July 13, 1861. *Gold Coin.*
July 27, 1861. *Mandamus.*
May 20, 1862. *Gold Coin.*
July 17, 1862. *Captured and Abandoned Property.*
March 12, 1863. *Captured and Abandoned Property.*
June 8, 1864. *Pilotage.*
July 4, 1864. *"Appropriation, or Destruction of, or Damage to."*
April 9, 1866. *Civil Rights Bill.*
May 16, 1866. *Customs of the United States*, 6.
July 13, 1866. *Pilotage.*
July 18, 1866. *Customs of the United States*, 5.
July 25, 1866. *Pilotage.*
July 27, 1866. *Removal of Causes.*
February 22, 1867. *Landlord and Tenant.*
February 25, 1867. *Pilotage.*
March 2, 1867. *Removal of Causes.*
June 25, 1868. *Court of Claims.*
June 21, 1870. *District of Columbia.*
July 12, 1870. *Drake Amendment; Captured and Abandoned Property*, 3.

SUBROGATION.

1. A purchaser of real estate who after purchasing has paid off certain

SUBROGATION (*continued*).

unquestionable early incumbrances, but whose purchase has been afterwards set aside as a fraud on creditors, cannot, on his purchase being set aside, come into equity and ask either to be repaid the money which he applied in discharge of the incumbrances, or to be subrogated to the rights of their holders. *Railroad Company* v. *Soutter*, 517.

2. An insurer of goods, consumed and totally destroyed by accidental fire in course of transportation by a common carrier, is entitled, after he has paid the loss, to recover what he has paid, by suit in the name of the assured against the carrier. *Hall & Long* v. *The Railroad Companies*, 367.

SUPPLIES TO SHIP. See *Lien*.

TAX SALES.

A statutory provision, that the sheriff, in selling property upon a judgment recovered by the State against the property for delinquent taxes, shall *only sell the smallest quantity* of the property which any purchaser will take and pay the judgment and costs, is mandatory upon the officer and not directory merely. *French* v. *Edwards*, 506.

TENDER. See *Pleading*, 5; *Legal Tender*.

TERRITORIAL COURTS. See *Practice*, 9; *Utah*.

Distinguished from courts of the United States created under the judiciary powers of Congress. *Clinton* v. *Englebrecht*, 434.

TERRITORIES OF THE UNITED STATES, THE.

The theory upon which the various governments for have been organized, has been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress. *Clinton* v. *Englebrecht*, 434.

TRADE-MARK.

To entitle a name to equitable protection as a trade-mark, the right to its use must be exclusive, and not one which others may employ with as much truth as those who use it. *Canal Company* v. *Clark*, 311.

TREASURY REGULATION.

No. 22, of 11th September, 1863, forbidding the transportation of coin, &c., to rebel States, is valid and authorized by the act of May 20th, 1862. *Gay's Gold*, 358.

TROVER

Lies against a purchaser of personal property buying fraudulently in breach of a trust of it. *Kitchen* v. *Bedford*, 414.

USAGE.

1. Evidence of may be given to explain a written contract left by its terms undefined in an important point. *Robinson* v. *United States*, 363.
2. May be established by a single witness. *Ib.*

UTAH.

The Utah jury law of 1859 examined and considered in the light of the

UTAH (*continued*).
history of the Territories, and certain objections to it declared to be without foundation. *Clinton* v. *Englebrecht*, 434.

VERDICT. See *Pleading*, 1.
Effect of in curing defects in the declaration. *Boyden* v. *United States*, 17

WARRANTY. See *Insurance*, 2.

WAIVER OF NOTICE. See *Negotiable Paper*.