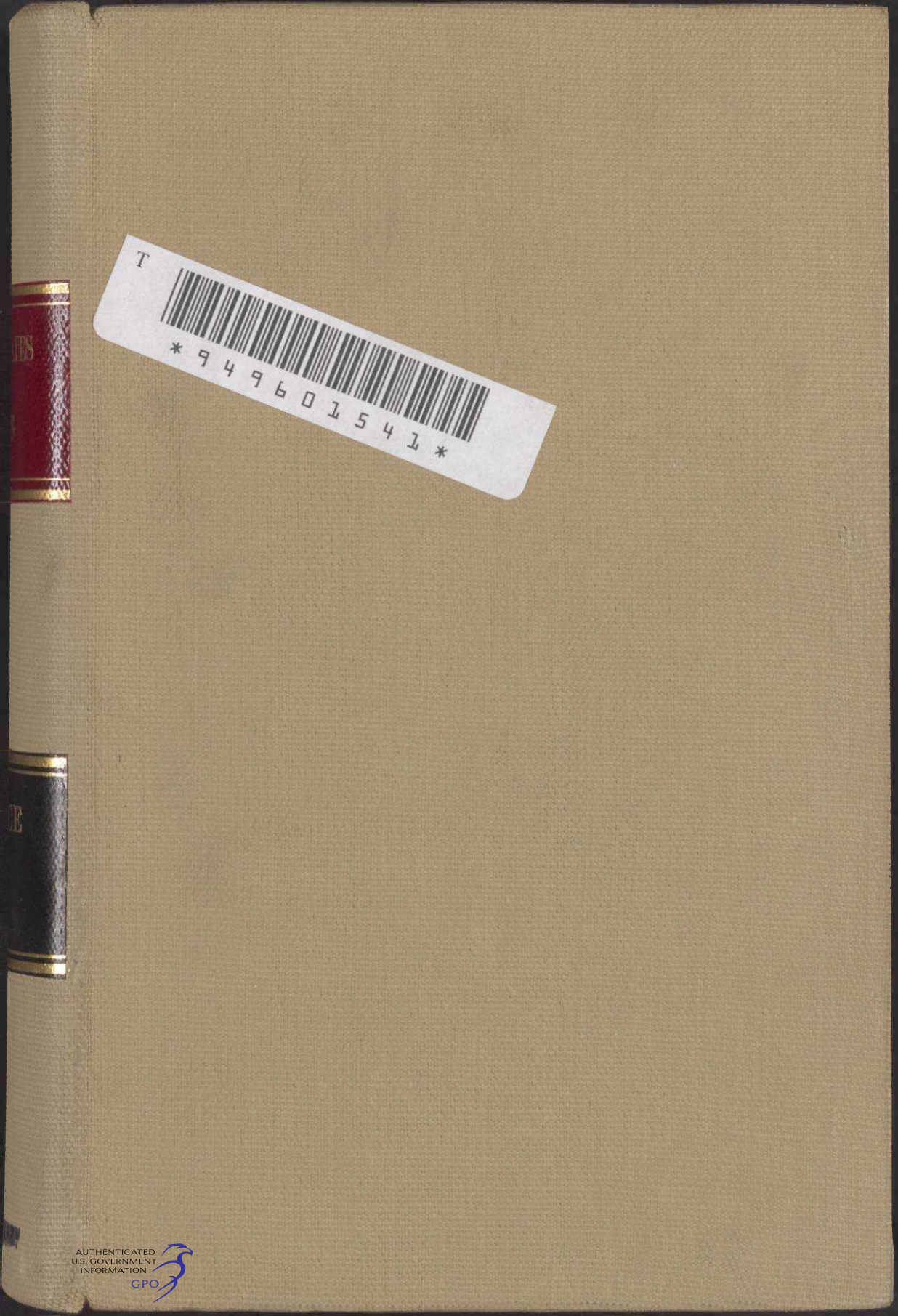

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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

DECEMBER TERM, 1871.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XIV.

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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.

ACT OF CONGRESS.

AN ACT

To fix the Time for Holding the Annual Session of the Supreme Court of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act the annual session of the Supreme Court of the United States shall commence on the second Monday of October in each year, and all actions, suits, appeals, recognizances, processes, writs, and proceedings whatever, pending or which may be pending in said court, or returnable thereto, shall have day therein, and be heard, tried, proceeded with, and decided, in like manner as if the time of holding said sessions had not been hereby altered.

Approved, January 24th, 1873.

MEMORANDA.

RESIGNATION OF MR. JUSTICE NELSON.

At the close of December Term, 1872, Mr. Justice Nelson, who during the whole term had been prevented, by indisposition, from attending court, resigned his commission. The following interesting correspondence, between himself and his brethren, took place, and was entered on the minutes of the court by its order:

Cooperstown, November 28th, 1872.

My dear Chief Justice:

The mail that carries these lines to you carries my resignation of the office of Associate Justice of the Supreme Court.

I part from my brethren with regret, and retire from an occupation which has been the height of my ambition for much the largest portion of my life, not from choice, but for the reason that age and infirmities have disabled me from the performance of a full share of its duties.

Please to communicate this to our associates, and believe me

Sincerely your friend,

S. Nelson.

Chief Justice Chase.

SUPREME COURT OF THE UNITED STATES,
WASHINGTON, December 7th, 1872.

DEAR BROTHER NELSON:

We have received with deep sensibility your letter announcing your resignation of the post you have so long and so worthily filled. We greatly regret that we are no more to have the benefit of your long experience, mature wisdom, and large learning in conference, and that the profession and the country will lose the fruits of them in the decisions of the court.

You carry with you in your retirement a reverent and universal affection given to few men. The bar are unanimous in their eulogies, and we, your brethren of the bench, are not behind the bar in our sense of your great services, your sterling integrity, and your constant benevolence.

May our Father in heaven give you yet many days in which to enjoy the affections of family, friends, and countrymen which cluster around you.

Yours faithfully,

S. P. CHASE, Chief Justice.
NATHAN CLIFFORD, Associate Justice.
N. H. SWAYNE " "
SAMUEL F. MILLER, " "
DAVID DAVIS, " "
STEPHEN J. FIELD, " "
W. STRONG, " "
JOSEPH P. BRADLEY, " "

A few days after the resignation of the venerable Justice had become publicly known a meeting of the bar was held, at which, on motion of the Honorable REVERDY JOHNSON, the Honorable CALEB CUSHING was called to the chair, and DANIEL WESLEY MIDDLETON, Esq., appointed secretary.

After expressions from several of the speakers, indicative of the deep regrets of the profession at the event by which the meeting had been caused, and of affectionate respect for the retiring Justice, with every good wish for his happiness, it was ordered that a letter should be prepared, suitable to the occasion, and be left in the office of the Clerk of the Court for the signatures of such members of the bar as should desire to sign it, and be afterwards sent to Mr. Justice NELSON, at his residence at Cooperstown, N. Y. All this was accordingly done. The letter, which was transmitted by Mr. CUSHING and Mr. MIDDLETON, was as follows:

WASHINGTON, 13th December, 1872.

TO THE HON SAMUEL NELSON.

SIR: We desire to express to you the sincere and deep regret with which by reason of your retirement we are compelled to part with you as a Justice of the Supreme Court.

During many years of practice before you, we have had ample opportunity to appreciate and to admire your learning, sagacity, impartiality, and

integrity; your kindly deportment towards the members of the bar, your elevated conception of justice and of right; in a word, those pre-eminent judicial qualities which have distinguished your career on the bench.

Though no longer present in the court, the remembrance of you will remain fresh in our minds. Your opinions, as published in the reports, constitute an imperishable monument of fame. And you carry with you into private life the universal respect of the people of the United States, including the personal respect and admiration of

Your affectionate friends,

GEORGE H. WILLIAMS, Attorney-General,
REVERDY JOHNSON (Md.),
J. S. BLACK (Pa.),
P. PHILLIPS (D. C.),
C. N. POTTER (N. Y.),
SAMUEL F. PHILLIPS, Solicitor-General.
BENJ. R. CURTIS (Mass.),
GEO. F. MOORE (Texas),
J. M. CARLISLE (D. C.),
GEO. F. EDMUNDS (Vt.),
A. J. PARKER (N. Y.),
JOEL GILES,
J. HUBLEY ASHTON (Pa.),
N. P. CHIPMAN (D. C.),
JOHN V. L. PRUYN (N. Y.),
LOUIS JANIN (La.),
L. P. POLAND (Vt.),
JAMES H. EMBRY (Ky.),
F. FRELINGHUYSEN (N. J.),
CHARLES SUMNER (Mass.),
CAUSTEN BROWNE (Mass.),
J. H. B. LATROBE (Md.),
C. COLE (California),
H. L. DAWES (Mass.),
JAMES B. BECK (Ky.),
GEORGE F. HOAR (Mass.),
WM. M. MERRICK (Md.),
M. C. KERR (Ind.),
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JOHN B. HAWLEY (Ill.),
H. C. BURCHARD (Ill.),
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HORACE MAYNARD (Tenn.),
WM. S. HOLMAN (Ind.),
R. T. W. DUKE (Va.),
R. C. PARSONS (Ohio),
R. T. MERRICK (D. C.),
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T. J. D. FULLER (D. C.),
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C. CUSHING (Mass.),
C. H. HILL (Mass.),
HENRY SHERMAN,
WM. T. DITTOE (Iowa),
HENRY COOPER (Tenn.),
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THOS. M. NORTH (N. Y.),
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CHAS. O'CONOR (N. Y.),
A. G. RIDDLE (D. C.),
M. H. CARPENTER (Wis.),
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JNO. H. REYNOLDS (N. Y.),
TH. DONALDSON (Md.),
GEO. WM. BROWN (Md.),
F. W. BRUNE (Md.),
S. T. WALLIS (Md.),
S. S. FISHER (O.),
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WAYNE MCVEIGH (Pa.),
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JOSHUA M. VAN COTT (N. Y.),
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CHARLES P. CROSBY (N. Y.),
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STEPHEN P. NASH (N. Y.),
WM. ALLEN BUTLER (N. Y.),
WM. M. PRITCHARD (N. Y.),
T. C. T. BUCKLEY (N. Y.),
J. W. WALLACE.

Of this letter the venerable Justice was pleased to express his

appreciation in the following reply, addressed to Mr. CUSHING and Mr. MIDDLETON, by whom, as already said, the letter of the bar had been sent to him:

COOPERSTOWN, January 20th, 1873.

GENTLEMEN:

Your favor of the 14th ult., inclosing a letter of one hundred and twenty-one distinguished members of the bar of the Supreme Court of the United States relating to my resignation of the office of Associate Justice of that court, has been received.

I am deeply grateful for the too favorable opinion expressed of my judicial services, and of personal regard and friendship. So general a concurrence of eminent members of the bar, who have personally witnessed the administration of justice in the court, and who, themselves, largely participated in it, in the expression of a favorable opinion of myself, as a humble member of it, cannot but affect me most sensibly and gratefully. Most of the names are familiar to me, and many of them I recognize as intimate associates and friends; and each and all of them have my earnest prayer that their useful lives may be long and happy.

You, gentlemen, have my hearty thanks for the kind and friendly manner in which you have communicated this ever to be remembered tribute of my professional brethren.

I am, with great respect and regard, your friend,

S. NELSON

THE HONORABLE C. CUSHING, Chairman,
D. W. MIDDLETON, Esquire, Secretary.

GENERAL RULES.

SUBSTITUTION TO THE 35TH RULE IN ADMIRALTY.

ORDERED, That the 35th rule in Admiralty be abolished, and the following substituted in its stead, viz.:

The stipulations required by the last preceding rule, or on appeal, or in any other admiralty or maritime proceeding, shall be given and taken in the manner prescribed by rule fifth as amended.

[Promulgated May 6th, 1872.]

AMENDMENT TO THE 21ST RULE.

ORDERED, That the 21st rule be hereby amended, and that it shall hereafter be as follows:

SECTION 1. Only two counsel shall be heard for each party on the argument of a cause.

SECTION 2. Two hours on each side shall be allowed to the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side, at their discretion: Provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments.

SECTION 3. The counsel for the plaintiff in error, or appellant, shall file with the clerk of the court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

SECTION 4. This brief shall contain, *in the order here stated:*

I. A concise abstract, or statement of the case, presenting succinctly the questions involved, and the manner in which they are raised.

II. An assignment of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged, and, in cases brought up by appeal, the assignment shall state, as specifically as may be, in what the decree is alleged to be erroneous. If error is assigned to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

III. A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record, and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

SECTION 5. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused.

SECTION 6. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

SECTION 7. Counsel for a defendant in error, or an appellee, shall file with the clerk twenty printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff or appellant, except that no assignment of errors is required, and no statement of the case, unless that presented by the plaintiff or appellant is controverted.

SECTION 8. Without such an assignment of errors, counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, though the court, at its option, may notice a plain error not assigned.

SECTION 9. When, according to this rule, a plaintiff in error, or an appellant, is in default, the case may be dismissed on motion, and when a defendant in error, or an appellee, is in default, he will not be heard, except on consent of his adversary, and with request of the court.

SECTION 10. When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

This rule, as amended, shall take effect on the 1st day of January, 1873.

[Promulgated November 16th, 1872.]

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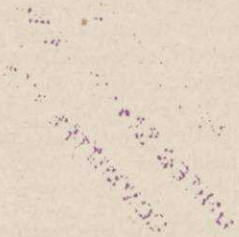
Smith *v.* Mason, Assignee,	419	November 8, 1871,	November 20, 1871.
Steines *v.* Franklin County,	15	April 5, 1872,	April 15, 1872.

NAME OF THE CASE.	PAGE.	WHEN ARGUED.	WHEN ADJUDGED.
The Bridgeport,	116	January 24, 1872,	February 19, 1872.
" Cayuga,	270	January 23 and 24, 1872,	April 1, 1872
" Continental,	345	February 1, 1872,	February 26, 1872.
" Delaware,	579	December 8 and 11, 1872,	January 29, 1872.
" Java,	189	March 25, 1872,	April 8, 1872.
" Key City,	653	November 18, 1872,	December 9, 1872.
" Laura,	336	February 15, 1872,	March 4, 1872.
" Mabey and Cooper,	204	April 25, 1872,	May 6, 1872.
" Merrimac,	199	April 9, 1872,	May 6, 1872.
" Scotia,	170	February 27 and 28, 1872,	March 25, 1872.
" Steamer Webb,	406	December 13, 1871,	January 22, 1872.
" Thames,	98	February 5, 1872,	March 4, 1872.
" Vaughan and Telegraph,	258	January 24, 1872,	March 4, 1872.
Traders' Bank *v.* Campbell,	87	March 1, 1872,	April 8, 1872.
Turner *v.* Smith,	553	October 31, 1872,	November 11, 1872.
United States *v.* Ballard,	457	March 6, 1872,	April 8, 1872.
" " *v.* Crusell,	1	February 26, 1872,	March 25, 1872.
" " *v.* Hunt,	550	November 7 and 8, 1872,	November 18, 1872.
" " *v.* Justice,	535	November 8, 1872,	November 25, 1872.
" " *v.* Powell,	493	October 29, 1872,	November 11, 1872.
Ward *v.* United States,	28	January 11 and 22, 1872,	February 26, 1872.
Willard *v.* Presbury,	676	February 25, 1870,	March 7, 1870.



DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1871.

UNITED STATES *v.* CRUSELL.

A judgment of the Court of Claims giving a loyal owner the proceeds of cotton seized under the Abandoned and Captured Property Act, affirmed; the case tending generally, though not in the most specific manner, to show that the cotton had been sold and its proceeds paid into the treasury; and an opposite conclusion being irreconcilable with the presumption that the military and fiscal officers of the United States had done their official duty.

PROPERTY OF UNITED STATES SENATE COMMITTEE COPY

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

The "Abandoned and Captured Property Act"* 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 against the United States, and authorized also the sending of such property to any place of sale within the loyal States, and the sale of it at auction to the highest bidder. "*And the proceeds thereof*," says the act, "shall *be paid into the Treasury of the United States.*" "The treasurer," adds the act, "*shall cause a book of accounts to be kept showing from whom such property was received*, and the cost of transportation, *and proceeds of the sale thereof.*"

The fourth section enacts:

"That all property coming into any of the United States not

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* 12 Stat. at Large, 820.

declared in insurrection as aforesaid, from within any of the States declared in insurrection, through or by any other person than an agent duly appointed under the provisions of this act, or under a lawful clearance by the proper officer of the Treasury Department, shall be confiscated to the use of the government of the United States. And any agent or agents, person or persons, by or through whom such property shall come within the lines of the United States unlawfully as aforesaid, shall be guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum not exceeding $1000, or imprisoned for any time not exceeding one year, or both, at the discretion of the court."

The sixth section is as follows:

"It shall be the *duty* of every officer or private of the regular or volunteer forces of the United States, or any officer, sailor, or marine in the naval service of the United States upon the inland waters of the United States, who may take or receive any such abandoned property, from persons in such insurrectionary districts, or have it under his control, to turn the same over to an agent appointed as aforesaid, who shall give a receipt therefor; *and in case he shall refuse or neglect so to do, he shall be tried by a court-martial, and shall be dismissed from the service, or, if an officer, reduced to the ranks, or suffer such other punishment as said court shall order with the approval of the President of the United States.*"

The act also provides that any person asserting himself to have been owner of any such abandoned property "may 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, shall 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 one Crusell, a loyal citizen of Georgia, presented his petition to the Court of Claims, claiming the net proceeds of 73 bales (about 37,500 lbs.) of cotton which he

alleged belonged to him, and had been stored at Atlanta, Georgia, where, on the capture of the place by General Sherman, in September, 1864, it had been seized by the United States, turned over to an agent of the Treasury Department, sold by him, and the net proceeds paid into the Treasury. Owing to the fact, as was testified, that the quartermaster in charge of captured and abandoned property had left Atlanta before the claimant's cotton had been delivered at the depot there, the claimant had not procured a receipt.

The findings of the court showed that a large amount of cotton had been sold and the proceeds thereof paid into the treasury. The question in the case was whether these 73 bales were in fact so included.

They were in the possession of the quartermaster in charge of abandoned and captured property at Atlanta, in October, 1864. This quartermaster in that month shipped to the officer in charge of military railroad transportation, at Nashville, 130,605 pounds of cotton; but whether the cotton of the claimant was included in the shipment was not shown. It seemed, however, that the officer in charge turned over to the treasury agent at Nashville 1382 bales and a large quantity of loose cotton, coming from Atlanta, Chattanooga, and points beyond Chattanooga, in Georgia. The cotton received by this agent was forwarded to the supervising agent at Cincinnati, and sold by him, and the proceeds paid into the treasury.

It was shown that in the month of December, 1864, there was a sale of cotton at Cincinnati, and sundry bales of cotton marked with the claimant's mark were sold. Whether the person conducting the sale was the supervising agent of the Treasury Department did not appear.

The Court of Claims found on this case that the 73 bales of the petitioner had been sold and the proceeds paid into the treasury, and the identity of the several lots of cotton coming from Atlanta having been lost, the court gave the claimant judgment for a *pro rata* amount of the proceeds of all the cotton seized at that place.

From this decree the United States appealed.

Mr. B. H. Bristow, Solicitor-General, and Mr. C. H. Hill, Assistant Attorney-General, for the appellants, contended that the 73 bales were not sufficiently traced, and that there was no sufficient identification of them; nor any sufficient evidence that the money had been paid into the treasury, and that whether or not the Court of Claims had done wrong to give a *pro tanto* judgment.

Messrs. Hughes, Denvers, and Peck, contra:

One of two conclusions is inevitable, either that the army and other officers did their duty, or that they committed an offence for which they were liable to be degraded and otherwise punished. The first presumption is a natural one; the last, not one to be made in the face of statutes denouncing fines, penalties, confiscation, imprisonment, degradation, and dismissals from service against every officer or person who should attempt to move this property, except in the authorized manner. The government asks the court to believe that the cotton did not take the only course which under the circumstances it was possible for it to take.

If the cotton was unidentified, the reason was that the quartermaster was absent from Atlanta when it was delivered at the depot, and when it was shipped; and therefore it went forward unidentified on the books of the treasury agent, as did other bales. The *pro rata* judgment was a right one, in view of the case.

The CHIEF JUSTICE delivered the opinion of the court.

Presuming that the officers of the government performed their duty, there can be no doubt that the quartermaster at Atlanta forwarded to the officer in charge of military railroad transportation the cotton of the claimant; and that this officer turned over the cotton to the agent at Nashville, by whom it was forwarded to Cincinnati and sold by the supervising agent there. The presumption in this case is strengthened by the fact that heavy statutory penalties would be incurred by neglect of duty. There is nothing in the case to repel this presumption. If any evidence to this effect exists,

it must be contained in the books of the Treasury Department, and these are under the control of the defendant.

We think, therefore, that the conclusion of the Court of Claims, that the proceeds of the 73 bales of cotton belonging to the claimant were paid into the treasury, and that the claimant was entitled to judgment, was right.

JUDGMENT AFFIRMED.

Mr. Justice DAVIS, with whom concurred Mr. Justice SWAYNE and Mr. Justice MILLER, dissenting.

In my opinion, the burden of proof in this case is on the claimant to show that the money which he seeks to obtain under the Captured and Abandoned Property Act has been paid into the treasury. The court, in its opinion, throws the burden of proof, on this point, on the United States, and on that account I am constrained to dissent from the judgment in the case.

COCKROFT *v.* VOSE.

The court reiterates the proposition that unless it can be seen from the record that a State court *decided* the question relied on to give this court jurisdiction, the writ of error will be dismissed.

MOTION by *Mr. E. C. Benedict*, to dismiss a writ of error to the Supreme Court of New York, taken under the assumption that the case was within the 25th section of the Judiciary Act; a section abundantly known to most lawyers practicing in this court, but which as it makes the basis of the judgment in this and several cases which follow, is partially copied for the benefit of any who do not at all times recall its phraseology.

"SEC. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had,

Statement of the case.

"Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is AGAINST their validity;

"Or where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is IN FAVOR of such their validity;

"Or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is AGAINST the title, right, privilege, or exemption, specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute, or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error."

The case was thus:

The State of New York passed "An act to provide for the collection of demands against ships and vessels," and authorizing warrants of attachment and seizure of the vessel, much in the style of admiralty proceedings. Under this act one Vose, professing to have claims against the vessel, had a warrant issued and the vessel seized. For the purpose of discharging the vessel from the custody of the sheriff, and in pursuance of the statute, one Cockroft gave his bond to Vose, whereby he became bound to pay to Vose the amount of all such claims and demands "as shall have been exhibited, which shall be established to have been subsisting liens" upon the vessel pursuant to the statute above mentioned. On this bond Vose brought the suit below; setting forth in his declaration or petition the warrant, seizure, and giving of the bond sued on; all spoken of as having been made in pursuance of the statute.

The defence, which did not deny in any way the validity of the statute, though it professed not to know more than that there had been a "pretended seizure," and a discharge, chiefly relied on the alleged fact that the supplies furnished had not been furnished on the credit of the vessel, but on

the credit of the master exclusively. The case was tried upon that issue, and judgment entered in favor of the plaintiffs. From this judgment the defendants appealed to the General Term, by which the judgment was affirmed. From that judgment an appeal was taken to the Court of Appeals, which affirmed the judgment, and on the remittitur from the Court of Appeals final judgment was entered in the Supreme Court in favor of the plaintiffs.

The published opinions of the Court of Appeals showed that the constitutionality of the statute was not raised in the Supreme Court or in the General Term, and was discussed for the first time in the Court of Appeals. It was there argued by counsel that the obligors having given the bond and got the benefits of the statute by having their vessel released, were estopped to deny the validity of the statute under which they took that benefit. In the decision of the Court of Appeals the opinion is expressed that the statute was invalid, as being against the provision of the United States.

Messrs. J. M. Carlisle and C. N. Black, in support of the motion to dismiss:

The State statute is plainly void, because it infringes upon the exclusive jurisdiction of the Federal courts.* Now the face of this record shows that the Court of Appeals sustained the validity of this State statute. What reasons the judges may have assigned in their opinions for what they did is unimportant. The important matter is, that if this judgment is enforced, the obligors in the bond will be compelled to pay a judgment founded upon an unconstitutional and void State statute.

The jurisdiction of the Supreme Court cannot be ousted by a State court assigning reasons for supporting a judgment founded on an unconstitutional statute, that do not in words declare the law constitutional. Does the plaintiff recover under a plainly unconstitutional and void statute? That is

* The Moses Taylor, 4 Wallace, 411; The Hine, Ib. 555.

the point. When the whole question is before it by the record, this court will look to nothing but the decision simply for or against. On any other principle, State courts, at their option, might oust the Supreme Court of its jurisdiction in this class of writs.

In this particular case the Court of Appeals, while admitting the invalidity of the statute, gives it validity, existence, and effect; an apparently paradoxical condition of things, that can only be relieved from inconsistency by holding that the State court decided in favor of the validity of the statute, irrespective of, or in spite of, its *obiter dictum* opinion, or in spite of an opinion then rendered by it, that can be treated only as *obiter dictum* under the circumstances.

Messrs. Benedict and Benedict, contra.

Mr. Justice MILLER delivered the opinion of the court.

It does not appear to us that the Court of Appeals in which the case was decided, held the State statute to be valid, and if it did not the jurisdiction of this court cannot be invoked to declare it invalid.

The suit before us was an action on a bond given by the owners of the vessel and their sureties to release her when she had been attached in the original proceeding to enforce the lien, and several questions were raised in the defence, none of which seem, from the pleading, or anything else in the record, to have been founded on the invalidity of the statute. One of these questions evidently was whether the credit was given to the owner personally, or to the vessel; and another was whether, after the bond had been given and the vessel released, the obligors in the bond were not estopped to deny the validity of the proceeding in the attachment suit.

Now, if the court decided the case on this latter ground, as it may have done, or on any of the other grounds except the validity of the statute, we have no jurisdiction.

The inference from the condition of the record, that the court did not decide the statute valid, might receive confir-

mation from the opinion of that court, if we were at liberty to consider it, for it is there held that the statute is invalid for the very reason given here by the plaintiff in error why *we* should hold it invalid.

On the whole, we do not find, from anything in the record of this case, that the question relied on here was decided against the right claimed by plaintiff in error, and the writ is, therefore,

DISMISSED.

BANK OF WEST TENNESSEE *v.* CITIZENS' BANK OF LOUISIANA.

Where a decision of the highest court of a State in a case is made on its settled pre-existent rules of general jurisprudence, the case cannot be brought here under the 25th section; notwithstanding the fact that the State has subsequently made those rules one of the articles of its constitution, and the case be one where if the decision had been made on the constitution *alone*, a writ of error under the said section might have lain.

MOTION by *Mr. Edward Janin* (*Mr. T. J. Durant opposing*) to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of the State of Louisiana, taken under an assumption that the case fell within the 25th section of the Judiciary Act, quoted *supra*, pp. 5, 6.

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

The plaintiff in error brought the suit against the defendant in error in the Fifth District Court of New Orleans, to recover the sum of $93,380, 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 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

Statement of the case in the opinion.

"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 *Bethel* 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.

CASE DISMISSED.

PALMER *v.* MARSTON.

The principle of the preceding case affirmed in the same sort of example.

MOTION by *Mr. W. S. Holman* (*Mr. E. T. Merrick opposing*) to dismiss a writ of error to the Supreme Court of the State of Louisiana, taken on the assumption that the case fell within the 25th section of the Judiciary Act, quoted *supra*, pp. 5, 6.

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

Palmer sued Marston in the District Court of the parish

* Hunley et al. *v.* Scott, 19 Lou. Ann. 161; King *v.* Huston, Hubbel & Co., Ib. 288; McCracken *v.* Pool, Ib. 359; Norton *v.* Dawson et al., Ib. 464.

† 10 Wallace, 537.

Statement of the case in the opinion.

of East Feliciana, upon a promissory note made by Marston to J. O. Fuqua, and by him indorsed to Palmer, dated October 1st, 1863, for $1687, and payable one day after date, with interest at the rate of eight per cent. per annum from date until paid. The defendant answered that $1000 of the note had been paid, and that $949 of it was a part of the purchase price of an African negro claimed to be a slave, and that the slave had been freed by sovereign authority, and that hence the note, to the extent of the amount last named, was null and void.

The court held that, "whilst the law remains as pronounced by the late Supreme Court in the case of *Wainwright* v. *Bridges*,* and other cases, Fuqua, were he suing to recover the amount of the note, which is the subject of this controversy, would be defeated by this plea of failure of consideration. Therefore, the plaintiff must fail also." Judgment was given for the defendant. The case was appealed to the Supreme Court of the State, and that court affirmed the judgment.

In the opinion of the court, as drawn up by one of the judges, it is said:

"The balance of the note in suit in this action was clearly given in renewal of obligations arising from the sale of a slave, and is vitiated by this fact. It cannot be recovered under our jurisprudence, as settled in *Wainwright* v. *Bridges*, and the numerous cases which have followed that decision. Under the rule established in the case of *Groves* v. *Clark*,† it is immaterial whether the plaintiff became a holder before or after maturity. We have been asked by counsel to pass, in this case, upon the validity under the Constitution of the United States of the article 128 of the Louisiana constitution of 1868, which declares that contracts for the sale of persons are null and void, and shall not be enforced by the courts of this State. We do not feel it necessary to do this. The rule, that such contracts will not be enforced by the courts of this State, was established in our jurisprudence in the year 1867. It was firmly settled and repeat-

* 19 Annual, 234.

† 21 Id. 567.

edly acted upon before the adoption of the constitution of 1868, and has been invariably adhered to ever since. The question whether this article 128 be valid or invalid as an act of legislation, and in relation to article 10 of the Constitution of the United States, may possess considerable speculative interest, but we do not perceive that it can, in this case, have a practical influence upon the result. For the reasons given it is ordered and adjudged that the judgment appealed from be affirmed with costs."

It thus appears that the provision of the State constitution upon the subject of slave contracts was in no wise drawn in question. The decision was governed by the settled principles of the jurisprudence of the State. In such cases this court has no power of review. No right was claimed by either party under any State law or the constitution of the State which was resisted upon the ground of repugnancy to the Constitution, or a treaty or law of the United States, the decision having been in favor of the validity of the right so asserted. There is certainly no foundation for such a complaint on the part of the plaintiff in error. In the absence of such a claim and decision we cannot take cognizance of the case. This element, which is indispensable to our jurisdiction, is wanting. Substantially the same question arose in *The Bank of West Tennessee* v. *The Citizens' Bank of Louisiana*, heretofore decided.* The writ of error was dismissed for want of jurisdiction. The same disposition must be made of this case.

WRIT DISMISSED.

SEVIER *v.* HASKELL.

The Supreme Court of Arkansas ordered judgment for a plaintiff suing on a note given for the price of slaves. Subsequently to this the State of Louisiana ordained as part of its constitution, "that all contracts for the sale or purchase of slaves were null and void, and that no court of the State

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* *Supra*, p. 9, the preceding case.

Statement of the case in the opinion.

should take cognizance of any suit founded upon such contracts, and that no amount should ever be collected or recovered on any judgment or decree which had been, or should thereafter be, rendered on account of any such contract or obligation." On application by the defendant in the suit to supersede and perpetually stay all proceedings on the judgment against him, the Supreme Court overruled the application. The case being brought here under an assumption that it was within the 25th section, *held* that it was not so; and the case was dismissed for want of jurisdiction accordingly.

MOTION by *Mr. S. W. Williams* to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of Arkansas, taken under an assumption that the case fell within the 25th section of the Judiciary Act, quoted *supra*, pp. 5, 6. The plaintiff in error was Sevier, administrator of Jordan; the defendant in error Haskell, administrator of Smith.

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

The case, so far as it is necessary to state it, was a proceeding in equity to foreclose a mortgage given by the intestate of Sevier to the intestate of Haskell, to secure the payment of four promissory notes therein described, and the accruing interest. The answer set up as a defence that the consideration of the notes was the purchase of eighty-five slaves by Jordan of Smith; that the slaves had since become emancipated and lost to the estate of Jordan, and that the consideration of the notes had thus wholly failed. The Circuit Court, at the May Term, 1867, decreed that the bill should be dismissed and the complainant pay the costs. The case was appealed to the Supreme Court of the State, and that court, at the December Term, 1867, reversed the decree and remanded the cause to the Circuit Court, with directions to enter a decree for the complainant, which was accordingly done.

The plaintiffs in error applied to the Circuit Court at the November Term, 1868, for an order that all further proceedings upon the decree should be superseded and perpetually stayed, for the reason that, on the 11th day of February, 1868, since the decision of the Supreme Court of the State

in the case was made, it was ordained by the constitution of the State then adopted, that all contracts for the sale or purchase of slaves were null and void, and that no court of the State should take cognizance of any suit founded upon such contracts, and that no amount should ever be collected or recovered on any judgment or decree which had been, or should thereafter be, rendered on account of any such contract or obligation. The Circuit Court overruled the application, and the plaintiffs in error excepted. The case was again taken to the Supreme Court of the State and that court affirmed the decision of the lower court.

Where the judgment of a State court is brought into this court for review, to warrant the exercise of the jurisdiction invoked, the case must fall within one of three categories—(1) There must have been drawn in question the validity of a treaty or statute of—or an authority exercised under—the United States, and the decision of the State court must have been against the validity of the claim which either is relied upon to maintain; (2) or there must have been drawn in question a statute of, or an authority exercised under, a State, on the ground of their being repugnant to the Constitution, a law or treaty of the United States, and the decision must have been in favor of the validity of the State law or authority in question; (3) or a right must have been claimed under the Constitution or a treaty or law of, or by virtue of a commission held or authority exercised under the United States; and the decision must have been against the right so claimed.*

The case before us is within neither of these classes. Before the State constitution of 1868 was adopted, the Supreme Court must have proceeded upon the general principles of the jurisprudence of the State. Whether in applying those principles that tribunal reached the proper conclusions, cannot be a subject of consideration by this court. We have no authority to enter upon such an inquiry. After the con-

* 14 Stat. at Large, 386.

stitution of 1868 was adopted, the plaintiffs in error relied upon that, to annul the decree which had been rendered. The Supreme Court affirmed the validity of the decree, the provision in the State constitution relied upon to the contrary notwithstanding.

Here, again, no Federal question is presented. What considerations controlled the judgment of the court is not disclosed in the record. If it were held, as it well may have been, that the provision in the Federal Constitution which forbids any State to pass a law impairing the obligation of contracts, protects from the operation of the State constitution slave contracts made prior to its adoption, as the contract here in question was sustained and enforced, still no question arose of which this court can take cognizance. The record exhibiting no such question, the motion must prevail.

WRIT DISMISSED.

STEINES *v.* FRANKLIN COUNTY.

1. The decision of the highest court of a State in granting or refusing to grant a motion for a rehearing in an equity suit is not re-examinable in this court under any writ of error which the court can issue to review the judgment or decree of a State court.
2. Where the record only shows that a particular judgment was given by the highest State court, no writ under the 25th section lies if the judgment *may* have been given on grounds which that section does not make cause for error, as well as upon some ground which it does so make.

MOTION by *Mr. F. A. Dick* (*Messrs. Crews and Letcher opposing*) to dismiss a writ of error to the Supreme Court of Missouri; taken on an assumption that the case came within the 25th section of the Judiciary Act, quoted *supra*, pp. 5, 6.

Mr. Justice CLIFFORD delivered the opinion of the court.

Jurisdiction may be exercised by this court in three classes of cases where a final judgment or decree in any suit in the

highest court of a State in which a decision in the suit could be had, is brought here by virtue of a writ of error to the State court, as authorized to be issued under the act to amend the act to establish the Federal judicial courts.*

First. Where is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity.

Secondly. Where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity.

Thirdly. Where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of, or commission held, or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority.

Certain taxpayers of the county complained in the State court that the County Court of the county entered into a written agreement with the parties therein named to construct a certain county road and to pay the contractors for the work and materials in constructing the same the several sums and at the rates therein specified; that the County Court agreed to make the payments in the bonds of the county, and that the contractors agreed to accept the bonds of the county in payment of all claims under the contract; that bonds of the county to the amount of two hundred and five thousand dollars were accordingly issued by the County Court, and were, by the authority of the County Court, delivered to the contractors; that the County Court did not, before making the contract, submit the amount of the proposed expenditure to the voters of the county at any election whatever, general or special, at any time or in any manner,

* 1 Stat. at Large, 85; 14 Id. 386.

Statement of the case in the opinion.

as required by the law of the State in such case made and provided.

Complaint is also made that the County Court afterwards, on the second of July, in the same year, passed an order making the bonds transferable by the indorsement of the contractors, and directed that the clerk should indorse the order on the back of the bonds; and that the County Court on the following day also ordered the county clerk to reissue one hundred and eighty-six bonds in substitution of the same number previously delivered, to correct an error in their execution; and also that the County Court, on the sixth of May, in the following year, ordered the county clerk to issue bonds for the purpose of exchanging and taking up all bonds previously issued for the construction of such roads and bridges, whether completed or in the progress of construction, it being understood that all bonds issued prior to that date should be cancelled and destroyed, and that warrants should also issue for the payment of such interest as had accrued to that time, and the charge is that bonds were issued under that order to an amount equal to the whole amount of the bonds held by the contractors and all other holders, amounting in the aggregate, reckoning both issues, to six hundred thousand dollars, and that warrants for the payment of interest to that date, amounting to thirty thousand dollars, were also issued, and yet the complainants charge that the bonds previously issued have never been cancelled, delivered up, or destroyed, but that they remain to this day a charge against the property-holders and taxpayers of the county.

They also charge that the original agreement was, by collusion between the judges of the County Court and the contractors, fraudulently antedated and made to bear a rate of interest greater than the legal rate at the time the agreement was actually executed, and they also charge the fact to be that the road is not made nor the work performed in accordance with the contract and specifications, and that the County Court, or a majority of the judges thereof, acting collusively with the contractors, fraudulently connived at these flagrant

Statement of the case in the opinion.

violations of the contract to the great injury and oppression of the property-holders and taxpayers of the county.

Other acts equally fraudulent and oppressive are also charged against the respondents in the bill of complaint, and the complainants finally allege that the contract and agreement, and all the orders of the County Court based upon the same or in relation thereto, are without authority of law and contrary to the provisions of the statute applicable in such cases, and that the bonds are fraudulent, null, and void; and they pray that an order may be made declaring that the contract and agreement, and all the orders of the County Court based upon the same or in relation thereto, are null and void and of no effect, and that the parties holding the bonds shall deliver the same up, that the same may be cancelled, annulled, and held for nought, and that an injunction may be issued enjoining and restraining the respondents from negotiating, selling, transferring, or disposing of the bonds, and enjoining and restraining the county and the county treasurer from paying the same, either interest or principal.

Service was made and the respondents appeared and filed an answer, in which they admit that the County Court did not submit the amount of the proposed expenditure to the voters of the county, but they deny that it was required by law that the County Court should do so before making the contract for the construction of the road. They admit that interest was paid as alleged and that the bonds of the county in lieu of those first issued were reissued to the contractors, but they aver that it is not true that bonds of the county were reissued to any other persons, and they deny that the bonds of the county were issued to any greater amount than two hundred and five thousand dollars, or that any greater amount was ever paid to the contractors on account of the road described in the contract; and they also aver that a like amount of bonds in lieu of those reissued were at the same time given up, cancelled, and retired.

Apart from the merits they also deny that the agreement was antedated as alleged, and they also controvert each and

every illegal and irregular act set up in the bill, and specifically deny all charges of fraud, collusion, and want of good faith therein alleged and imputed, and they aver that they have complied in all respects with their obligations and duties in the premises.

Amendments were afterwards made to the bill and new parties respondents were added, and the complainants filed the general replication and the parties proceeded to take proofs, and having been fully heard upon the merits, the court made the following finding of facts: That none of the allegations of fraud or collusion are proved, and that no fraud, collusion, or conspiracy existed as charged; that the bonds in question were not, nor were any of them, issued without authority of law, and that the same were and are valid, and were issued under legal authority; that the contractors were not the holders or owners of any of the bonds at the commencement of the suit, and that the defendants who were holders of the bonds at that time became such in good faith for value, and that they were and are innocent holders and unaffected by any irregularity which may have existed in the issue of the bonds. Consequently the court denied the prayer of the complainants for an injunction and dismissed their bill of complaint. Exceptions were filed by the complainants, pursuant to the practice in that court, and the cause was removed into the Supreme Court of the State, where the decree of the subordinate court was in all things affirmed.

Argument to show that the case as exhibited in the pleadings does not present any question cognizable in this court under a writ of error to a State court is hardly necessary, as neither the bill of complaint nor the answer contains any averment which would warrant such a conclusion or which has any tendency to support such a theory. Instead of that the bill is an ordinary bill to set aside a contract alleged to have been executed by the officers of a county without authority of law, and for an injunction to enjoin and restrain the county from paying certain bonds issued under the con-

tract to pay certain contractors for the construction of a certain road described in the contract, and from levying any taxes upon the property-holders of the county for that purpose, because the bonds, as the complainants allege, were issued without authority and contrary to law and through fraud and collusion between the County Court and the contractors; and also to enjoin and restrain the holders of the bonds from transferring or otherwise disposing of the bonds to other parties.

Clearly the pleadings do not present a case where is drawn in question the validity of, or an authority exercised under the United States; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is claimed under the Constitution or any treaty or statute of or commission held or authority exercised under the United States; or where is drawn in question the construction of the Constitution or of a treaty or statute of, or commission held under, the United States, as the language is in the corresponding provision of the Judiciary Act. Cases not falling within one or the other of the three classes of cases mentioned are not re-examinable in this court under a writ of error to a State court, as the court possesses no other appellate jurisdiction in such cases than that conferred by those provisions. Apply that rule to the present case and it is as clear as anything in legal investigation can be that the pleadings in the case do not present any question re-examinable in this court under a writ of error to a State court.

Final judgments and decrees only of a State court are re-examinable in this court, and before the court can entertain jurisdiction to re-examine such a judgment or decree, it must appear, either by express averment in the pleadings or by clear and necessary intendment, that some one of the questions mentioned in the twenty-fifth section of the Judiciary Act or in the second section of the act to amend the Judiciary Act was raised in the State court and that it was

there decided in the manner therein required to give this court such appellate jurisdiction, or that the State court could not have reached the conclusion it did without deciding the question and in the manner required by those provisions to give this court jurisdiction in the case.*

Clear and necessary intendment that the question was raised and must have been decided as claimed, in order to have induced the judgment, is sufficient, but it is not sufficient to show that such a question might have arisen and been applicable to the case, unless it appears in the record that it did arise and was applied by the State court in disposing of the controversy.†

Had the record stopped there the case would be free of all difficulty, but it does not stop there, as appears by the return to the *certiorari* granted by this court. On the contrary, the respondents afterwards moved the court to set aside the decree and to grant a rehearing of the cause for the following reasons, among others not necessary to be mentioned: (1.) That the act of the legislature under which the bonds in controversy were issued is null and void because it is repugnant to the constitution of the State. (2.) That the act in question is null and void because it is repugnant to the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts or to deprive any person of life, liberty, or property without due process of law; and the proposition submitted is that the State law in question is repugnant to both of those provisions.

Much discussion of either proposition is not required, as the court is of the opinion that the decision of a State court in granting or refusing a motion for rehearing in an equity suit is not re-examinable in this court under any writ of error which this court can issue to review the judgment or decree of a State court. Beyond doubt the respective aver-

* Rector *v.* Ashley, 6 Wallace, 147.

† Hamilton Co. *v.* Massachusetts, 6 Wallace, 636; Furman *v.* Nichol, 8 Id. 56; Crowell *v.* Randell, 10 Peters, 368.

ments in question, if they had been embodied in the bill of complaint, would have been sufficient to raise questions re-examinable in this court, and if it had also appeared that one or both of them had been decided in the manner required to give this court jurisdiction in such a case, or that the State court could not have reached the conclusion it did without deciding the question in that way, it would be plain that the motion to dismiss ought not to be granted. Necessary jurisdictional allegations cannot properly be introduced for the first time on a motion for rehearing, as the motion itself is one addressed to the discretion of the court and one in which the decision of the court in granting or refusing it is not subject to review in an appellate court.* Such a motion is not founded in a matter of right, but rests in the sound discretion of the court.† Matters resting in the discretion of a subordinate court cannot be assigned for error in an appellate court.‡ Exceptions do not lie to the granting or refusing a new trial in a suit at law, nor will an appeal lie from the Circuit Court to this court from an order of the Circuit Court in granting or refusing a petition for rehearing in an equity suit for the same reason, which is that the motion in the one case, or the petition or motion in the other, is alike addressed to the discretion of the court, as shown by all the decisions in the Federal courts.

Even if it could be admitted that the questions suggested were raised in the case by the motion for rehearing, it certainly does not appear that either of them was decided in a way to give this court jurisdiction, as it is quite obvious that the motion may have been denied upon grounds altogether distinct from any question which is re-examinable in this court. All the information the record contains upon the

* Thomas *v.* Harvie's Heirs, 10 Wheaton, 151; Peck *v.* Sanderson, 18 Howard, 42.

† Daniel *v.* Mitchel, 1 Story, 198; Dexter *v.* Arnold, 5 Mason, 315; Story's Equity Pleading (7th ed.), §§ 412, 417; Brown *v.* Aspden, 14 Howard, 25; Emerson *v.* Davis, 1 Woodbury & Minot, 21; Jenkins *v.* Eldridge, 3 Story, 299; Public Schools *v.* Walker, 9 Wallace, 603; United States *v.* Knight, 1 Black, 488; Same *v.* Samperyac, Hempstead, 118.

‡ Murphy *v.* Stewart, 2 Howard, 263; Morsell *v.* Hall, 13 Id. 212.

subject is that the motion was subsequently overruled, unaccompanied by any statement as to the grounds of the decision, but it is quite clear that it may have been denied because that objection to the bonds was not made in the bill of complaint, or because the subsequent act of the legislature confirmed the doings of the County Court under the prior act, or because the court was of the opinion that the subsequent acts of the County Court or other officers estopped the county from setting up that defence to the bonds in the hands of innocent holders, or for many other reasons which might be suggested, wholly irrespective of the questions which it is supposed may be re-examined in this court. Suppose, therefore, it does appear that one or more of the questions which give jurisdiction under such a writ of error was presented in the motion for rehearing, and that such a question may properly be presented in such a motion, still the motion to dismiss must prevail in this case, because the record shows that the motion might have been denied upon other grounds, and it does not appear, even if those questions did arise in the case, that either of them was decided by the State court, or that the supposed erroneous rule was applied by the State court in disposing of the controversy.*

Viewed in any light the case fails to show that this court has any jurisdiction of the controversy, and the writ of error is

DISMISSED FOR THE WANT OF JURISDICTION.

KENNEBEC RAILROAD *v.* PORTLAND RAILROAD.

The court reasserts the principle that, in cases brought here by writs of error to the State courts, it will not entertain jurisdiction if it appears that, besides the Federal question decided by the State court, there is another and distinct ground on which the judgment or decree can be sustained, and which is sufficient to support it.

MOTION by *Mr. Artemas Libbey* (*Mr. A. G. Stinchfield opposing*) to dismiss a writ of error to the Supreme Judicial

* Hamilton Co. *v.* Massachusetts, 6 Wallace, 636.

Court of the State of Maine; taken on an assumption that the case fell within the 25th section of the Judiciary Act, quoted *supra*, 5–6.

This motion had been delayed for some time by an effort on the part of the plaintiff in error to have the record so amended as to show that the State court decided against it one of the questions necessary to give this court jurisdiction; and to obviate this difficulty it was agreed by the parties here that the opinion of that court, delivered at the decision of the case, might be considered as though it were a part of the record.

The suit was a bill in chancery, brought by the Kennebec and Portland Railroad Company against the Portland and Kennebec Railroad Company, asserting the right to redeem the railroad and its appurtenances, which had passed from the former to the latter under what was supposed to be a foreclosure of a mortgage.

The plaintiff set up several grounds for this right to redeem, and he now alleged that one of the principal questions in the case was, that the law under which the foreclosure was had was passed after the mortgage was executed, and that the method of foreclosure prescribed by that statute impaired the obligation of the contract of mortgage, and was, therefore, void by the Constitution of the United States. And though it did not appear clearly from the pleadings or decree, or other proceedings in the case, that this question was involved, it appeared nevertheless that the question was discussed in one part of the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract. The mortgage was made in 1852. The statute referred to was passed in 1857, and the foreclosure complained of was had shortly after. It appeared at the same time, however, in another part of the opinion, which was a very long one, covering thirty-three 8vo. pages, each much larger than those of these reports, and in a smaller type (long primer) than the body of these books is printed in—a part not referred to in any way by the plaintiff in error—that the court founded its judgment

upon the ground that the foreclosure was valid, because the method which was followed conformed exactly to the mode of foreclosure authorized when the contract was made, by the then laws.

Mr. Justice MILLER delivered the opinion of the court.

It has been repeatedly decided by this court that the opinion is no part of the record, and it is only by agreement of counsel and consent of the court that it can be looked into for such purpose. As the record, without the opinion, does not show that such a question was decided, we have examined the opinion with care, and have felt bound to look to the whole of it, as well as that part of it relied on by the plaintiff in error; and though the matter which the plaintiff now alleges was one of the principal questions in the case—to wit, that the law under which the foreclosure was had was passed after the mortgage was executed, and that the method of foreclosure prescribed by that statute impaired the obligation of the contract of mortgage, and was, therefore, void by the Constitution of the United States—does not clearly appear from the pleadings, or the decree, or any other proceedings in the case, yet it does appear that the question was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract.

If this were all of the case we should undoubtedly be bound in this court to inquire whether the act of 1857 did, as construed by the court, impair the obligation of the contract.*

But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence.

Now, if the State court was right in their view of the law

* Bridge Proprietors *v.* Hoboken Company, 1 Wallace, 116.

as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that this court cannot inquire whether the Supreme Court of Maine was right in that opinion.

Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the State court could rest even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the State court we cannot take jurisdiction, because we could not reverse the case though the Federal question was decided, erroneously in the court below, against the plaintiff in error.*

The writ must, therefore, be

DISMISSED FOR WANT OF JURISDICTION.

BARTEMEYER *v.* IOWA.

When a Supreme Court of a State is composed of a chief justice and several associates, writs of error to the court under the 25th section of the Judiciary Act must be signed by the chief justice; and if signed by one of the associates only, it will be dismissed for want of jurisdiction.

ERROR to the Supreme Court of the State of Iowa; the case being thus:

The 25th section of the Judiciary Act, quoted *supra*, p. 5–6, which gives a right to this court to re-examine, in certain cases specified, the final judgment or decree of any suit in the highest court of law or equity in which a decision in the suit could be had, says that the same

"May be re-examined, and reversed or affirmed, in the Supreme Court of the United States, upon a writ of error, *the cita-*

* Rector *v.* Ashley, 6 Wallace, 142; Kingler *v.* State of Missouri, 13 Id. 257; and Steines *v.* Franklin County, *supra*, 15.

tion being signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of; or by a justice of the Supreme Court of the United States."

This statute being in force, one Bartemeyer sought to bring here, under the 25th section thus referred to, of the Judiciary Act, a judgment rendered by the Supreme Court of Iowa. That court is composed of a chief justice and three associates. *The writ was allowed by one of these last.* The case, in this court, was submitted on printed briefs, in advance of its regular call, by *Mr. W. T. Dittoe, for the plaintiff in error, and Mr. H. O'Connor, contra;* no objection being taken by the latter to the fact that the writ was not signed by the chief justice of the Supreme Court of Iowa; and the case being argued in the briefs on merits.

Mr. Justice MILLER delivered the opinion of the court.

This case is submitted to us on printed argument. In this class of cases the court has been in the habit of examining the record to see if it has jurisdiction whether the question is raised by counsel or not; and the case before us we find ourselves compelled to dismiss, because there is no proper allowance of the writ of error.

Writs of error to the Circuit Court, under the 22d section of the Judiciary Act, issue as a matter of course, and can be obtained from the clerk of the Circuit Court, and, when filed in his office by the party, are duly served. But writs of error to the State courts can only issue when one of the questions mentioned in the 25th section of that act was decided by the court to which the writ is directed, and in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the chief justice, or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States. It has been the settled doctrine of this court that a writ of error to a State court must be allowed by one of the judges above mentioned, or it will be dismissed for want of jurisdiction, and the case before us raises the ques-

tion whether the writ has been allowed by a judge authorized to do so.

The Supreme Court of Iowa, which rendered the judgment complained of, is composed of a chief justice and three associate justices, and this writ is allowed by one of the associate justices.

We are of opinion that the act of Congress requires that, when there is a court so composed, the writ can only be allowed by the chief justice of that court, or by a justice of the Supreme Court of the United States. In case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the Supreme Court of the United States.

The result of this construction of the statute is that the associate justice of the Supreme Court of Iowa who allowed the present writ had no authority to do so, and it is accordingly

DISMISSED.

Mr. Justice SWAYNE, with whom concurred the CHIEF JUSTICE and Mr. Justice BRADLEY, dissenting.

I dissent from the opinion just read. The objection was not taken by the counsel for the defendant in error. The writ of error was allowed by an associate justice of the Supreme Court of the State—the court by which the alleged error was committed. This, I think, was sufficient. In my judgment the construction given to the provision in question, of the statute, is unwarrantably narrow.

WARD v. UNITED STATES.

1. When a plaintiff presents as an important part of his case a written proposal, he is not at liberty to insist on a recovery on the ground of mere suspicion that there was a verbal proposal differing from the one in writing introduced by the plaintiff.
2. If there is no evidence at all of a different verbal proposal it is the duty of the court to tell the jury there is none, when requested.

3. It is error in the court in such case to charge the jury that they may find such a verbal proposition, when there is nothing but mere suspicion on which they can do so.
4. Where there is such a written proposal it is the duty of the court, at the request of either party, to construe it, and in doing so the admitted facts concerning the relations of the parties to the transaction are to be considered.

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

This was an action of assumpsit brought by the United States against one Ward to recover the sum of $45,000—so much money had and received by the defendant to the use of the plaintiffs.

The whole of the testimony was embraced in a bill of exceptions.

The facts out of which the implied promise was supposed by the United States to arise were thus: In the years 1856 and 1857 the Detroit and Milwaukee Rail*way* Company were building their road, and were in an embarrassed condition, in which it became important to them to obtain the delivery of their iron rails by giving rewarehousing bonds with surety. To obtain acceptable sureties they offered to pay a large compensation for the use of the names of responsible persons, and in that way the defendant became surety on numerous bonds of the corporation, given to the plaintiffs at various times, amounting to over $90,000. This railway company, while these bonds were unpaid, was sold out, with all its property and franchises, and was purchased by a new organization under the laws of Michigan, which took the name of the Detroit and Milwaukee Rail*road* Company, and this latter company, in the process of transmutation, made or recognized a lien on the road and other property in favor of the United States for the whole or a part of the debt evidenced by these bonds, but denied any liability on the part of the corporation for those bonds; and it seemed probable that both the defendant and the agents of the United States were ignorant of the existence of this lien until after a compromise (hereafter to be mentioned) of the bonds. At this stage of the proceedings the defendant was the only solvent

surety, and he insisted that he was discharged by the dealing of the plaintiffs with his principals. In this state of things the bonds were placed in the hands of the District Attorney of the United States for suit.

All this appeared from a stipulation entered into between the parties to the suit, *and* "*given in evidence on the trial by the counsel of the plaintiff to prove the issue on its part.*" The paper so given in evidence thus began:

"It is stipulated by counsel for the defendant that the following statements *are facts*, and that the same may be admitted in evidence upon the trial of this cause on the part of the plaintiffs."

Among these statements was this one:

"That in April, 1863, the board of directors of said railroad company was applied to by the defendant verbally to make a proposition of compromise of said bonds, which was put in writing by the president, on the 14th day of May, as follows:

DETROIT AND MILWAUKEE RAILROAD CO.,
DETROIT, May 14th, 1863.

CAPTAIN E. B. WARD.

MY DEAR SIR: Referring to the conversation we have had on the subject of the duty bonds due the United States, I am authorized to say that if you can procure the settlement and cancelling of them for a sum not exceeding $80,000 currency, that sum to include *your* services and any claim *you* may have against the company on account of those bonds, this company is ready to pay, and will pay that sum; one-half on your making the arrangement with the government, and the other half within thirty days thereafter. This offer, however, not to be considered as waiving any defence the company has to said bonds and claims.

Yours truly,
C. C. TROWBRIDGE,
President.

"And that subsequently, in April, said board did verbally make the said defendant the said proposition."

The *plaintiffs* also introduced as a witness, Trowbridge (the party signing the proposition above set out), and he testified that though he had not heard the first conversation between the board and defendant, he afterwards heard of it from Mr. Brydges, managing director, or from Mr. Emmons, counsel for the company, and that after this and upon re-

ducing it to writing, in answer to the question of the defendant, as to what the board had decided as to his proposition, he repeated it orally to the defendant as he understood it, and as so stated, and as he understood it, *it was fully expressed in the letter of May 14th.* Trowbridge had become president of the company during these transactions.

After his interview, above mentioned, with the directors of the company, Ward had a conference with the District Attorney of the United States, in which, while denying his liability, he offered to pay $35,000 in full for the delivery of the bonds on his own account, whether the company did or did not furnish the money, as he hoped they would; saying, "that the company was apt to be behind when money was to be paid out." This offer was afterwards accepted, and the $35,000 was paid and the bonds delivered to Ward.

It was conceded as part of the case that the agents of the United States had no knowledge of the offer of the company to pay the $80,000 when Ward made his proposition, nor until after the bonds were delivered and the $35,000 paid and accepted as a compromise; and further conceded that Ward received the $80,000, and had part of it, or all, in his hands when the compromise was finally accepted.

The District Attorney of the United States becoming acquainted with what had passed between Ward and the company, and especially with the proposition about the $80,000, demanded the sum of $45,000 (the difference between this sum just named and the $35,000 paid), alleging that it had been paid to Ward for the purpose of being delivered to the government, on a compromise of their claim against him and the road. Ward, insisting that he was under no sort of obligation to pay any sum to the government, as the compromise had been fair, stated nevertheless, that since making the compromise he had learned of the making or recognition by the new company of the lien on the road and other property in favor of the United States for the debt evidenced by the bonds, and as that might have put the claim of the government on a better basis than it stood before, he was willing to pay over a check for $22,028. He did accordingly

pay it over to the government agent, but before it was presented at bank, stopped the payment of it. At the time when the check was given, Ward said that in giving it he was doing better by the government than he was doing by himself; that the government were getting about 75 per cent. on their claim, while he was getting only some 55 per cent. on what he claimed.

It was upon this state of facts mainly that the United States asserted that the entire $80,000 was money had and received by Ward to their use, and sued for the $45,000 not paid over.

The defendant's counsel requested an instruction to the jury that there was no evidence from which they could infer any other contract between the defendant and the railroad company concerning this $80,000 than the one found in the written proposition. The learned judge refused, however, this request, and charged the jury that there *was* evidence tending to show that the written proposition of May 14th, 1863, did not fully evidence the terms made to the defendant by the railroad company in April, when he made the proposition of compromise to the district attorney, and added:

"I do not deem it necessary or expedient to say what the legal effect of that proposition is, as if, in your opinion, it is but a partial expression of the arrangement, or is different from the oral arrangement of April, a construction would only tend to complicate your inquiries."

The jury were also told that it was for them to find what the arrangement or proposition was between the railroad company and the defendant in reference to a compromise of these bonds, and whether there was any other different proposition than that reduced to writing May 14th, 1863, or whether that evidenced the precise terms of the arrangement between the company and defendant when the latter opened negotiations with the district attorney. They were told also that upon their finding in that respect would depend their verdict.

There were several other prayers for instruction asked by

the defendant's counsel and refused by the court, on which error was assigned; among them these:

"That the proposition of May 14th did not constitute the defendant the agent of the company to pay over to the plaintiff the sum of $80,000, or any given sum, but that under it he was at liberty to make any arrangement he saw fit with the plaintiffs for a settlement and cancellation of the bonds held by them.

"That if the jury find that said $80,000 was paid to the defendant by the railroad company under the said proposition, the plaintiffs are not entitled to recover any portion of the money thus paid to him, as in such case it was not paid to the defendant for the use of the plaintiffs, but to pay him in full for his own services and claims, and for procuring the settlement and cancelling of the bonds held by the plaintiffs, and for the delivery of the same to the railroad company.

"That even if the jury find that the defendant was guilty of either fraudulent disclosures or concealments in his negotiations with the plaintiff and thereby obtained the compromise in question, the plaintiff cannot recover in this action, unless they find under the charge of the court that the whole $80,000 was specifically paid to the defendant to pay the plaintiff."

But the court refused to give any of these instructions. It charged, also,

"That the defendant Ward was in conscience and equity bound under the circumstances of the interview, when he offered $35,000 in the compromise to the attorney of the government to disclose whatever information he possessed, not accessible alike to both parties, which would materially affect or influence the decision of the government in coming to a conclusion upon the offer of $35,000, so that if he misrepresented or concealed any material fact which the government ought to have been informed of, and thereby obtained a surrender of the bonds for a less sum than would have been demanded had the government been fully advised, the government is not bound to abide by the settlement."

Verdict and judgment having been given for the United States for the $45,000 claimed, with interest, the defendant brought the case here.

Argument for the plaintiff in error.

Messrs. C. J. Walker and G. F. Edmunds, for the plaintiff in error:

1. There was no evidence tending in the least degree to prove that the $80,000 was paid to defendant under any other proposition or arrangement than the written one of May 14th, 1863.

There is not a scintilla of evidence that tends to show that the original verbal proposition differed from the written one. It was *the* proposition of compromise of the bonds which was put in writing by Trowbridge, the president, on the 14th of May, for which the defendant verbally applied in April, and no other or different one, and it was the said proposition that was embodied in the written proposition, which the board verbally made to the defendant subsequently to his application for the proposition from the company.

Whether there was evidence tending to prove that the original verbal proposition was different from the written proposition was a question of vital importance. This, under the charge of the court, was the hinge upon which the controversy turned. And the refusal to charge as requested, and the charge as given, substituted conjecture for deduction, and could hardly fail to mislead and confuse the jury.

But whatever may have been the character of the verbal proposition made before the money was paid over, there was *no* evidence tending to show that it *was actually paid over* to defendant upon any other proposition than that of May 14th, or for any other purpose than that mentioned therein.

2. The court erred in refusing to give any construction to the written proposition or contract of May 14th.

According to the very theory of the charge of the court, the jury were at liberty to, and might well have found, that the proposition or arrangement under which the defendant received the $80,000, was the written one of May 14th. On that hypothesis it was clearly the duty of the court to give construction to this written instrument. There was vital error in refusing to give such construction. It left the jury

to give any construction they saw fit to this most important instrument, upon which the rights of the parties turned.

3. The defendant was entitled to the instructions that he asked as to the meaning of the proposition of May 14th.

The instrument is to be read in the light of surrounding circumstances. A compromise was contemplated, not of one claim, but of two; the claims both of the defendant and of the United States. To effect *this* compromise the company were willing to pay $80,000, and they proposed to the defendant that if he would discharge his own claim and procure a settlement and cancellation of that of the plaintiffs, they would pay him $80,000. He was at liberty to make the best bargain with the plaintiffs that he could; to pay them in cash or to get time, or to pay in anything else that the plaintiffs would receive. All that the interests of the company required was the discharge of the two claims. The $80,000 was to be paid in one entire sum for the double purpose; not a part, proportionate or otherwise, to apply on the claim of each. They may have expected that it would have cost the defendant more than it did to take up the bonds held by the plaintiff, but that expectation, if proved, would have nothing to do with the construction of the paper. That left him at liberty to make the best bargain he could with the plaintiffs, and he was to have for himself all that remained, were it more or less.

Mr. G. H. Williams, Attorney-General, and Mr. B. H. Bristow, Solicitor-General, contra:

1. There was nothing which would have justified the court in instructing the jury, as requested, that the evidence tended to show that the money was paid by the company under the written proposition of May 14th. On the contrary, the evidence rather tended to show that the verbal proposition, made by the board of directors in April, was in reality the one under which it was paid. Trowbridge, who reduced the proposition to writing in the form of a letter addressed to the defendant, testified that he heard nothing of the defendant's application to the company until after it occurred,

and that his first information respecting the proposition made to the defendant came from the managing director, or from the company's attorney; that after receiving this information, and before writing his letter, he, in response to an inquiry from defendant, repeated orally to the latter the proposition as he understood it, and that *the proposition as he understood it* was fully expressed in said letter. The verbal proposition was the one upon which the defendant acted in treating with the plaintiff's attorney for the compromise, and which the defendant must be presumed from his conduct to have relied upon, and there is no evidence that it was superseded by any other; for the written proposition of May 14th was not put forth as an independent proposition, designed to take the place of the previous verbal proposition, but merely as a memorial of the latter *as it was understood by the writer.*

The whole case indicates, indeed, that the written proposition was an afterthought; a contrivance to conceal an irregular transaction. The claim which really disturbed the company was not the defendant's, but that of the government, and to settle it the $80,000 was given to Ward. Having by his fraudulent concealments got them to take less than half the sum, he adroitly gets the written letter in order that he may apply the balance to his own use.

2. If this was all so, there was no need of the court giving any construction to the letter of May 14th. But if there had been such need, the requests of the defendant, on this subject, should not have been granted; for the view taken by him of the meaning of the contract—on an assumption of which meaning as true, the requests for instruction were founded—was an erroneous view.

What the defendant undertook to bring about, and actually succeeded in bringing about, was a compromise—not as between himself and the company, nor as between himself and the plaintiff, but as between the company and the plaintiff. In this affair he was their common negotiator, the go-between or mutual agent of both parties. There was, considering the nature of the undertaking, no incompatibility

in the office thus assumed by him. There existed, then, such a fiduciary relation between the plaintiff and the defendant as to devolve upon the latter the obligation of making a frank and full disclosure of any fact which might influence the judgment of the former in making the compromise.

From this point of view, it appears that there was no error in rejecting the instructions requested, as to the construction of the proposition of May 14th.

Mr. Justice MILLER (having stated the case) delivered the opinion of the court.

The whole of the testimony is embraced in a bill of exceptions, not long, and the questions to be decided here arise out of the charge of the court to the jury and its refusal to give instructions asked by the defendant.

It is quite clear that the court charged the jury that there was evidence of a verbal contract differing from the one in writing; that they might infer that the verbal contract was such that defendant would be held in law to be a bailee for the United States as to the whole $80,000, and designedly left the impression that this was so clear that it was unnecessary for him to instruct them as to the legal effect of the written contract on the rights of the parties.

Now, as all the testimony is in the bill of exceptions, and as the plaintiffs read this written contract as part of their case, we should be able to discern some evidence on which the jury could find not only that there was a verbal contract but that it differed from the written one, and that it showed that the defendant received the entire $80,000 to the use of the United States; for if this was not so the verbal contract was insufficient to authorize the verdict. We have not been able to find in the bill of exceptions anything which justified this charge of the court.

It is clear from the paper given in evidence by the plaintiffs, and from the statement which it contains,*—and which

* Quoted *supra*, p. 30, in small type.

it stipulates are facts which may be admitted in evidence upon the trial of this cause on the part of plaintiffs,—that the plaintiffs themselves have shown by their own testimony that the proposition which the defendant asked the railroad company to make and which they did make verbally in April is the proposition and the same proposition which was reduced to writing by Trowbridge, the president, on the 14th May thereafter. The writing refers to the previous conversation, and there is no attempt to conceal the fact that the proposition was made at a previous time verbally.

Now the plaintiffs not only introduced the statement above alluded to, but they proved by Trowbridge, their own witness, as part of their case, that the verbal proposition of April was identical with the written proposition which they had introduced.

How can they be permitted to contradict their own witness and discredit their own written testimony, consistently with the rules of evidence?

But if they could, we have searched in vain for any evidence which varies in the slightest degree that which we have cited. It is in fact all that there is on that subject. It has been argued here, as it probably was before the jury, that the written proposition was gotten up after the fact to cover up a fraud; that in fact Ward was given the $80,000 for payment to the United States alone without reference to his own claim on the company, and having concealed this fact and made a better compromise than was expected, he had this paper made out to include his own claim to give color to a fraud. But of this there is nothing but the merest suspicion of counsel. No witness has testified that the agreement of April was such as is here supposed, or that it differed from the writing of May 14th. The plaintiffs themselves have proved that they were identical. It would be a total disregard of all rules of evidence to allow them to go to the jury with an argument founded on mere suspicion, a suspicion contradicted by their own evidence, and then have the court charge that there was in the testimony a founda-

tion for this suspicion, a foundation so strong as to render a construction of the only real proposition which was proved, useless and embarrassing to them.

And if it could for any reason be conjectured that the verbal proposal differed from the one made in writing, there is nothing to show what that difference was, and whether it might not have been even more favorable to the defendant than the one produced in writing. The jury were left by the court, and in fact told to disregard the facts which were proved, and indulge in the vagaries of their imagination, in this the turning-point of the case.

Now, it is undeniable that Ward made a very enormous profit in the transaction, and that he availed himself of a knowledge of facts unknown to the officers of the government, in a manner which was well calculated to prejudice the jury against his case, but this was no reason why the court should authorize them to indulge this prejudice by a disregard of the established principles of the law of evidence.

We are, therefore, of opinion that the Circuit Court erred in refusing to instruct the jury that there was no such evidence, and in charging them that there was.

There were several other prayers for instruction asked by the defendant's counsel and refused by the court, on which error is assigned and which we do not deem necessary to notice further than this: that some of the prayers seemed to require a construction of the written proposition found in the record.

Whether the specific prayers of the defendant's counsel were such as should have been given or refused, we are of opinion that it was the duty of the court to have given the jury a construction of that instrument, and as this duty will probably arise, and the interpretation of the writing become an important element of a new trial, we will consider it now.

The evidence makes it pretty clear that the original corporation, the principal in the warehouse bonds, was also indebted to the defendant in a considerable amount, which appears to have never been liquidated. The corporation whose

directors made the proposition to Ward, while it denied a direct liability either to him or to the United States, found a lien on their property which made them desire the settlement of both these claims. These facts are undisputed, and in view of them, and of the other fact that Ward was probably liable to the government for the full amount unpaid on the bonds, we are to determine what those directors meant.

The first and important element of their proposal is that "we will pay $80,000 on account of these bonds if you can procure a settlement and cancelling of them for a sum not exceeding that amount." The second branch of it is that this sum must include "your services in making this settlement, and any claim you may have against the company on account of the bonds. When this arrangement is made the company is ready to pay half that sum, and the other half in thirty days thereafter."

Is this a proposition to pay Ward $80,000 if he procures a settlement of both demands, leaving him at liberty to keep as much or as little of it as he chose, provided he effected their purpose? Or is it a proposal to pay generally the $80,000 on the two demands, provided it be accepted in full satisfaction of both?

The language of the proposition is that they will pay that sum for a settlement of both claims. It does not say that they will pay it to Ward, but will pay that sum on account of these two demands. Ward had first called on them to do something in the matter. This was their response. Without entering into any further verbal criticism of the language of the instrument, but looking to the relations of Ward to the government, and to the railroad company which made the proposal, we think that its true construction is, that the $80,000 was to be paid in settlement of the claims of the government on the bonds, and of Ward's claim for becoming surety, and a fair compensation for his services in obtaining the compromise with the government.

With this construction of the instrument—the only evidence before the jury of the terms on which defendant received the money—it should have been left to them to

ascertain how much was due the plaintiffs on account of the bonds when the proposition was made, how much was due the defendant for becoming surety for the railroad company, and what was a fair compensation for his services in effecting the compromise with the United States.

These facts being ascertained, they should have been directed to apportion the $80,000 between the plaintiffs and the defendant, according to the amounts thus ascertained as due to each, and make this the foundation of their verdict, deducting from the proportion of the $80,000 falling to the United States the $35,000 paid them by the defendant.

JUDGMENT REVERSED, AND A NEW TRIAL AWARDED.

Mr. Justice BRADLEY, with whom concurred Justices CLIFFORD and DAVIS, dissenting.

I dissent from the opinion of the court in this case. It seems to me that the charge of the judge to the jury was correct. The defendant was surety for the Detroit and Milwaukee Railroad Company on their rewarehousing bonds, given to secure duties on railroad iron, for an amount admitted to be $76,000, besides interest. The property of the company was sold under mortgages, and a new company was formed by the purchasers, who purchased under a stipulation to recognize and pay all sums due the Federal government for duties upon railroad iron which, it was admitted, then amounted to $94,000. The purchasers, after organization, gave a mortgage in November, 1860, to secure the payment, amongst other things, of the duties owing to the government of the United States, so that the new company assumed the payment of the duties in question. But their assumption was not communicated to the officers of the government, and was not known by them. In April, 1863, Ward, the plaintiff in error, urged upon the new company to settle this claim, and also a claim which he had, by way of compensation for becoming surety. The board of directors verbally made him a proposition, afterwards put in writing, to the effect that if he could procure the settlement and cancellation of the bonds for a sum not exceeding eighty

thousand dollars currency (that sum to include his services and any claim he had), they would pay that sum—one-half on his making the arrangement, the other half within thirty days. Thereupon Ward had an interview with the district attorney, and after dilating upon the difficulties which would be met with in collecting the money, the defences which the company had against the claim, &c., said that he had been urging the directors to do something in relation to the bonds; that he thought they were going to have some money that could be applied to this purpose, and that they would do something in relation thereto. He then offered $35,000 in full for the bonds, saying that whether the company did or did not furnish any money, as he expected they would, he would pay that sum out of his own funds, and that the company was apt to be behind when money was to be paid out. He never said one word about the offer of the company to pay the $80,000, and yet he was the surety, and was seeking to get up obligations that were his own as well as the company's. Under these representations and this suppression of the facts, the district attorney was induced to recommend the offer to the acceptance of the department, and on the 24th of July, 1863, Ward paid the $35,000, got possession of the bonds, and the next day delivered them to the company and received from it the $80,000 which had been offered. Afterwards, in February, 1864, when the district attorney had discovered the deception, and demanded the balance of $45,000, Ward offered him a check for $22,000, on the plea that when the compromise was made he did not know that the company had provided for the government claim in their mortgage of November, 1860.

Upon this state of facts the government claimed that the whole $80,000 was received for their use.

A singular feature of the case is, that the offer of the company, made to Ward in April, was not put into writing until the 14th of May, 1863, and was then written out at the request of Ward, by Trowbridge, an officer of the railroad company, who was not present when the verbal proposition

was made, but only heard of it from others. He wrote it out in a formal letter to Ward, dated May 14th, 1863, and this letter and the evidence of Trowbridge as to what he learned about it from others, is all the evidence we have of its precise terms.

The judge left it to the jury to say whether the letter contained the precise oral arrangement or not, with liberty to take into consideration all the facts and circumstances of the case. The plaintiff in error complains of this feature of the charge. He insists that there was no evidence that the oral agreement was anything different from what the letter stated it to be.

It seems to me that the judge went quite as far as he was bound to go in favor of the plaintiff in error. The great controlling facts of the case were that the company agreed to pay this $80,000 to get clear of the bonds, and of all claims in regard to them; that Ward never informed the government officials of this offer, but made representations which entirely ignored any such state of things—representations, to say the least, that were disingenuous, considering the relation in which he stood to the parties as surety on the bonds. Upon these representations he got a compromise, and afterwards had the offer of the railroad company put in writing in the shape in which it now stands in Trowbridge's letter. He finally received the money and pocketed it all, except $35,000, which he paid to the government.

His conduct was surely an estoppel against himself, so far as the government was concerned. He was under an obligation to disclose the offer which had been made to him. He admits he received the $80,000 on account of the bonds. He cannot be permitted to say that he received part of the money for himself. If that was the arrangement why did he not tell the district attorney so? As between him and the government, the latter had the prior right to be paid out of the fund. Ward was surety to the government for the payment of its whole claim. He must be deemed in law, under the circumstances, to have received the money for the use of the government. Hence the judge was right in de-

clining to say what the true construction of Trowbridge's letter was.

I think the judgment should be affirmed.

HENDERSON'S DISTILLED SPIRITS.

1. Parties have a right to enter into a stipulation waiving a jury in the District Court, and to submit their case to the court upon an agreed statement of facts, independent of any legislative provision on the subject.
2. Where a forfeiture is made absolute by statute a decree of condemnation relates back to the time of the commission of the wrongful acts, and takes effect from that time, and not from the date of the decree. Accordingly where a removal of distilled spirits from the place where distilled, with intent to defraud the United States of the tax thereon, was alleged as a ground for the forfeiture of the spirits, it was *held* that neither the subsequent payment of the taxes nor the fact that the claimant was an innocent purchaser, without notice of the wrongful acts of the antecedent owner, constituted a defence to the charge.
3. A removal of distilled spirits from the place where distilled to a bonded warehouse of the United States, if made to secure the payment of the tax to the government, is a lawful act, but if made with intent to defraud the United States of the tax, the act of removal is illegal, and the spirits removed are subject to forfeiture. A removal of the spirits from the place where distilled to the bonded warehouse is not inconsistent with, and may be a part of a scheme to defraud the United States of the duties

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

On the 13th July, 1866, Congress passed an act to provide internal revenue,* laying and levying taxes on many hundred products of the country. The act is a long act, having seventy-one sections, and covering seventy-five large and closely-printed pages of the statute-book. The first thirteen sections, which cover fifty-three of these pages, relate to the levying and collecting of taxes on a great variety of things, but not of a tax on spirits. Section 14th thus proceeds:

"That in case *any* goods or commodities for or in respect whereof any tax is or *shall* be imposed, or any materials, uten-

* 14 Stat. at Large, 98–173.

sils, or vessels, proper or intended to be made use of, for or in the making of such goods or commodities, shall be *removed*, or shall be deposited, or concealed in any place *with intent to defraud the United States of such tax*, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case, and in every case, where any goods or commodities shall be forfeited under this act, or any other act of Congress relating to the internal revenue, all and singular the casks, vessels, cases, or other packages whatsoever containing, or which shall have contained, such goods or commodities respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited; and every person who shall remove, deposit, or conceal, or be concerned in removing, depositing or concealing any goods or commodities for or in respect whereof any tax is or shall be imposed, with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine or penalty of not exceeding $500."

The sections from the 21st to the 45th relate to distilled spirits. The 28th section provides:

"That general bonded warehouses for the storage of spirits or other merchandise allowed by law to be placed in bond, may be established."

And the 45th section enacts:

"That any person who shall remove any distilled spirits from the place where the same are distilled, *otherwise than into a bonded warehouse*, as provided by law, shall be liable to a fine of double the amount of the tax imposed thereon, or to imprisonment for not less than three months. All distilled spirits so removed, and all distilled spirits found *elsewhere than in a bonded warehouse*, not having been removed from such warehouse according to law, and the tax imposed by law on the same not having been paid, shall be forfeited to the United States, or may, immediately upon discovery, be seized, and after assessment of the tax thereon, may be sold by the collector for the tax and expenses of seizure and sale. And proceedings upon such seizure shall be according to existing provisions of law in relation to dis-

traint, and in conformity with any regulations which shall be made by the Commissioner of Internal Revenue. And the burden of proof shall be upon the claimant of said spirits to show that the requirements of law in regard to the same have been complied with. And any person who shall aid or abet in the removal of distilled spirits from any distillery *otherwise than to a bonded warehouse*, as provided by law, or shall aid in the concealment of such spirits so removed, shall be liable, on conviction thereof, to a fine of not less than $200, or more than $1000, or to imprisonment for not less than three nor more than twelve months. And any person who shall remove, or shall aid or abet in the removal of any distilled spirits from any bonded warehouse, other than is allowed by law, shall be liable to a fine of not more than $1000, or to imprisonment for not less than three nor more than twelve months."

Section 54th provides a fine of $100 and imprisonment not exceeding a year of any one who shall sell, remove, &c., any *fermented* liquor, on which no stamp or a fraudulent one has been affixed.

The act took effect generally from the 1st of August, 1866;* but so far as it changed existing laws relative to distilled and fermented spirits, only from the 1st of September.

The 29th section enacts:

"That there shall be appointed by the Secretary of the Treasury an inspector for every distillery established according to law, who shall take an oath faithfully to perform his duties; and who shall take an account of all the meal and vegetable productions or other substances to be used for the purpose of producing spirits, when put into the mash-tub or otherwise used; and shall inspect, gauge, and prove all the spirits distilled, under such rules and regulations as may be prescribed by the Commissioner of Internal Revenue; and shall take charge of the bonded warehouse established for the distillery in conformity to law; and such warehouse shall be in the joint custody of such inspector and the owner thereof, his agent or superintendent; and when any spirits shall be placed in such warehouse, an entry therefor, in such form as shall be prescribed by regulations, shall immediately be made and signed by the owner of

* Section 1

said spirits, and shall have indorsed thereon a certificate of the inspector that the spirits mentioned have been duly inspected and received in said warehouse, and such entry and certificate shall be filed with the collector of the district; and said inspector shall not engage in any other business while employed as an inspector."

With this act in force, the attorney of the United States for the Eastern District of Missouri, filed an information in the District Court there, on the 7th of September, 1868, to enforce a forfeiture of one hundred barrels of distilled spirits. The fourth count of the information was founded on the first of the above two quoted sections; that is to say, upon the 14th section of the statute, and was as follows:

"That the said one hundred barrels of spirits were manufactured at some place within the United States, to the said attorney unknown, and between the 1st day of September, A.D. 1866, and the date of the said seizure, by some person or persons to the said attorney unknown, and were then and there goods and commodities on which a tax was then and there imposed by the provisions of law, and the same were removed from the place where distilled with intent to defraud the United States of such tax, the same being then and there unpaid, contrary to the form of the statutes of the United States in such case made and provided."

One Henderson, of New Orleans, appeared to the monition issued on the information and claimed the spirits as owner. And he filed an answer, putting in issue the material matters alleged in the information, and further alleged that the said spirits "were purchased by him while the same were in a bonded warehouse, and that he, the claimant, paid the tax imposed thereon by law before he removed the same from said bonded warehouse." In answer to the count, the claimant denied that the "spirits were removed from the place where distilled with intent to defraud the United States of any tax being then and there imposed as alleged."

An agreement was filed in the District Court waiving a jury trial, and the case was heard by the judge upon the following facts, agreed to by the parties according to a stipulation filed before the trial:

Argument in favor of the condemnation.

"1st. That Henderson purchased the spirits while in a bonded warehouse of the United States, at New Orleans, *after the same had been placed therein by the owners of the distillery at which the same were made*, and that he, Henderson, paid to the United States collector the taxes due on the spirits and removed them from the warehouse, according to law, without knowledge on his part at any time before seizure, of any fraud on the part of the distiller, either actual or alleged; that Henderson was a purchaser, innocent and *bonâ fide*, and paid, himself, the tax on the spirits.

"2d. That he shipped the same to St. Louis, and that they were in his constructive possession at the time of seizure.

"3d. That they were manufactured and distilled at a distillery in the first collection district of Louisiana, in May and June, 1868, carried on in the name of Nimrod Johnson, by the use and means of certain boilers, stills, and other vessels of which Johnson was superintendent and owner.

"4th. *That the fourth article* in the *information was true*, but that Henderson subsequently to removal from the distillery and before removal from the bonded warehouse, and before seizure, paid the tax on said spirits, and was a *bonâ fide* and innocent purchaser thereof.

"5th. That he was not a purchaser from the United States, and the United States at no time sold said spirits."

The District Court gave judgment for the claimant and the Circuit Court affirmed the judgment, that court holding that as the overt act alleged, namely, the removal, was rightful, "it was difficult to see how it could have been made to defraud the United States of the tax, and that a mere intent to defraud, formed or existing in the mind of the distiller, which intention had never been executed, or attempted to be, was not made a ground of forfeiture."

The case was now here on error.

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

1. If these spirits were liable to forfeiture under any count of the information, the forfeiture attached at the moment of

the commission of the offence, and can be enforced against the offending property in the hands of an innocent purchaser.*

2. The case agreed on admits the truth of the allegations in the fourth count, namely, that the spirits were removed from the distillery "with intent to defraud the United States of said tax, the same being then and there unpaid." It then comes by plain words within the 14th section of the statute.

The fallacy of the reasoning of the Circuit Court was in assuming it to be impossible that one step in an attempt to defraud the government of the tax due upon those spirits could be their removal to a bonded warehouse. But it is notorious that spirits have often been removed to United States bonded warehouses from distilleries in accordance with conspiracies between distillers and warehousemen in order to defraud the government, by having the spirits secretly drawn off from the barrels; and under agreements with the revenue officers to have them released upon worthless security without payment of the tax.

Mr. J. A. Garfield, contra:

In *Bennet* v. *Hunter*,† this court gave its construction of the 4th section of the act of July 7th, 1862,‡ a highly penal statute, in which it is provided, "that the title of, in, and to every piece or parcel of land upon which said tax has not been paid as above provided *shall thereupon become forfeited* to the United States." In construing this statute, the Chief Justice, delivering the opinion of the court, said:

"It must be remembered that the primary object in the act was undoubtedly revenue, ... and it seems unreasonable to give to an act considered as a revenue measure a construction

* Robert *v.* Witherhead, 12 Modern, 92; Wilkins *v.* Despard, 5 Term, 112; United States *v.* Grundy, 3 Cranch, 338; United States *v.* 1960 Bags of Coffee, 8 Id. 398; Wood *v.* The United States, 16 Peters, 342; Caldwell *v.* The United States, 8 Howard, 366.

† 9 Wallace, 326.

‡ 12 Stat. at Large, 294.

which would defeat the right of the owner to pay the amount assessed, and relieve his land from the lien."

Speaking of the claim set up by the plaintiffs in that case, that forfeiture worked *eo instanti* on the failure of the owner to pay the tax within the required time, the Chief Justice said:

"It is certainly proper to assume that an act of sovereignty so highly penal is not to be inferred from language capable of any milder construction."

This principle of interpretation is applicable to this case.

2. The Circuit Court did not err in holding the spirits were not forfeited under the fourth count in the information. The 14th section, on which the fourth count is based, does not apply to the removal of spirits. That section applies to the removal from the place of manufacture, and to the deposit or concealment of articles named in the *previous* sections of the statute; among which articles liquors are not included. Subsequent sections, it is, which govern them, and the 45th section, which concludes this portion of the statute, provides a special and different penalty for the removal of spirits in violation of the law. Different penalties are provided by section 54th for the unlawful removal of fermented liquors, showing that Congress excepted them from the operation of section 14th; a view strengthened by the fact that the statute generally took effect on one date, but that the provisions relating to distilled and fermented liquors did not take effect till a later one.

Section 45th is, therefore, the law which applies to the allegation in the fourth count of the information. But the forfeiture prescribed in that section applies to the removal of spirits "from the place where the same are manufactured *otherwise than into a bonded warehouse*," and the removal of these spirits was *not* otherwise. It was a bonded warehouse of the United States.

The allegation in the fourth count that the spirits were removed "from the place where distilled, with intent to defraud the United States of the tax," and which allegation

is admitted in the case agreed on to be true—is rendered nugatory by the other, the fact equally admitted, that the removal was made by the distiller himself to a bonded warehouse of the United States. This act was legal, was in pursuance of the statute, was the very course prescribed by the law "to secure the payment of the tax." No conspiracy—which is what, in truth, the opposing counsel assume to have existed—is alleged in the information, nor in the facts agreed on. The contrary appears from the case agreed on. If it did not, all the proceedings required of the inspector by the 29th section*—numerous and stringent provisions—must be assumed in the absence of any proof, or even allegation, to the contrary to have taken place. And the fact that when Henderson purchased the spirits he paid the full amount of the tax, and received the collector's certificate of such payment, is conclusive that there was no conspiracy.

The government by accepting and retaining the taxes paid to it by the claimant, is estopped to say the property all the time belonged to it, by reason of previous forfeited title by the vendor or the claimant. Henderson had every possible assurance that he had acquired a perfect title to the property he purchased. If it now be declared forfeited, he loses both the tax and the property, by no fault or negligence on his part. In civil actions, and in all cases like this, which involve a mere right to property, estoppel binds the government as it does individuals.†

Reply: Section 45th is widely different from section 14th. The gist of section 14th is the intent with which the spirits are removed; forfeiture only taking place where they are removed, deposited, or concealed in any place with intent to defraud the United States. In section 45th the intent with which the removal is made is immaterial, if they are removed elsewhere than to a bonded warehouse. Thus an information can be founded on section 45th, however innocent may

* Quoted *supra*, pp. 46, 47.

† Lindsey *v.* Hawes et al., 2 Black, 554; Alviso *v.* United States, 8 Wallace, 337.

have been the intention of the parties; but, when founded on section 14th, the intent to defraud the government becomes essential. The fact that an information for fraudulently removing spirits elsewhere than to a bonded warehouse may be founded either on section 14th or section 45th, does not show any conflict between the two sections, or that the one limits the other. Such cumulative remedies are very often provided in revenue laws.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Distilled spirits, upon which no tax had been paid according to law, were, by the thirty-second section of the act of the thirteenth of July, 1866, subject to a tax of two dollars on each and every proof gallon, to be paid by the distiller, owner, or any person having possession thereof, and the same section provided that the tax shall be a lien on the spirits distilled, and on the distillery used for distilling the same, with the stills, vessels, fixtures, and tools therein, &c.† Express provision is also made by the fourteenth section of that act, that all goods or commodities, for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities, in case they shall be removed or shall be deposited or concealed in any place with intent to defraud the United States of such tax, or any part thereof, shall be forfeited.‡ Certain alterations are made in each of those provisions by the fourteenth section of the act of the second of March, 1867, but the alterations are not material to the present case, as the same section provides that the new provision shall not exclude any other remedy or proceeding provided by law, which beyond all doubt leaves in full operation the fourteenth section of the prior act.§

Regular seizure of the one hundred barrels of distilled spirits in question was made on the first day of September,

* The Distilled Spirits, 11 Wallace, 356, 364, 365.

† 14 Stat. at Large, 157. ‡ Ib. 151. § Ib. 481.

1868, by the collector of the district, as alleged in the information, and the record shows that the information was duly filed by the district attorney on the seventh of the same month, in the District Court of the United States for the district where the seizure was made. Being a seizure on land, the claimant was entitled to a trial by jury, but he appeared and the parties entered into a stipulation waiving a jury and submitted the case to the court upon an agreed statement of facts, as they had a right to do, even before any legislative provision was enacted for waiving a jury by a written stipulation.* Pursuant to that stipulation the parties were heard, and the District Court dismissed the information and rendered judgment for the respondent. Exceptions were duly taken by the district attorney and he sued out a writ of error and removed the cause into the Circuit Court, where the judgment rendered by the District Court was affirmed, and the United States thereupon sued out a writ of error to the Circuit Court and removed the cause into this court for re-examination.

Seizure of the spirits was made, as before explained, by the collector of internal revenue for the district, and it is alleged in the information that the collector still holds the same in his possession and custody as forfeited to the United States, under the provisions in the act to amend the existing laws relating to internal revenue. Six articles, each charging a forfeiture of the spirits in question, are contained in the information, but in the view of the case taken by the court it will only be necessary to examine the fourth in the series, which is as follows:

That the said one hundred barrels of spirits were manufactured at some place within the United States to said attorney unknown, and between the first day of September, 1866, and the date of said seizure, by some person or persons to said attorney also unknown, and were then and there goods and commodities on which a tax was then and there

* Suydam *v.* Williamson, 20 Howard, 434; United States *v.* Eliason, 16 Peters, 291; Stimpson *v.* Railroad, 10 Howard, 329; Campbell *v.* Boyreau, 21 Id. 224.

imposed by the provisions of law, and the same were removed from the place where distilled, with intent to defraud the United States of such tax, the same being then and there unpaid, contrary to the form of the statutes of the said United States in such case made and provided.

Seasonable claim in due form was made for the spirits by the defendant, and he appeared and filed an answer, denying all the material allegations of the information, and tendered an issue to the country, which was joined by the United States. Apart from that, he also answered each article separately, and in respect to the fourth article he denied that the spirits in question were removed from the place where distilled with intent to defraud the United States of any tax then and there imposed, as alleged in the information.

Evidently the answer was precisely equivalent to the general issue, and made it incumbent upon the United States to prove the charge as alleged, and the effect of the stipulation submitting the case to the court was to substitute the court for the jury as the tribunal to determine the issue of fact presented in the pleadings. Had the stipulation contained nothing further, it is clear that the evidence on the one side and the other must have been introduced to the court substantially as provided in the recent act of Congress upon that subject, but the parties went further and stipulated in writing as to what the facts in the case were, in which stipulation it is agreed that the fourth article in the information is true, and it is insisted by the United States that that stipulation is equivalent to a confession of guilt, and that it entitles the United States to judgment, and the court would certainly be of the same opinion if that admission was unaccompanied by what follows in the stipulation in the same connection.

Standing alone, it is an admission that the charge as contained in the fourth article of the information is true, but it must be read in connection with what follows as a part of the same stipulation, and the question is whether the qualification annexed to the admission that the fourth article of the information is true, changes the aspect of the evidence

and entitles the defendant to the judgment rendered in his favor by the subordinate courts.

Appended to the admission that the fourth article in the information is true, is the statement that the defendant, subsequently to the removal of the spirits from the distillery, and before their removal from the bonded warehouse, and before the seizure, "paid the tax on said spirits, and that he was a *bonâ fide* and innocent purchaser;" and the question is whether that statement, appended as it is to the admission, qualifies the language of the admission in such a way that the admission does not establish the truth of the charge contained in the fourth article of the information.

Due weight must also be given to certain other facts stated in the stipulation in determining the question whether the judgment for the defendant was correct or incorrect. He was not the purchaser from the United States, nor have the United States ever sold the spirits in question, but the agreed statement also shows that he purchased the spirits while they were in a bonded warehouse in New Orleans, after the same had been placed therein by the owner of the distillery at which the same were distilled; that he paid the tax due on the spirits to the collector, and removed the same from the warehouse according to law, without any knowledge on his part, at any time before the seizure, of any fraud, either actual or alleged, on the part of the distiller; that the spirits were manufactured and distilled at a certain distillery in that district, in the months of May and June, prior to the seizure, by the person therein named, by the use and means of certain boilers, stills, and other vessels of which the distiller was superintendent and owner, and the parties agree to the effect that all the acts averred in the fifth and sixth articles of the information as having been done in respect to the spirits in question by some person unknown are true, when the averments are applied to the person named in the agreed statement as the manufacturer and distiller of the said spirits.

Four material ingredients are involved in the charge contained in the fourth article of the information: (1.) That the

spirits were manufactured at some place within the United States, between the day therein named and the date of the seizure. (2.) That the spirits were then and there goods and commodities on which a tax was imposed by some provision of law then in force. (3.) That the spirits were removed from the place where distilled with intent to defraud the United States of such tax. (4.) That the tax was unpaid at the time the spirits were so removed, with such fraudulent intent.

Beyond all doubt the admission that the fourth article is true is a conclusive admission that each and every one of the well-pleaded allegations which it contains are also true, which, standing alone, would certainly be a confession on the record that the property is subject to forfeiture, unless it can be shown that the fourth article in the information is insufficient in law to warrant a judgment in favor of the United States.

Viewed in that light, as the admission must be, the next question is whether the statement appended to the admission is sufficient to save the property from condemnation in the possession of the defendant. Properly analyzed the statement appended to the admission contains two averments in avoidance of the consequences which would otherwise follow from the admitted acts of the antecedent owner: (1.) That the defendant paid the tax subsequent to the removal of the spirits from the distillery and before they were removed from the bonded warehouse and before the seizure by the collector. (2.) That he was a *bonâ fide* and innocent purchaser, without notice that the spirits were forfeited as alleged in that article of the information.

Where the forfeiture is made absolute by statute the decree of condemnation when entered relates back to the time of the commission of the wrongful acts, and takes date from the wrongful acts and not from the date of the sentence or decree.* Subsequent payment of the duties, therefore, is

* Roberts *v.* Witherall, 1 Salkeld, 223; Robert *v.* Witherhead, 12 Modern, 92; United States *v.* Bags of Coffee, 8 Cranch, 398; The Brigantine Mars, 1b. 417; Gelston *v.* Hoyt, 3 Wheaton, 311; Caldwell *v.* United States, 8

no defence to an information for a forfeiture founded upon antecedent wrongful acts, as the effect of such wrongful acts, where the forfeiture is made absolute by statute, is to divest the owner of all property in the goods seized and to vest the title to the same in the United States, in case a prosecution ensues, and a decree of condemnation follows, as the decree of condemnation when entered by a court of competent jurisdiction relates back to the date of the wrongful acts as alleged and proved at the trial or in the hearing of the cause.* Repeated decisions of this court have established that rule in all cases where the forfeiture is made absolute by the act of Congress, and it necessarily follows that neither the subsequent payment of the duties nor the fact that the defendant is an innocent purchaser, without notice of the wrongful acts of the antecedent owner, constitutes any defence to the charge contained in the fourth article of the information.† Many such adjudged cases are to be found in the reported decisions of this court, and it must be admitted that they establish the rule beyond all doubt, that the forfeiture becomes absolute at the commission of the prohibited acts, and that the title from that moment vests in the United States in all cases where the statute in terms denounces the forfeiture of the property as a penalty for a violation of law, without giving any alternative remedy, or prescribing any substitute for the forfeiture, or allowing any exceptions to its enforcement, or employing in the enactment any language showing a different intent; and that in all such cases it is not in the power of the offender or former owner to defeat the forfeiture by any subsequent transfer of the property even to a *bonâ fide* purchaser for value without notice of the wrongful acts done and committed by the former owner. Established as that rule has been by the decisions of this court for more than half a century, it is insisted that it should be applied in the case before the court, and it is

Howard, 381; United States *v.* Grundy, 3 Cranch, 338; Wood *v.* United States, 16 Peters, 342; Clifton *v.* United States, 4 Howard, 248.

* Fontaine *v.* Ins. Co., 11 Johnson, 293; Kennedy *v.* Strong, 14 Id. 128.

† Wilkins *v.* Despard, 5 Term, 112.

difficult to see any reason for rejecting the proposition, as the words of the act under which the fourth article of the information is drawn denounce the forfeiture of the property in terms as absolute and unqualified as any which can be chosen in our language.* Goods and commodities falling within that provision, it is enacted, *shall be forfeited* in case they shall be removed with intent to defraud the United States of such tax, or any part thereof, and the language denouncing the forfeiture is explicit and absolute and without any qualification whatever. Compare the language of the act of Congress with the language employed in the fourth article of the information and it will be seen that the charge against the spirits is preferred in the same language as that employed in the act of Congress denouncing the forfeiture, as the fourth article alleges that the spirits in question were then and there goods and commodities on which a tax was then and there imposed by the provisions of law, and that the same were removed from the place where distilled with intent to defraud the United States of such tax, the same being then and there unpaid; and the admission set forth in the agreed statement is that the fourth article of the information is true, which is a direct confession that the prohibited acts charged in that article were done and committed at the time and place and by the person and in the manner therein alleged.

Concede all that and it is clear that the United States are entitled to judgment, if it be true that the forfeiture relates back to the date of the wrongful acts charged in the information. Escape from that conclusion, it would seem, is impossible, if it be admitted that the fourth article of the information sets forth a good cause of forfeiture, and it is clear that the affirmative of that proposition must be admitted, unless it be affirmed that the 14th section of the act of Congress, on which it is drawn, does not provide for such a forfeiture, under the circumstances therein described.

* United States *v.* Bags of Coffee, 8 Cranch, 398; United States *v.* Grundy, 3 Id. 338.

Such a proposition, whether so intended or not, is precisely equivalent to a demurrer to the fourth article of the information or to a motion in arrest of judgment after verdict; and if so, then it follows, as shown by all the authorities upon the subject, that everything well pleaded in the fourth article of the information must be taken as true, which is the exact admission contained in the agreed statement. Nothing can be more certain in legal investigation than that the decree must have been for the United States if the claimant had demurred to the fourth article of the information, unless it can be held that the act of Congress denouncing the forfeiture is unconstitutional, as the article in question embodies the exact language of that provision, and it is equally certain that a motion in arrest of judgment would also have been unavailing for the same reason, and also because the validity of the act of Congress is beyond all doubt.

Congress possesses the power to levy taxes, duties, imposts, and excises, and it is as clear that Congress may enact penalties and forfeitures for the violation of such laws as it is that Congress may levy the taxes or duties or pass laws for their collection, safe-keeping, and disbursement.

Section fourteen, it is admitted, is broad enough in its terms to embrace the removal of spirits, on which there is a tax, from the place where distilled, with intent to defraud the United States of the tax, but it is suggested that another section of the same act requires that spirits, when removed from the place where distilled, shall be deposited in a bonded warehouse, and that the penalty imposed for a violation of that requirement is different from the penalty imposed by the fourteenth section of the act, and it must be admitted that the suggestion is correct, but it is impossible to see in what respect the suggestion tends to support the views of the defendant in the present case.

Suggestion is also made that it is not an illegal act to remove spirits from the place where distilled to a bonded warehouse, and that also is true, but the corollary attempted to be drawn from the two suggestions is a *non-sequitur*, and

cannot be sustained, which is that the charge that the spirits were removed from the place where distilled, with intent to defraud the United States, cannot be true if it appears that the spirits were removed from the distillery to a bonded warehouse, as the removal of spirits from the place where distilled to a bonded warehouse is authorized by law. Undoubtedly such a removal of spirits from the place where distilled to a bonded warehouse, if made to secure the payment of the tax to the government, is a lawful act, but it is equally clear, if the removal is made even to a bonded warehouse to defraud the United States of the tax, that the act of removal is illegal, and that the spirits removed are forfeited.

Both of these suggestions, however, are founded upon the assumed theory that the record shows that the only removal of the spirits alleged or proved was a removal from the place where distilled to a bonded warehouse, but that assumption is wholly unsupported either by the charge contained in the fourth article of the information or by the admission that the fourth article is true, as exhibited in the agreed statement. On the contrary, the fourth article of the information alleges that the spirits were removed from the place where distilled, with intent to defraud the United States of the tax, without any specification as to the place to which the same were removed, or where they were deposited; nor is that omission any objection to the form of the charge, as that article of the information follows substantially the language of the fourteenth section of the act of Congress on which it is drawn.

Tested by the charge, as made in that article, and the admission applicable to it, as exhibited in the agreed statement, as the question must be, and it is clear that the spirits may have been removed elsewhere than to a bonded warehouse before they were placed in that depository by the owner and distiller. Such certainly would be the legal conclusion if the defendant had demurred to the information, and the court is of the opinion that the same conclusion must follow from the admission that the fourth article of the

information is true, as the admission is expressed in the agreed statement.

Henderson, the claimant, purchased the spirits while they were in the bonded warehouse and after they had been deposited therein by the owner of the distillery where the spirits were manufactured, and having made the purchase without notice that any fraud had been practiced by the distiller, and having paid the tax before the spirits were removed from the bonded warehouse, it is insisted by his counsel, in every possible form of argument, that his title is perfect and that the spirits are not liable to forfeiture, but the decisive answer to all that is the one already given, that the forfeiture relates back to the unlawful or wrongful acts of the antecedent owner, and that he cannot by any subsequent transfer of the property defeat the title of the United States, as settled by a series of decisions which, if traced to their source, have their origin in the early history of the common law.*

Rules of decision of such long standing and so necessary to protect the public revenue cannot be changed, nor can it be admitted that the charge contained in the fourth article of the information may not be sustained, even if it appears that the only removal of the spirits made by the distiller was to the bonded warehouse, as assumed in argument by the defendant.†

Unquestionably a removal of distilled spirits from the place where distilled to such a depository, if made to secure the payment of the tax, is a lawful act, but it is equally clear that if it is made with intent to defraud the United States of the tax it is an unlawful act, and subjects the spirits to forfeiture.

Grant that the removal was rightful, as assumed by the circuit judge, and the conclusion which he adopted would follow, but it cannot be assumed in this case that the re-

* 4 Bacon's Abridgment, by Bouvier, 346; Plowden, 488, b. Co. Litt. 25; 1 Chitty's Criminal Law, 727.

† Clarke *v.* Insurance Co., 1 Story, 109.

moval was rightful, as the charge in the fourth article of the information is that it was made with intent to defraud the United States of the tax, and the admission in the agreed statement is that the fourth article of the information is true, which shows as fully as it can be shown that the United States are entitled to a decree of condemnation, unless it can be established that the fraudulent intent there charged could not under any circumstances be carried into effect by such a removal as that alleged in the fourth article of the information and admitted in the agreed statement.

Suppose it be true, as assumed in argument, that the only attempt made to execute the unlawful intent charged was the removal of the spirits from the place where distilled to the bonded warehouse, still it would by no means necessarily follow, as is supposed, that the removal was a legal act, as the removal, though to a bonded warehouse, may nevertheless have been made for the express purpose to defraud the United States of the tax, and if so, then the removal was indubitably an illegal act, and the spirits are properly subject to forfeiture as charged in the information.

Cases have arisen, as the records of this court show, where the removal to the bonded warehouse was made as a part of a preconcerted arrangement with other parties to avoid the payment of the tax, and it would not be difficult to suppose other cases where the removal of the spirits from the place where distilled to the bonded warehouse would be a necessary part of a well-devised scheme to defraud the United States by delivering the spirits to purchasers without the payment of the duties.*

Inspectors of spirits are required to be appointed by the Secretary of the Treasury, and all distilled spirits, before being removed from the distillery, are required to be inspected and gauged by a general inspector, whose duty it is to mark the vessels or packages in the manner required by law, and penalties are prescribed and imposed in case the

* Distilled Spirits, 11 Wallace, 364.

spirits are removed from the place where distilled without a compliance with those requirements.*

Persons distilling spirits, and the owners of stills used for the purpose of distilling spirits, are required to keep books and to make certain entries therein, and to render certain accounts to assessors, and if they do not comply with those requirements they also are subject to certain penalties for the neglect.†

Bonded warehouses are established for the storage of spirits to be placed therein to secure the payment of the duties imposed by law, and the provision is that if any person shall ship, transport, or remove any spirits under any other than the proper mark or brand, known to the trade as designating the kind and quality of the contents of the casks or packages containing the same, or cause the same to be done, he shall forfeit the same, and shall, on conviction thereof, be subject to and pay a fine of five hundred dollars.‡

Cautious merchants, in consequence of those regulations, and many others equally stringent, are often disinclined to purchase spirits at the place where distilled lest they should be subject to forfeiture, if equally favorable terms are offered by other parties who have made deposits in the bonded warehouses. Distillers, therefore, intending to evade the payment of the duties may find it a most effectual way to accomplish their unlawful designs, in case they can, by bribery or otherwise, secure the co-operation of the inspector, storekeeper, or collector, to remove the spirits to a bonded warehouse, as spirits placed in that depository are less subject to suspicion and sell more readily than before they were removed from the place where distilled.

Spirits placed in such a depository sell more readily than before they were removed, because they are regarded as less likely to be subject to forfeiture than while they remained in the distillery, but it is clear that the theory that an intent to defraud the United States cannot be predicated of a removal of spirits from the place where distilled to a bonded ware-

* 14 Stat. at Large, 156; 14 Id. 481. † Ib. 157. ‡ Ib. 155, 156.

house is an erroneous theory, as it is manifest that the dishonest distiller, if he can obtain the assistance of the inspector, storekeeper, or collector, as a partner or agent, will find such a removal an essential step in almost every scheme which he may devise to accomplish his wicked designs.

Viewed in any light, therefore, the court is of the opinion that the judgment of the Circuit Court is erroneous.

Questions are also presented in the record under the fifth and sixth articles of the information, but the court having come to the conclusion that the United States are entitled to judgment upon the fourth article of the information, do not deem it necessary to express any opinion as to the other questions.

JUDGMENT REVERSED and the cause remanded with instructions to render

JUDGMENT FOR THE UNITED STATES.

Mr. Justice FIELD, with whom concurred the CHIEF JUSTICE and Mr. Justice MILLER, dissenting.

I am unable to concur in the judgment of the majority of the court, and will briefly state the grounds of my dissent.

The proceeding is an information for the forfeiture of one hundred barrels of distilled spirits. The forfeiture is not decreed, on the ground that the government has not received the taxes levied on the spirits, for it is admitted that these have been paid; nor on the ground that the claimant has committed or participated in the commission of any fraud in the acquisition of the property, for it is conceded that he purchased the spirits in good faith without knowledge of any defect or taint in his vendor's title. Nor is the forfeiture inflicted for any violation of law, in act or deed, on the part of the distiller of whom the claimant purchased. He only removed the spirits from the place of their manufacture to the bonded warehouse of the United States, and that was a lawful, and not an unlawful act. The forfeiture is decreed because the former owner, in removing the spirits to the bonded warehouse, intended at the time to defraud the gov-

ernment of the tax thereon—an intent, however, which he never attempted to carry into execution.

We thus have this singular and, I venture to say, unprecedented fact, in the history of judicial decisions in this country, that the property of a citizen honestly acquired, without suspicion of wrong in his vendor, is forfeited and taken from him because such vendor, at some period whilst owning the property, conceived the intent to defraud the government of the tax thereon, although such intent was never developed in action, and for the execution of which no step was ever taken.

The presumption is that the majority of the court are right in this decision, and that the minority are mistaken in their views of the law governing the case. It is, therefore, with diffidence that I venture to dissent from their judgment, a diffidence which is greatly augmented by the declaration of the majority, that it is impossible to escape the conclusion which they have reached.

But for this conclusion I should have supposed that it would have been impossible, at this day and in this age, and in our country, to obtain a decree confiscating the property of a citizen for anything which a former owner of the property may have intended to do, but never did, with respect to it. I should have said that the intentions of the mind, lying dormant in the brain, had long since ceased to be subjects for which legislatures prescribed punishment. Against threatened injuries to person or property remedies are provided; and this, it is believed, is the extent to which legislation can legitimately go with respect to intentions, however fraudulent or wicked, so long as they remain undeveloped by action. Penalties and forfeitures are not inflicted at this day in any civilized and free government for the motives with which lawful acts are done.

The inability to ascertain, with certainty, the intentions of a party, except as they are exhibited in his acts, and the injustice which must necessarily follow any attempt to inflict punishment for them, except as they are thus exhibited, have hitherto, in this country, prevented any legislation of

that character, unless such legislation is found in the present revenue act of Congress. The injustice in its operation of such legislation, assuming such legislation to exist, could not be more strikingly illustrated than in the present case. But I am not prepared to admit, notwithstanding the cogency and persuasiveness of the able and elaborate argument in the opinion of the majority, that there is any such legislation on our statute-book.

The act of Congress under which this proceeding was taken provides, in its twenty-eighth section,* for the establishment of bonded warehouses for the storage of spirits "to secure the payment of the internal revenue tax thereon," and, in its forty-fifth section, prohibits "the removal of distilled spirits† from the place where the same are distilled *otherwise than into a bonded warehouse*, as provided by law," imposing penalties upon parties making such removal, and declaring that "the distilled spirits so removed" shall be forfeited to the United States.

The same act declares, in its fourteenth section,‡ that if any goods or commodities, upon which a tax is imposed, or the materials, utensils, or vessels, proper or intended to be used in their manufacture, are removed, deposited, or concealed in any place, "with intent to defraud the United States of such tax, or any part thereof," they shall be forfeited to the United States. And it is upon the language of this section, as applied to the facts admitted by the parties, that the majority of the court found the decree of forfeiture.

The language is undoubtedly broad enough to cover any removal of spirits, upon which a tax has been imposed, from their place of manufacture; and, if it has any reference to articles of that character, it must be construed in connection with the language of the forty-fifth section. And the evident meaning of the two sections, if they are construed together, is, that the removal, for which a forfeiture is declared, is a removal to some other place than a bonded

* 14 Stat. at Large, 155. † Ib. 163. ‡ Ib. 151.

warehouse of the United States. Of a removal to such warehouse it is difficult to perceive how an intent to defraud the government can be, in truth, affirmed. It would be as reasonable to declare that a debtor had an intention to defraud his creditor when he placed in the hands of the latter the money to pay his demand. It is plain, in my judgment, or rather I should have said it was plain but for the opinion of the majority, that the removal of spirits forbidden by that section is a removal to some place beyond the reach of the government, or where the government would be in some way embarrassed or obstructed in the collection of its tax. It seems to me a strange application of the prohibition to make it cover a removal of spirits to a warehouse specially provided by the government for their reception, and where they are placed in the possession and custody of the officers of the United States.

But I am unable to convince myself that the fourteenth section has any reference whatever to the removal of distilled spirits. The previous sections of the act relate to taxes on a great variety of articles, of several hundred different kinds, and it does not include distilled spirits among them. The removal mentioned in the fourteenth section would seem, therefore, to apply to the removal from the place of their manufacture of the articles thus previously designated, or at least of articles mentioned in the statute, for the removal of which no different penalties are specifically prescribed.

The sections of the act, from the twenty-first to the forty-fifth inclusive, relate to the tax on distilled spirits, and contain numerous provisions applicable only to them. The punishment they prescribe for the removal of the spirits from the place of their manufacture, otherwise than to a bonded warehouse, in addition to their forfeiture, is different from the penalty prescribed by the fourteenth section, for the like removal of other goods. This fact would seem to be conclusive, if other reasons were wanting, that the fourteenth section has no reference to the removal of distilled spirits. The special provisions respecting them should ex-

cept them, according to all established canons of interpretation, from the general language of that section.

"That a law," says Chief Justice Marshall, "is the best expositor of itself, that every part of an act is to be taken into view for the purpose of discovering the mind of the legislature, and that the details of one part may contain regulations restricting the extent of general expressions used in another part of the same act, are among those plain rules laid down by common sense for the exposition of statutes, which have been uniformly acknowledged."*

And it is laid down in the elementary treatises that where a general intention is expressed in one part of a statute, and a particular intention in another part, inconsistent with the general intention, the particular intention is to be regarded as an exception.†

The suggestion by the counsel of the government, that a removal of distilled spirits to a bonded warehouse, although the law provides for such removal as a means for securing the payment of the tax, may be made with intent to defraud the United States of such tax, inasmuch as there may be an agreement between distillers and warehousemen to have the spirits secretly drawn out from the vessels, or to have the spirits released upon insufficient security, does not strike me as entitled to any consideration in this case. Conspiracies there undoubtedly may be with officers of the United States to defraud the government, but in the absence of any proof tending to establish such a conspiracy, the court would not be justified in imagining its existence for the purpose of working a forfeiture of goods in the hands of an innocent party. It would rather indulge the more rational and just presumption that all the officers of the government did their duty, until at least some evidence to the contrary was produced.

This is a case of great hardship and manifest injustice. The claimant found the spirits in a bonded warehouse of the

* Pennington *v.* Coxe, 2 Cranch, 52.

† Potter's Dwarris on Statutes, 110; Sedgwick on Statutes, 423.

government, in custody of the officers of the United States. He paid to them the tax due on the goods, and he paid to the owner their value. He had no suspicions that his vendor ever entertained any intention to defraud the government of the tax levied on them, and if he ever had such suspicions he might well have supposed that his vendor had repented of his intention, when he delivered the property to the keeping of the officers of the United States.

The government through its officers took from the innocent purchaser the duties upon the goods, thus saying to him that the goods then belonged to the distiller who placed them in the warehouse. The government now declares through its officers that these goods all the time belonged to it by reason of the previous forfeiture, and thus the honest claimant loses both the taxes and the goods, or at least is left to the doubtful chances of obtaining the former by petition to the government, and the latter by action against his vendor.

The object of the act of Congress, under which the forfeiture is declared, is to raise revenue; and it seems to me that the severe construction in favor of forfeitures in the hands of innocent parties, given by the majority of the court, must have a tendency to defeat this object; for it will scarcely be possible for any one to purchase merchandise with safety when it may be seized and forfeited in his possession for reasons such as are assigned in this case.

I am of the opinion that the judgment of the court below should be affirmed.

CHRISTMAS *v.* RUSSELL.

1. Where a bill does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of, an original suit, it is an original bill, not an ancillary one.
2. Accordingly, when such bill is between citizens of the same State, the Circuit Courts have no jurisdiction.

3. A mere promise, though of the clearest and most solemn kind, to pay a debt out of a particular fund, is not an assignment of the fund even in equity. To make an equitable assignment there should be such an actual or constructive appropriation of the subject-matter as to confer a complete and present right on the party meant to be provided for, even where the circumstance do not admit of its immediate exercise. If the holder of the fund retain control over it, as *ex gr.*, power on his own account, to collect it or to revoke the disposition promised, this is fatal to the thing as an equitable assignment.

APPEAL from the Circuit Court for *the Southern District of Mississippi;* the case being thus:

Richard Christmas, of *Kentucky*, on 30th November, 1859, sold to one Lyons, of Mississippi, an estate there, and received in consideration therefor his promissory notes, each for $16,666, payable to him the said Richard or bearer, with interest, with a mortgage on the estate.

These notes subsequently (May, 1866) passed into the hands of H. H. Christmas, also of Kentucky, the son of Richard by his first wife, who, in the following June, had a settlement and compromise with Lyons, who paid a certain sum in cash, and for the remainder executed his two promissory notes in favor of said H. H. Christmas, for $8339.90 each; one payable December 1st, 1866, and the other February 1st, 1868. These notes were to be secured by the mortgage aforementioned.

The said H. H. Christmas being indebted to Payne, Huntington & Co., of New Orleans, pledged to them, in February, 1867, the first of these notes. Neither note being paid, two suits were instituted on them in the Circuit Court of the United States *for the Southern District of Mississippi;* one in the name of H. H. Christmas, for the use of Payne, Huntington & Co., on the pledge above stated, and the other in his own name and for his own use.

A bill was also filed to foreclose the mortgage on the notes, on which these respective rights were asserted.

On the 1st May, 1868, H. H. Christmas entered into a written obligation with Mrs. Mary Christmas, the second wife of said Richard (and like her husband, of Kentucky); in which, in consideration of her assuming to pay the debt

due to Payne, Huntington & Co., he transferred to her the note of Lyons, left in pledge with them. She having paid the note by a sale of her separate estate, made *by Richard, under a power of attorney executed by his wife, and by a deed executed by him, as trustee for her, in June*, 1868, the bill to foreclose the mortgage was amended, by showing this transfer and the payment of the amount due to P., H. & Co., and application was made to substitute her name for that of P., H. & Co., on the action at law. On the second of these notes a judgment was rendered on 13th November, 1868, for $8868. The other one remained in suit.

So far as to this part of the case. And now the subject-matter changes. It is thus:

On the 25th of May, 1860, one Russell, also of *Kentucky*, for himself and other persons there, for whom he sued, obtained a judgment for about $12,000 against the father, Richard Christmas, already named. The judgment was brought by writ of error to this court, and execution stayed by a supersedeas bond executed by the said Richard and one *Yerger*, and a certain *Anderson*, as his sureties. To induce Yerger and Anderson thus to become his sureties, Christmas had promised them a counter security of some sort, and he had in fact given them such security—the note of one Martin—which, however, to promote in some way his convenience, they had surrendered to him. The matter stood thus until the war of the rebellion closed, A.D. 1865. Christmas had during the war gone to Texas, and thence went to Havana, and thence to Europe. On reaching Liverpool he wrote, October 23d, 1865, a letter to Yerger, thus:

"I feel great uneasiness about your liability on the bond in suit of Russell against me. I have ever held the Lyons note as *sacred for the payment of this debt, and have it now in New York endeavoring to sell it with the mortgage to pay this debt. I expect to hear from it daily. If not sold I will send it to you as soon as I return.*"

On the 14th of February, 1866, he wrote again, stating that he had countermanded the sale of the Lyons note, and

that he would make a liberal arrangement with him, and adds:

"I could not safely send you Lyons's note by mail, as it is payable to me or bearer; hence, if lost, might put me to much trouble."

On the 20th of February, 1866, he wrote again to Yerger, stating that he had written on the 17th, proposing that if Lyons would take up Russell's debt he would allow it as a credit, dollar for dollar, on the note; but reflecting that the judgment *might not* be affirmed in the Supreme Court of the United States, and that the note was well secured, he requests that no further action be had until he can be better informed, suggesting that the rents of the land subject to the mortgage would pay the amount for which Yerger was surety, and then adds:

"I will hold this note—$16,666, and many years' interest—*always* subject to this debt, provided the judgment is affirmed, until which time let the matter rest *where* it is. When a compromise is made it must be through you as surety. I am sorry you told Lyons of our understanding, as he will be apt to let Russell know, and prevent an advantageous compromise."

On the 21st of February, 1866, he wrote again from Liverpool, saying, "I wrote you on the 17th and 20th," suggesting that he had written to Burwell to compromise the Russell debt, and adds:

"You may rest assured I will protect you with the Lyons note. . . . This fact should not be known, to enable me to make a good compromise."

On the 12th of May, 1866—after the transfer of the notes to his son, H. H. Christmas, which he says he had been compelled to make—he adds:

"In this I hope I have not lost sight of my purpose to protect you," &c.

In this state of things—and Richard Christmas being now wholly insolvent—Russell and the others, for whom he had

recovered the judgment, filed a bill in the same, the Circuit Court for the Southern District of Mississippi, against Lyons, still of Mississippi, and all three of the Christmases, father, wife, and son—these last three, like himself, as already mentioned, being citizens of Kentucky—setting forth the facts above stated, including the citizenship; and seeking to enjoin Lyons from paying his notes to either Mrs. Christmas or to the son, H. H. Christmas, and seeking to cause the payment (when payment was to be made), to be made to *them*, on the ground of their already-mentioned judgment against the father, Richard Christmas (for the payment of which Yerger and Anderson, his sureties, had, by the affirmance of the judgment, in this court, become equally liable with him), and on the further ground that the said Richard had made an equitable assignment of the fund to them, and that they were in equity entitled to enforce the security.*

The court below decreed for the complainants, "it appearing," as it said, "that the said Richard, with intent to provide for the payment of the judgment, in case the same should be affirmed, and to induce the said Yerger and the said Anderson to become his sureties aforesaid, did agree to provide special indemnity to them; and with such intent, and to the end that said judgment should be paid, and his said sureties saved harmless, did *assign* to them, his said sureties, the debt mentioned in the complainants' bill, as due from the defendant, Lyons, to him, the said Richard;" "and did so assign and set apart the said debt to the sureties aforesaid, as to give them a lien upon the said debt, which in equity they are entitled to enforce for the purpose of paying the said judgment, and that their lien attaches to and binds the debt due from Lyons, and not converted by said Harry and Richard, and which debt is evidenced by the judgments recovered in this court in favor of H. H. Christmas, and of H. H. Christmas for the use of Mary E. Christ-

* Yerger and Anderson, citizens of Mississippi, were also made defendants. Really, however, they were complainants. Lyons was, of course, but a stakeholder. The real parties in interest were H. H. Christmas and the wife.

mas, and by a decree in this court against Lyons in favor of said H. H. Christmas and Mary E. Christmas, foreclosing the mortgage, executed by said Lyons, to secure the payment of said debt due by him as aforesaid."

The court accordingly decreed payment to the complainants of the fund in court, which had been paid by Lyons, $7873, and that the said Lyons pay to them $8192, with interest from the 21st May, 1869.

From this decree the present appeal was taken. The errors assigned being—

First. That under the Constitution, which declares that the judicial power shall extend to "*controversies between citizens of different States*," the court below had no jurisdiction over the defendants, Richard, H. H., and Mary Christmas, who were stated in the bill to be citizens of Kentucky.

Second. That if this was not so, and if the court below had jurisdiction, the evidence did not authorize the conclusion that there had been an equitable assignment.

Mr. P. Phillips, for the appellants:

As to jurisdiction. The complainants are citizens of Kentucky, and Richard, H. H., and Mary Christmas, the only real defendants, are citizens of the same State. The controversy between these parties arises out of the question, whether Richard had made to the complainants, or to others for their benefit, an equitable assignment of the three original notes given by Lyons to Richard on the purchase of certain real estate. That controversy is for the first time brought to the notice of the court by the bill filed in this case. The court, therefore, by the language of the Constitution, had no jurisdiction of the controversy, unless the bill was a bill not original; that is to say, unless it was ancillary to a case of which it had jurisdiction. Then, indeed, as of a matter but ancillary to the former case, it would have jurisdiction, though it would not have it as of an original proceeding. This is all hornbook law.

Now, the bill here was an original bill, for it related to

matters not before litigated in the court by the same persons, standing in the same interest.

The matter of this equitable assignment was never litigated before in the court, nor was the bill an addition to, or a continuance of, an original suit. It is therefore an original bill. Cases on the subject in this court are, *Logan* v. *Patrick*,* *Sims* v. *Guthrie*,† *Dunn* v. *Clark*,‡ *Clark* v. *Mathewson*,§ and lately, *Jones* v. *Andrews*.‖ In all these cases the suit was sustained irrespectively of citizenship; but in each the suit was but a continuation of a former controversy and between the same parties. The same is true of *Dunlap* v. *Stetson*,¶ a circuit case. The absence of jurisdiction being thus clear, the decree must on that ground be reversed and the bill dismissed. This being so, the court cannot properly pass upon the other point. Any decision of it would be extra-judicial.

But if the court thinks that the jurisdiction exists, the case is clear on merits. As far back as Lord Hardwicke's time, and in Ridgway's Cases,** in a suit where A. filed a bill against B., and one of his debtors, praying that the court would stay the money in the debtor's hands, and not suffer it to be paid to B., for fear of his misapplying it, B. having promised to pay the complainant's demand out of such specific debt, Lord Hardwicke refused to hear any argument on the question. He dismissed the bill, saying:

"If a debtor promises to pay his creditor out of the money to be recovered in a certain suit, and on the faith of this promise the creditor forbears to sue him, this creates no specific lien on the money recovered."

And this same doctrine, declared frequently since, is thus presented with emphasis of late times in the Leading Cases in Equity:††

"It is necessary, moreover, in order to constitute an assignment, either in law or in equity, that there should be such an

* 5 Cranch, 288. † 9 Id. 19. ‡ 8 Peters, 1.
§ 12 Id. 170. ‖ 10 Wallace, 331. ¶ 4 Mason, 349.
** Page 194. †† Vol. ii, part 2, p. 233, Hare & Wallace's Notes.

actual or constructive appropriation of the subject-matter assigned as to confer a complete and present right on the assignee, even when the circumstances do not admit of its immediate exercise. A covenant on the part of a debtor, to apply a particular fund in payment of the debt as soon as he receives it, will not operate as an assignment, for it does not give the covenantee a right to the funds, save through the covenantor, and looks to a future act on his part as the means of rendering it effectual."

Speaking of this extract, the Supreme Court of Ohio says:*

"This rule seems to be well sustained and settled by the cases cited in its support."

Mr. Hubley Ashton, contra:

Of course, if there is no jurisdiction the case is at an end, and no question of merits arises. But there is jurisdiction, for a bill of the character of the one filed in this case, to enjoin proceedings pending in the Circuit Court, and to prevent a wrongful use of the proceedings, is not regarded as an original suit; and non-resident plaintiffs in the proceedings sought to be enjoined, or as to which relief is sought, being in court as parties, may be made such by the bill. This court, in *Freeman* v. *Howe*,† correct the case of *Dunn* v. *Clark*, relied on by Mr. Phillips. Referring to the opinion given in that case, they say:

"It would seem, from a remark in the opinion, that the power of the court upon the bill was limited to a case between the original parties to the suit. This was probably not intended, as *any party may file a bill whose interests are affected by the suit at law.*"

The jurisdiction exists then, and question of merits does arise.

From the best authorities on the subject of equitable assignments,‡ the following propositions may be extracted:

* Christmas *v.* Griswold, 8 Ohio, N. S. 563. † 24 Howard, 460.

‡ See notes to the case of Row *v.* Dawson, 1 Vesey, 331, in Leading Cases in Equity, 3d American edition, vol. 3, pp. 357–8; Raymond *v.* Squire, 11 Johnson, 47; People *v.* Tioga, 19 Wendell, 73; 1 Strobhart (Equity), 47; 6 Leigh, 534; Knapp *v.* Alvord, 10 Paige, 205.

Argument for the appellees.

1. Anything which shows an intention to assign on the one hand, and from which an assent to receive on the other may be inferred, will operate as an assignment if sustained by a sufficient consideration.

2. No writing or particular form of words is necessary if the consideration be proved, and the meaning of the parties apparent.

3. The obligation to indemnify sureties is a continuing obligation, and a sufficient consideration for a transfer or conveyance.

The object of the parties here is apparent. It was to place Yerger and Anderson in the position of sureties with specific indemnity. Christmas being under an express obligation to do so, and having obtained the surrender of the first indemnity on an understanding that he was to replace it by something equivalent, Yerger accepted it, and notified Lyons of the understanding with Christmas. It was a power of attorney coupled with an interest, a designation of the fund as one to be used by the surety with power to use it, and notice to the debtor of that power and its object.

There can be no doubt as to the effect of this pledge as between the parties. A court of chancery could enforce it against Christmas, and against any party occupying the position of H. H. Christmas, who took the note long after it was due, and for a pre-existing debt and not as actual payment. A party taking securities after maturity takes the title of the vendor subject to all equities by which it is affected.* Then, as to Mrs. Christmas, the whole matter was conducted by Richard Christmas, who had, *as her agent, full notice.*

The right and justice of the claim of the sureties to have this debt applied to their relief is clear. The opposing title of the son and wife of Richard Christmas looks like a fabricated title. No fair-minded person can read the letter of October 23d, 1865, in which the elder Christmas declares that he has ever held the note "sacred for the payment of this

* Texas *v.* White, 7 Wallace, 735.

Recapitulation of the case in the opinion.

debt," that he "has it now in New York endeavoring to sell it in order to pay this debt," and if not sold "will send it to Russell," and not feel a disposition to sustain the decree below, unless the claims of Mrs. Christmas and the son are clear, which they are not.

Reply: The language cited from *Freeman* v. *Howe et al.* was extra-judicial; dictum merely. It is unsupported by the two cases to which it refers, to wit: *Pennock* v. *Coe*,* and *Guy* v. *Tide-water Canal.*† The question now under consideration did not directly arise, nor is it even remotely referred to in the argument.

Mr. Justice SWAYNE delivered the opinion of the court.

Two questions have been argued and are presented for our consideration. They are:

Whether the residence of the parties as disclosed in the record was such as gave the court below jurisdiction of the case? and

Whether William Yerger and Warren P. Anderson had such a lien, by equitable assignment, upon the fund in controversy as warranted the decree appealed from.

The solution of these questions requires a brief statement of the case as it appears in the record

Richard Christmas held three notes of Lyons payable to himself, all dated November 30th, 1859, each for the sum of $16,666.50, and payable respectively, one, two, and three years from date. Richard Christmas assigned and delivered them to his son, H. H. Christmas. H. H. Christmas made a compromise with Lyons whereby these notes were delivered up to the maker, and he executed to H. H. Christmas, in their stead, two notes, each for $8339.90, one payable December 1st, 1866, the other February 1st, 1868. Both were secured by a mortgage upon real estate. H. H. Christmas hypothecated one of the notes to Payne, Huntington & Co., of New Orleans, to secure a debt which he owed them.

* 23 Howard, 117. † 24 Id. 262.

Recapitulation of the case in the opinion.

Suits upon the notes were instituted in the court where this bill was filed. The suit upon one of the notes was in the name of H. H. Christmas for his own use. The other was in his name for the use of Payne, Huntington & Co. A bill was also filed in the same court to foreclose the mortgage. It set out the rights of H. H. Christmas and of Payne, Huntington & Co. touching the notes. On the 1st of May, 1868, H. H. Christmas entered into an agreement with Mary Christmas, whereby in consideration of her assuming the payment of the debt due to Payne, Huntington & Co., he transferred to her the note hypothecated to them. Payment to them was made out of her means, and they delivered up the note. The foreclosure bill was amended by the substitution of her name for that of Payne, Huntington & Co., and an application, which is still pending, was made for the like substitution in the suit at law upon the note transferred to her. A judgment was recovered upon the other note.

In this condition of things the complainants filed their bill. It alleges the following state of facts: Russell, now deceased, for himself and the use of the complainants other than his executors, recovered a judgment against Richard Christmas, which was taken to the Supreme Court of the United States by a writ of error. William Yerger and Warren P. Anderson became his sureties in the error bond. The judgment was affirmed by this court, and the sureties thus became liable on their bond. The sureties executed the bond upon a promise of indemnity by their principal. He subsequently gave them a lien for this purpose upon one of the original notes of Lyons. It is claimed that this lien attaches to the notes taken in substitution for them. Richard Christmas is hopelessly insolvent, and has gone into bankruptcy. The complainants seek to be subrogated to the rights of the sureties and to enforce the alleged lien for the satisfaction of the judgment. The bill alleges that the complainants are all residents of the State of Kentucky; that the defendants, Richard, H. H., and Mary Christmas are all residents of the same State, and that the defendants, Yerger

and the legal representatives of Anderson and Lyons, are residents of the State of Mississippi.

No party to the original suits has had any connection with the filing of this bill. Lyons, the defendant in these suits, asks no protection against them. He did not answer the bill, but allowed a decree *pro confesso* to go against him. The case which the bill makes is wholly outside of the litigation in the suits at law. It is alien to everything involved in those proceedings. It alleges a lien upon the liability of Lyons, prior and paramount to the right of H. H. Christmas as plaintiff for his own benefit in one of the suits at law, and to that of Mary Christmas as *cestui que use* in the other. The controversy is wholly between them and the complainants. The bill is essentially an original one. In no sense can it be held to be auxiliary or ancillary to the action at law. Can such a bill be maintained?

The Constitution, article 3, limits the judicial power of the United States to "controversies between citizens of different States." There are exceptions which do not affect this case, and need not, therefore, be more particularly adverted to. The act of 1789* declares that "no civil suit shall be brought . . . against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ." The act of 1839† authorizes the voluntary appearance of parties in regard to whom there is no inherent and insuperable jurisdictional objection, in suits elsewhere than in the district in which they reside, or in which they may be found.

In the light of these provisions it is clear that this bill cannot be maintained as an original one; and we think it equally clear that it cannot be maintained as an auxiliary or supplementary bill, because it is not one of that character. The case falls clearly within the rules laid down by this court, upon the subject of parties, in *Shields* v. *Barrow*.‡

* § 11, 1 Stat. at Large, 78. † 5 Id. 321. ‡ 17 Howard, 130.

The several adjudications of this court upon the point under consideration have been referred to by the counsel on both sides.* Those cases call for a few remarks. In the five earliest cases the defendants in the suits at law were complainants in the suits in equity. In one of them, *Dunn* v. *Clark*, a judgment had been recovered against Dunn and others in the Circuit Court for the District of Ohio. The plaintiff, who was a citizen of Virginia, had died. The defendants filed their bill in the same court, praying for an injunction and a conveyance of the premises. All the complainants and all the defendants in the chancery suit were citizens of Ohio. This court said: "The injunction bill is not considered an original bill between the same parties as at law, but if other parties are made in the bill and different interests involved, it must be considered to that extent at least an original bill, and the jurisdiction of the Circuit Court must depend upon the citizenship of the parties." It was further said, that as there appeared to be matters of equity in the case which could be investigated by a State court it would be reasonable and just to stay all proceedings on the judgment until the complainants should have time to seek relief from a State tribunal. The decree of the Circuit Court was modified accordingly.†

In *Freeman* v. *Howe*, it appears that White had sued in the Circuit Court of the United States for Massachusetts and attached certain property of the defendant. The property was taken from the possession of the marshal by a writ of replevin issued from a State court. The marshal appeared in that court and set up as a defence that he held the property when it was taken from him, by virtue of process issued from the Circuit Court. This defence was overruled and the judgment against him was affirmed by the Supreme Court of the State. That judgment was reversed by this

* Logan *v.* Patrick, 5 Cranch, 288; Simms *v.* Guthrie, 9 Id. 19; Dunn *v.* Clark, 8 Peters, 1; Clark *v.* Matthewson, 12 Id. 170; Dunlap *v.* Stetson, 4 Mason, 349; Freeman *v.* Howe, 24 Howard, 450; Jones *v.* Andrews, 10 Wallace, 331.

† See also Williams *v.* Byrne et al., Hempstead, 473.

court upon the ground that the Circuit Court, having first acquired possession of the *res*, could not be deprived of that possession until the litigation there was brought to a close. This was the only point involved in the case and the only one decided. The learned judge who delivered the opinion remarked that the marshal's possession might have been protected by a proceeding in equity. In that connection he made certain remarks which were entirely proper as regards the facts of the case before him, but it is a misapprehension to suppose they are of universal application or that they can affect a case of the character of the one under consideration.*

The last of this series of cases is *Jones* v. *Andrews*. Andrews, a citizen of New York, recovered a judgment in the Circuit Court of the United States for the Western District of Tennessee against Reed and Bryson, by default. For the satisfaction of that judgment he sued out a writ of garnishment to seize in the hands of the judgment debtors the notes to them of Jones, a citizen of Georgia. Thereupon Jones filed a bill in equity in the same court, wherein he alleged that Reed & Bryson had transferred the notes to Andrews in payment of their debt to him; that they owed Andrews nothing when he sued them; that the judgment was obtained by collusion, and that the writ of garnishment was a contrivance to enable Andrews to avoid the necessity of a direct suit against Jones, and to deprive Jones of a valid defence which he had against the notes. Andrews appeared in the case voluntarily. This court held that the bill was well brought as an original one under the act of 1839, and also as one incidental and auxiliary to the garnishment proceeding. On both points the judgment was correctly given. According to the face of the bill Jones was to be as much affected by the garnishment proceeding, and a bill was as necessary for his protection and to the due administration of justice as if he had been a party to the record in the garnishment case.

The course indicated in *Dunn* v. *Clark* should have been

* Buck *v.* Colbath, 3 Wallace, 334.

pursued in this case. The bill should have been filed in the proper State court and an application should have been made to the Circuit Court to hold the proceeds of the suits at law under its control until the right to them should have been settled by an adjudication of the State court between the conflicting claimants. There would be no more inconsistency or embarrassment in these different proceedings than there is where a mortgagor resorts in different courts to the several remedies which he is entitled to pursue at the same time. He may file a bill to foreclose in one court, sue at law to recover his debt in another, and bring an action of ejectment to recover possession of the mortgaged premises in a third. Each of such courts will see in the end that its process is not abused and that no wrong is done to the debtor.

The evidence relied upon to support the alleged lien, consists, so far as it is necessary to consider it, of letters from Richard Christmas to Yerger, written before Richard transferred to H. H. Christmas the notes originally given to Richard by Lyons. In a letter of the 25th of October, 1865, Richard said: "I feel great uneasiness about your liability on the bond in suit of Russell against me. I have ever held the Lyons note as sacred for the payment of this debt, and have it now in New York, endeavoring to sell it, with the mortgage, to pay this debt; I expect to hear from it daily. If not sold I will send it to you as soon as I return." On the 14th of February, 1866, he wrote: "I could not safely send you the Lyons note by mail as it is payable to me or bearer—hence if lost might put me to much trouble." On the 21st of the same month he said: "You may rest assured I will protect you with the Lyons note." In the next letter, of the 12th of May following, he announced the transfer of the notes to H. H. Christmas, and said: "In this I hope I have not lost sight of my purpose to protect you." These letters contain no words of transfer, and nothing which by construction or otherwise can have any effect in that way. At most they are only evidence of a promise to pay the

judgment, if affirmed, out of the proceeds of one of the notes, and to send the note, if not sold, to Yerger.

An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. The phraseology employed is not material provided the intent to transfer is manifested. Such an intent and its execution are indispensable. The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he do, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund-holder can safely pay, and is compellable to do so, though forbidden by the assignor. Where the transfer is of the character described, the fund-holder is bound from the time of notice.* A bill of exchange or check is not an equitable assignment *pro tanto* of the funds of the drawer in the hands of the drawee.† But an order to pay out of a specified fund has always been held to be a valid assignment in equity and to fulfil all the requirements of the law.‡ These views are fatal to the claim asserted by the complainants in behalf of the sureties on the bond.

Upon both the grounds which have been considered, the decree of the Circuit Court must be REVERSED, AND THE BILL DISMISSED. The cause will be remanded with directions to

PROCEED ACCORDINGLY.

* Rogers *v.* Hosack, 18 Wendell, 334; Hoyt *v.* Story, 3 Barbour's Supreme Court, 263; Dickenson *v.* Phelps, 1 Id. 461; Clayton *v.* Faucet, 2 Leigh, 19; Hopkins *v.* Beebe, 2 Casey, 85; Hall *v.* Jackson, 20 Pickering, 194.

† Copperthwaite *v.* Sheffield, 3 Comstock, 243.

‡ Knapp *v.* Alvord, 10 Paige, 205; Yeates *v.* Groves, 1 Vesey, Jr., 280; Row *v.* Dawson, 1 Vesey, 331; Morton *v.* Naylor, 1 Hill, 585.

HURLEY *v.* STREET.

In this case the court dismissing, as involving no Federal question, an appeal from the Supreme Court of a State taken on a false assumption, that the case fell within the 25th section of the Judiciary Act of 1789, call the attention of the bar of the court generally to the fact that much expense would be saved to suitors, if before they advised them to appeal from decisions of the highest State courts to this one, they would see that the case was one of which this court had cognizance on appeal.

MOTION, by *Mr. G. G. Wright*, to dismiss a writ of error to the Supreme Court of Iowa.

Hurley sued Street to recover a lot of ground at Council Bluff. The defendant set up that the plaintiff had no title himself, and then relied on a tax sale, statute of limitation, and various other defences. The plaintiff demurred to four of these defences; assigning among other grounds of demurrer that "the law authorizing the tax sale was unconstitutional and void." The court overruled the demurrer, and the parties went to trial. On the trial much evidence was given about the character of the tax sale, the notice given, &c., tender of redemption-money, and other matters relating to the regularity of what had been done at the sale, but nothing of a different kind.

The court found for the defendant, and the defendant appealed to the Supreme Court of the State. The same sort of questions were there raised, and the same passed on; the Supreme Court finally affirming the decree. From that decree the case was brought here under an assumption that it came within the 25th section of the Judiciary Act, quoted *supra*, pp. 5, 6.

Mr. G. G. Wright and Mr. Lander, in support of the motion to dismiss, argued that it did not appear that any Federal question within the 25th section had been passed on; and that the decision was plainly made on other grounds not the subject of review here.

Mr. Moor, contra, reading a public act of the legislature

of Iowa, under which the sale was alleged to have been made, and which made the tax deed conclusive evidence of certain things, tending to give regularity to sales under it, argued that the act was in the face of the fifth amendment to the Constitution of the United States, which ordains that no person shall "be deprived of property except by due process of law." He then argued that the plaintiff did raise the point of unconstitutionality under one of his grounds of demurrer, and that the court could not have decided against him without deciding that the act was constitutional.

Reply: The plaintiff did not stand on his demurrer, but went to trial. It does not even appear that the plaintiff showed a *primâ facie* title in himself. If so, certainly the question of the constitutionality of the tax sale could not have arisen. But assuming that he did, it does not appear that the decision turned on that question. In addition, the allegation of unconstitutionality is too general. It applies presumably in the first instance to the State constitution. But if it applied to the restriction in the fifth amendment of the Federal Constitution, that restriction is not one on the States, but only on the United States.*

The CHIEF JUSTICE delivered the opinion of the court.

To give jurisdiction to this court upon error to the highest court of the State in which a judgment or decree has been rendered, it is necessary to show that some question under the 25th section of the Judiciary Act was made and decided, of which this court has cognizance by writ of error on appeal. This has been frequently ruled.†

It does not appear from the record that any such question was either made or decided.

Much expense to suitors would be spared if counsel would attend to the principle above stated, and as we have said, frequently laid down, before advising their clients to resort

* Pumpelly *v.* Green Bay Company, 13 Wallace, 166.

† Crowell *v.* Randell, 10 Peters, 368; Armstrong *v.* Treasurer, 16 Id. 281; Phillips's Practice, 108.

to the appellate jurisdiction of this court from the decisions of the State courts. The writ of error must be

DISMISSED.

TRADERS' BANK *v.* CAMPBELL.

1. Suit in chancery by an assignee in bankruptcy to recover the proceeds of goods sold under judgment in a State court against the bankrupt taken by confession when both parties knew of the insolvency.

   Such a judgment, though taken before the first day of June, 1867, is an unlawful preference under the 35th section of that act, if taken after the enactment of the bankrupt law.
2. The proceeds of the sale of the bankrupt's goods being in the hands of one sued as a defendant, another person who had a like judgment and execution levied on the same goods is not a necessary party to this suit, being without the jurisdiction. The rule laid down as to necessary parties in chancery.
3. The proceeds of the sale being in the hands of the bank, though it had given the sheriff a certificate of deposit, the assignee was not obliged to move against the sheriff in the State court to pay over the money to him, but had his option to sue the bank which had directed the levy and sale and held the proceeds in its vaults.
4. The defendant having money received as collections for the bankrupt delivered it to the sheriff, who levied the defendant's execution on it and applied it in satisfaction of the same. This is a fraudulent preference, or taking by process under the act, and does not raise the question whether if the defendant had retained the money it could be set off in this suit against the bankrupt's debt to the defendant.
5. So taking a check from the bankrupt and crediting the amount of the check then on deposit, on the bankrupt's note the day before taking judgment, was a payment by way of preference and therefore void, and does not raise the question of set-off.

APPEAL from the Circuit Court for the Northern District of Illinois.

The bankrupt act of the United States enacts by its 35th section that if any person being insolvent or in contemplation of insolvency, within four months before the filing of a petition by or against him, with a view to give a preference to any creditor having a claim against him procures his property to be seized or makes any payment, transfer, &c., thereof, *directly* or *indirectly*, the person receiving such pay-

ment, transfer, &c., having reasonable cause to believe the debtor to be insolvent, and that the payment, conveyance, &c., is in fraud of the act, the same shall be void, and the assignee may recover the property or its value.

Similarly its 39th section provides that if any person being insolvent or in contemplation thereof should make any payment or transfer of money or property, or give any warrant to confess judgment, or procure *or suffer his property to be taken on legal process, with intent to give a preference* or to defeat or delay the operation of the act, the money or property might be recovered back if the person receiving the payment or conveyance had reasonable cause to believe that a fraud on the act was intended, and that the debtor was insolvent.

The 20th section of the act provides "that in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other."

The act was approved on the 2d of March, 1867. But a proviso at the end of its 50th section provides, "that no petition or other proceeding under this act shall be filed, received, or commenced before the 1st day of June, A.D. 1867."

With this statute and this proviso as part of it in force, Hitchcock & Endicott, traders in Chicago, and keeping their bank account with the Traders' National Bank there—the bank being in the habit of discounting their notes and collecting their drafts—were requested by the bank, on the 6th of May, 1867, to furnish them with a statement of their affairs; the firm being at this time confessedly debtors of the bank, and in a much-embarrassed and really insolvent condition. A statement was soon furnished by the bookkeeper, which on the 24th of May was discovered by the bank to be untrue; the liabilities of the firm being set down in it much below their reality. Thereupon, on the 28th May, the bank brought a suit against Hitchcock & Endicott, in which, on an allegation of fraud, a capias was issued for the arrest of Hitchcock. To avoid this arrest the firm gave the bank a note, payable on demand, for the whole amount

of their debt, which was $6707.43, with a warrant of attorney to confess judgment, and on the next day, the 29th, the bank entered a judgment in one of the State courts of Illinois for the debt, and $50 attorney's fee, less $325.20, the amount which the firm had in deposit account with the bank on that day. For this $325.20, the firm drew a check in favor of the bank, in virtue of which check, the sum just named was indorsed on the note as a credit. Execution for $6438 was immediately (May 29th) issued on this judgment and levied on a stock of goods belonging to the firm. In what was thus done the president of the bank acknowledged that he was aware of the insolvent condition of Hitchcock & Endicott, and had instituted his proceeding after taking the opinion of counsel, and learning from this source that the bankrupt law did not affect such cases until after the first day of June, the earliest time at which proceedings could be commenced under that law.

On the 30th of May Hotchkiss & Sons, *of Connecticut*, obtained a judgment against the same parties for a much smaller debt, on which execution was also issued and levied on the same goods.

On the 25th of June, some other creditors of Hitchcock & Endicott filed a petition in the District Court for Northern Illinois, praying to have them declared bankrupt, and on the 10th of July they were so declared; one Campbell being appointed the assignee in bankruptcy. On the 21st of the following August the goods of the firm were sold under the execution of the bank. At the same time the bank caused to be sold under the same execution a certain sum of $943, which it had received on the 12th of June by way of collections made by it in the ordinary course of business, of drafts belonging to the firm. The net sum raised by the execution on the goods was $6062.43. On the 21st of August, while things were standing in this way—the sheriff having as yet made no return of his execution—Campbell, the assignee in bankruptcy, filed a bill in chancery, in the District Court below, against the bank and *Hotchkiss & Sons*, alleging that each of them had obtained from Hitchcock &

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Endicott fraudulent preferences, and that the several judgments in their favor were void. Hotchkiss & Sons being non-residents no service was made on them. The bill prayed that the judgments be set aside, and that the defendants be ordered to pay over to the assignee the value of the goods sold under the two executions. With this bill thus pending, the sheriff (who as already mentioned, had not made any return to his execution), deposited $6500 raised under the bank's execution on the goods in the bank itself, receiving from it a "certificate of deposit," that he had deposited the sum named "to the credit of *himself* subject to his order on the return of this certificate." There was, however, an arrangement made by the bank with the sheriff that the money should remain with the institution as a deposit, to be used by it until the suit brought by Campbell should be decided, and that if it was decided in favor of the bank that the money should, in that case, be returned to the sheriff, but if decided against the bank, that then it should abide whatever decision was made. The balance ($562.43) of the $6062.43, the net proceeds of the execution of the goods, the sheriff retained in his own hands.

The execution in favor of Hotchkiss came to nothing, the property levied on in virtue of it being levied on subject to the prior execution of the bank.

Pleadings being made up, and evidence taken, the bill was dismissed as to the non-residents and unserved defendants, Hotchkiss & Sons. On the other part of the case, the court was of opinion that Hitchcock & Endicott were insolvent on the 28th of May, 1867; that the Traders' Bank had reason to suspect and believe the fact of such insolvency; that under such circumstances the firm gave to them the note and warrant of attorney in question; that on the 29th of May the bank appropriated as part payment of this note $325.20, then on deposit to the credit of the firm; that the payment of $325.20 upon the note and the judgment in favor of the bank were alike void, as fraudulent preferences.

The decree ordered that the assignee recover from the bank the $325.20 and interest from May 29th, 1867, also an

amount equal to the judgment and costs rendered in favor of the bank with interest from May 29th, 1867, amounting in all to $7903.12.

This decree being affirmed in the Circuit Court the case was brought here on error.

Messrs. G. C. Campbell and B. C. Cook, for the appellants:

A preliminary point arises in view of the proviso of the 50th section. We submit that under that proviso the bill below did not lie, because all the acts which are complained of took place before the 1st of June, 1867, prior to which day the proviso declares that no petition or proceeding shall be begun. But waiving that, we submit that the decree is erroneous.

1. Because the proper parties were not before the court. In *Shields* v. *Barrow*,* Mr. Justice Curtiss, in delivering the opinion of the court, says:

"The court can make no decree affecting the rights of any absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and substantial justice cannot be done between the parties to the suit without affecting those rights."

Under this rule Hotchkiss & Sons were necessary parties. The goods and funds of the bankrupts had before bankruptcy been levied upon and sold by the sheriff, under two executions, one in favor of the bank and the other in favor of Hotchkiss & Sons. Upon the hearing the bill was dismissed as to Hotchkiss & Sons, and then decree rendered that the judgment in favor of the bank was void, and that it pay over to the assignee in bankruptcy $6500 of the proceeds of the executions, with interest from May 29th, 1867. This $6500 was still in the hands of the sheriff; that is, he held a certificate of deposit of the bank for that amount of the proceeds of sale; the balance, $562.43, he still held in cash. The judgment in favor of Hotchkiss & Sons has never been

* 17 Howard, 141.

declared void, but is still in force, and when the judgment in favor of the bank was declared void, *it* became the first lien upon the funds in the sheriff's hands made from the goods of the bankrupts, and was and is entitled to be paid in full out of those funds. No reason exists why Hotchkiss & Sons cannot obtain from the State court an order upon the sheriff to pay their judgment in full. The sheriff could not successfully resist such rule by pleading the decree in this case, Hotchkiss & Sons not being parties to the bill. If the decree in this case operates to transfer to the assignee in bankruptcy the $6500 deposited by the sheriff with the bank, leaving in his hands only $562.43 with which to satisfy the judgment of Hotchkiss & Sons, it certainly affects the rights of these absent parties. If the sheriff can plead this decree in answer to a rule in the State court, to pay over the money, Hotchkiss & Sons are deprived of their money by decree in a case to which they are not a party. If the sheriff cannot plead the decree in answer to such rule he is left liable to Hotchkiss & Sons in that amount, and that by the operation of a decree in a case to which he was not a party.

2. The assignee should have applied to the State court for an order on the sheriff to pay over to him the proceeds of the execution in his hands. The judgments in question were obtained in the State courts prior to adjudication in bankruptcy; executions were issued, levied, and sale made by the sheriff prior to any proceedings to recover the property or proceeds. The fund of $7062.43 realized from the goods of Hitchcock & Endicott was therefore legally in the hands of the sheriff, and under the control of the State court when this bill was filed.

3. The bank has never received from the sheriff any amount whatever in satisfaction of the judgment recovered by it against Hitchcock & Endicott. As heretofore stated, the sheriff still holds the funds made from the property of Hitchcock & Endicott. The decree seems to have proceeded upon the hypothesis that the money deposited by the sheriff with the bank was a payment to it of the amount of the ex-

ecution in its favor. This hypothesis is, however, inconsistent with the facts of the case.

If the assignee had applied to the State court for an order on the sheriff to pay over to him the funds realized upon the two executions, all parties would have been in court and bound by the order rendered, and equal and exact justice done to each.* This proceeding, on the contrary, results in great wrong to the appellant. A decree is rendered against it for $7903.12 as money made from the bankrupts' estate, when in fact it has only realized $325.20. So that in consequence of an honest misconstruction of the bankruptcy act, the bank not only lose their entire claim of $6707.43, but some $1800 in addition thereto.

4. The decree rendered against the bank is for far too large a sum. The account stated between the bank and the bankrupts is thus:

Original amount of the bank's debt, ...		$6,707 43
Contra.		
Cash of bankrupts' on deposit, . . .	$325 20	
Cash collected on drafts, June 12th, . .	928 38	
		1,253 58
True balance due the bank, ...		$5,453 85

Now, under the 20th section it was lawful for the bank to apply in payment of their claim against Hitchcock & Endicott all of the moneys which came into its hands prior to the filing of the petition in bankruptcy. Thus setting one debt off against the other the balance is $5453.85. This certainly would be the full amount of the claim which could have been allowed to the bank if its officers had appeared in the bankrupt court for the purpose of proving their claim.

If it were true then that the whole amount of the judgment in favor of the bank against the firm had been paid, the decree would be too great by $1259.40, and interest from the 29th of May to the date of the decree.

Mr. M. W. Fuller, contra.

Rohrer's Appeal, 62; Pennsylvania State, 498.

Mr. Justice MILLER delivered the opinion of the court.

It is not asserted by counsel here that the defendant acquired any rights to the property levied on by its execution. It would be useless to do so in view of the acknowledgments of the president of the bank upon this subject and of the circumstances in which he stated that he had instituted his proceeding.*

We are of opinion that the proviso to the 50th section of the Bankrupt Act, which declares that no petition or other proceeding under it shall be commenced before the first day of June, 1867, is limited in its effect to such commencement, and that any act done after its approval, March 2d, 1867, in fraud of the purpose of the statute, was within its prohibitions.

We will consider the objections to the decree in favor of the plaintiff in the order in which they are assigned in the appellant's brief.

1. It is said that Hotchkiss & Sons were necessary parties, without whom the court could not proceed. They were not within the jurisdiction of the court, and, though made defendants by the bill, never appeared in the case, and it was dismissed as to them without prejudice.

Their interest, as asserted by the appellant's counsel, was that they also had a judgment against the bankrupts, on which execution was levied, on the same property, and that, as it was sold under both executions, Hotchkiss & Sons have a right to be heard as to the validity of that sale.

In the case of *Barney* v. *Baltimore*,† this court, after reviewing the former decisions on this subject, remarks that there is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made par-

* See *supra*, p. 89.

† 6 Wallace, 280.

ties, if within its jurisdiction, before deciding the case. But, if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class, whose interest in the subject-matter of the suit, and in the relief sought, is so bound up with that of the other parties, that their legal presence as parties in the proceeding is an absolute necessity, without which the court cannot proceed.

Hotchkiss & Sons manifestly belong to this second class, and not the third. The bank is sued for its own wrong in procuring judgment and selling the property, and for the proceeds now in its vaults. Hotchkiss & Sons may, or may not, be in the wrong in procuring their judgment and levy, but it is not alleged that they have received any of the money. If they are entitled to any of it they will be at liberty to bring any suit they may be advised to, after this suit is disposed of, against the assignee, or any one else, and their rights will not be precluded by the present decree; nor have they any such interest in the subject-matter of this suit, that their presence is necessary to the protection of the bank. A complete decree can be made between the bank and the assignee without touching the rights of Hotchkiss & Sons, or embarrassing the bank in its relations to them. The organization of the Federal courts has always required them to dispense with parties in chancery not within their jurisdiction, unless their presence was an absolute necessity, which it clearly is not in this case.

2. It is said that the assignee should have applied to the State court for an order on the sheriff to pay over the proceeds of the execution to him.

But it cannot be maintained that the assignee, who is pursuing the assets of the bankrupt in the hands of third parties, is bound to resort to the State courts because there is a litigation there pending. The language of the 14th section, that the assignee may prosecute and defend all suits, pending at the time of the adjudication of bankruptcy, in which the bankrupt is a party, does not *oblige* him to seek a remedy in that way. The 2d section of the act declares that the

Circuit Courts of the United States shall have concurrent jurisdiction with the District Courts of all suits, at law or in equity, which may or shall be brought by the assignee against any person claiming an adverse interest touching any property, or rights of property, of said bankrupt.

The decree in the present suit is founded on the idea that the bank, by means of its illegal and collusive proceedings in the State court, has received the proceeds of property which ought to have come to the assignee. He has a right to proceed against the bank directly in the Federal court for those proceeds, and is not obliged to resort to the State court, where the matter is substantially ended, for relief.

3. The third objection is, that the bank has not received from the sheriff any sum whatever in satisfaction of the judgment which it recovered against the bankrupts.

The facts of the case are simple and undisputed. The goods of the bankrupt were sold under the execution in favor of the bank, and the sheriff after deducting the costs of the proceeding deposited the remainder with the defendant. This suit being then pending, the defendant, instead of giving the sheriff a receipt for the amount as paid on the execution in his hands, gave him a certificate of deposit. This transparent device can deceive no one, and does not vary the legal character of the transaction. The sheriff, under the direction of the bank, levies upon and sells the property of the bankrupt, after the title has passed to the assignee, and in violation of the law. He deposits the proceeds of the sale with the party whose agent he was in this illegal appropriation of the goods. The assignee electing to assert his right to the proceeds of the sale instead of the goods themselves, sues the party who caused the seizure and sale, and who has their proceeds in his possession. His right to recover under such circumstances cannot well be doubted.

4. The fourth objection is that the decree rendered against the bank is for too large a sum.

This assignment of error has regard to certain sums coming to the hands of the defendant as bankers of Hitchcock &

Endicott, and which they claim a right to retain by way of set-off.

The amount of $928.38 was received on the 12th day of June, some days after their judgment had been recovered in the State court, and after the execution had been levied on the stock of the bankrupts' goods. It was received as collections made by the bank, from drafts placed by the bankrupts in their hands in the ordinary course of business, and if they had retained it and appropriated it as a set-off against the debt of the bankrupt to them, an interesting question might have arisen as to their right to do so. But instead of doing this, they handed it over to the sheriff who levied on it as the property of the bankrupt, by virtue of the same execution under which he levied on and sold the goods. By the act of the bank it was thus placed in the same category with the goods, and instead of exercising their own right of set-off, by directing the sheriff to credit the execution with the sum received by them on the debt, they delivered it to him to be treated as the goods of the bankrupt and subjected by him to their illegal judgment. This amount then must be treated in the same manner as the other money received by them from the sheriff on the sale of the goods.

There was in the bank on deposit to the credit of Hitchcock & Endicott on the day they gave the judgment note, the sum of $325.20. This sum was not computed or deducted when the note was given. On the next day, before the bank caused the judgment to be entered up, they credited this amount on the note, and took judgment for that much less. They now assert that this was what they had a right to do, and that it should remain a valid set-off. But this does not appear to have been really what was done. It appears that Hitchcock & Endicott gave the bank a check for the sum, and by virtue of that check it was indorsed on the note as a payment. Now as both the bank and the bankrupts knew of the insolvency of the latter, this was a payment by way of preference and therefore void by the 35th section of the bankrupt act. In this case as in the other, if they had stood on their right of set-off, it might

possibly have been available, but when they treat it as the bankrupts' property, and endeavor to secure an illegal preference by getting the bankrupts to make a payment in the one case, and seizing it by execution in the other, when they knew of the insolvency, both appropriations are void.

We see no error in the decree which was rendered in the District Court and affirmed in the Circuit Court on appeal, and which is again

AFFIRMED BY THIS COURT.

THE THAMES.

1. The contract between a ship and the shipper is that which is contained in the bills of lading delivered to the shipper. The bill retained by the ship or "ship's bill," as it is sometimes called, is designed only for its own information and convenience; not for evidence, as between the parties, of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract.
2. By issuing bills of lading for merchandise, stipulating for a delivery to order, the ship becomes bound to deliver it to no one who has not the order of the shipper. It is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, and that notice of the arrival of the merchandise could not be given to him. Diligent inquiry for the consignee, at least, is a duty. And if, after inquiry, the consignee or the indorsee of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He has no right under any circumstances to deliver them to a stranger.
3. The indorsee of a bill of lading may libel the vessel on which the goods are shipped, for failure to deliver them, though he may be but an agent or trustee of the goods for others; as *ex gr.*, the cashier of a bank.

APPEAL from the Circuit Court for the Southern District of New York; the case being this:

In January, 1868, Alfred Bennett, James Van Pelt, and Gilbert Van Pelt, were merchants doing a commission business in New York under the name of Bennett, Van Pelt & Co. The partner, Gilbert, resided in Savannah, where he was in the habit of purchasing cotton and consigning it to

his firm in New York. In the course of this dealing he bought, on the 28th of January, 1868, one hundred and eleven bales of Brady & Moses, commission merchants in Savannah, for this firm in New York, and on the same day shipped the cotton to New York by the steamship Thames, one of the vessels of a line known as the Black Star Line. Three bills of lading, of the same tenor and date, were issued, each stating that the cotton was shipped by Gilbert Van Pelt, and that it was to be delivered "unto order or to his or their assigns." "And it is expressly understood," the bill of lading went on to say, "that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof, as soon as delivered from the tackles of the steamer, at her port of destination, and they shall be received by the consignee thereof, package by package, as so delivered; and if not taken away the same day by him, they may (at the option of the steamer's agents) be sent to store, or permitted to lay where landed, at the expense and risk of the aforesaid owner, shipper, or consignee." Two of the bills were delivered to said Gilbert Van Pelt; the other being retained as the ship's bill of lading. On the same day, in order to procure money wherewith to pay for the cotton, and in compliance with the terms and conditions of the purchase, he drew his draft on his firm in New York for $8300, payable fifteen days after sight, to the order of "Billopp Seaman, cashier," and delivered the draft and the two bills of lading which he had to the said Brady & Moses, who held moneys of the Atlanta National Bank of Atlanta, Georgia, for the purpose of investment in bills drawn on New York, and the draft was discounted for the account of that bank, and the proceeds were applied toward the payment of the cotton. The bill or invoice for the cotton was receipted as if it had been paid for in cash, and the Atlanta Bank was charged with the advances. The two bills of lading were indorsed,

"Deliver B. Seaman, Cashier, or order.

"G. S. VAN PELT."

Statement of the case.

The point of contest in the case was for what exact purpose the two bills of lading had been delivered to Brady & Moses, that is to say, whether to stand as security until the draft of Gilbert Van Pelt should be *accepted*, or whether to stand until it should be *paid*. Gilbert Van Pelt himself swore it was given but for the former purpose, and that this was perfectly understood on both sides. Brady & Moses, on the other hand, each swore that it was given to stand as security until the draft should be *paid;* and in this they were confirmed by the clerk of their house, one Bruen. The draft and the bills of lading were forwarded to Billopp Seaman, under general instructions from the Atlanta National Bank, to hold and collect for the credit of the account of the said Atlanta National Bank.

The Thames arrived in New York late on Sunday afternoon, February 2d, 1868. Before arrival, the purser had made out bills for freight, and made out those for freight on this cotton, to Bennett, Van Pelt & Co. There was a memorandum, in writing, at the foot of the ship's bill of lading, "for Bennett, Van Pelt & Co.;" by whom put there was not at all explained, further than that it was not in the handwriting of any of the ship's agents at Savannah who signed the bill of lading and made the contract for carriage. The ships of the Black Star Line, of which, as already mentioned, the Thames was one, had brought cotton regularly for Bennett, Van Pelt & Co. On Monday morning, February 3d, the steamer commenced delivering cargo. The one hundred and eleven bales were delivered on the pier. Bennett, Van Pelt & Co. sent their carts and took the cotton, paid freight for it, receipted for it on the ship's bill of lading, and sold the bulk of it for cash on delivery the day that they got it.

As appeared on the one hand, nothing was done by the Fourth National Bank in reference to the cotton, or its delivery, from the time of the acceptance of the draft, February 1st, 1868, until after its maturity, February 19th, 1868. On that day, and on that draft, Bennett, Van Pelt & Co. failed, and the draft was protested for non-payment. On the other hand it did not appear, except by the testimony of

Statement of the case.

James Van Pelt, which was contradicted by Billopp Seaman, that he, Seaman, knew of the arrival of the vessel before the cotton was delivered and sold. On the 19th, after the draft was dishonored, Seaman, by direction of the President of the Fourth National Bank, sent a clerk to the office of the agents of the ship, where he saw the ship's bill of lading, and heard that the cotton had been delivered some days before to Bennett, Van Pelt & Co. He made no demand. Afterwards, on March 16th, 1868, the bank made a formal demand for it.

Until the inquiries made on February 19th, 1868, the agents of the Thames had no notice, beyond that which the bill of lading itself gave, of any claim to or interest in the cotton in question by any other parties than Bennett, Van Pelt & Co.

It was undisputed that Seaman had no real interest in the cotton, and that it belonged to the Atlanta National Bank, whose sole agent in New York was the Fourth National Bank.

In this state of things Seaman filed his libel in the District Court of New York against the Thames, March 19th, 1868, claiming damages in the sum of $8300 for non-delivery to him, at New York, of the cotton, the bill of lading for which had, as he set forth, and as was not denied, been assigned to him for a valuable consideration. The owners of the Thames answered the libel and put in issue its material allegations, averring that the cotton was shipped by the Thames for and to be delivered to Bennett, Van Pelt & Co., of New York, and was so delivered in due course and without notice of the claim of the libellant, and that no claim for it was ever made by the libellant until long after such delivery; that the alleged assignment of the bill of lading to the libellant was by way of security for personal obligations of Bennett, Van Pelt & Co., who were solvent merchants, and to whom the libellant looked for payment of such obligations; and that he gave no notice and did no act as assignee of the bill of lading on the arrival of the

vessel or upon the delivery of the cotton, nor until after Bennett, Van Pelt & Co. had become insolvent, and that by his delay and laches he waived and lost all claim against the vessel and her owners.

The District Court, considering that Seaman had a sufficient interest to sue, and holding, upon the evidence, that the delivery of the bills of lading for the cotton was intended to, and did, transfer it to the libellant as a security for the payment of the draft for $8300, decreed in favor of the libellant, and the Circuit Court affirming that decree, the owners of the vessel brought the case here.

Messrs. Barney, Butler, and Parsons, for the appellant:

The witnesses do not, indeed, agree as to the purpose for which the bills of lading were transferred, but the *facts* show that it was as security for the acceptance, and not for the payment of the draft. Thus—

1. The draft was a *time* draft, having fifteen days to run, and was taken at the rate of such paper. Van Pelt would have had no motive to buy cotton on credit if his house was not to have the benefit of the purchase till the credit expired.

2. No instructions were given to the Fourth National Bank to deal with the cotton in the interval of fifteen days during which the draft would be running to maturity. The bank actually did nothing to show any interest in the property.

Even if the transfer of the bills of lading was intended to secure the payment of the draft, Seaman was not entitled to hold the vessel and owners for the non-delivery of the goods, inasmuch as by his own laches he suffered the cotton to go into the possession of Bennett, Van Pelt & Co., and to remain in their possession until after their insolvency. The cotton was shipped in the regular course of business on a vessel which formed one of a line of steam packets between New York and Savannah, and which had been engaged in carrying cotton for account of the same shipper and consignees. The vessel knew no other party in interest. Before arriving at New York, the purser made out the freight

bill to Bennett, Van Pelt & Co., assuming in good faith that the cotton was for them. A memorandum at the foot of the bill of lading, "For Bennett, Van Pelt & Co.," confirmed him in this assumption. The bill of lading, by its terms, required the consignee to take away goods on the day of the arrival of the vessel at her port of destination, or in default of his so doing the goods were, at the option of the steamer's agents, to be sent to store or left on the steamer's wharf. The vessel arrived on Sunday, and on Monday morning early, notice was given to Bennett, Van Pelt & Co., the only consignees of whom the ship had knowledge, and who came in the usual course of business and took it from the pier, receipting for it. The firm being solvent, and being regular consignees, and giving their receipt, the non-production of the outstanding bill of lading was not a circumstance to excite suspicion. Notwithstanding that the bill of lading showed a shipment on a steamer of a regular line at Savannah, January 28th, 1868, which in due course would have brought the goods to the pier in New York about 3d February following, the Fourth National Bank did absolutely nothing until February 19th, and even then made no demand, and took no further action till March 16th. Bennett, Van Pelt & Co. did not fail until February 19th, 1868.

On this state of facts Seaman took the risk of the continued solvency of Bennett, Van Pelt & Co., and of the possession of the cotton by them. Although he may have been legally entitled, in the first instance, to the possession, yet it was competent for him by his acts to waive actual possession, and permit the goods to go into the hands of Bennett, Van Pelt & Co., consignees and owners, subject to Seaman's rights. Had he intended to avail himself of the rights of a consignee of the cotton under the bill of lading, he should have looked after the property and asserted such right. A consignee, by refusing or failing to accept the consignment, and look after the property, disclaims and loses the position of consignee. By failing to assert his rights as consignee until after the insolvency of Bennett, Van Pelt & Co. had intervened, Seaman lost all recourse, except as against them.

They were liable to him in trover for the value of the goods if they took them from the ship without right. The ship's agent having acted in good faith, and Seaman having clearly been guilty of laches, the ship should not be visited with the consequences of his neglect.

3. Seaman was not entitled to maintain this action. He was not the real party in interest, nor had he such title to or interest in the case as to entitle him to sue in admiralty. The Fourth National Bank, the real agent and representative of the Atlanta National Bank, and not the cashier, was the only party entitled to bring the suit.*

The indorsement of commercial paper to and by a bank cashier is the act of his bank and not his individual act, and the libellant having no individual property or interest did not stand in any such relation to the transaction as to enable him to proceed.†

Mr. B. F. Lee, contra.

Mr. Justice STRONG delivered the opinion of the court.

The engagement of the ship with the shipper was to deliver the cotton in New York to order. In regard to this there is no doubt. Such was the express stipulation of the bills of lading, which were given on the 28th of January, 1868, when the cotton was received on shipboard. On that day Gilbert Van Pelt purchased the cotton in Savannah from Brady & Moses, and settled for it by giving in payment his draft upon the firm of Bennett, Van Pelt & Co., in New York, of which firm he was a member. The draft was drawn at fifteen days' sight in favor of the libellant, Billopp Seaman, cashier, or order, and it was discounted by Brady & Moses with money of the Atlanta National Bank, which they had in hand for the purpose of purchasing bills on New York on the bank's account. The price of the cotton was

* Houseman *v.* Schooner North Carolina, 15 Peters, 40; McKinley *v.* Morrish, 21 Howard, 355.

† Bank of Genesee *v.* Patchin Bank, 19 New York, 312; Folger *v.* Chase, 18 Pickering, 63; Watervliet Bank *v.* White, 1 Denio, 608.

thus, in substance, paid by money which Van Pelt obtained from the bank, as the proceeds of his draft. At the time when he drew the draft he also indorsed upon the bills of lading which the ship had given for the cotton, an order directing its delivery to Billopp Seaman, cashier, in whose favor the draft was drawn, and delivered them with the draft to Brady & Moses. They were made out in triplicate, as is usual, and, by them all, the ship undertook to deliver the cotton shipped *to order*. Two of them had been delivered to Van Pelt, the shipper, and the third was retained by the ship. That retained by the ship, it is true, when produced at the trial in the court below, was found to have, at its foot, the memorandum, "for Bennett, Van Pelt & Co.," which is not upon those delivered to the shipper. How that memorandum came there is not explained. No witness has testified in whose handwriting it is, but it is proved not to have been in that of any of the ship's agents at Savannah who signed the bills of lading and who made the contract for carriage. This, however, is of little importance. The contract between the ship and the shipper is that which is contained in the bills of lading delivered. The ship's bill was designed only for its information and convenience; not for evidence, as between the parties, of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract.

The proofs in the case leave no reasonable doubt that the bills of lading were indorsed to the libellant in order to transfer to him the cotton as a security for the payment of the draft at its maturity. Gilbert Van Pelt alone asserts the contrary. His testimony, it must be admitted, tends to show that they were indorsed and received as security for the acceptance only of the draft. But he is directly contradicted by Moses, by Brady, and by Bruen, neither of whom has any interest in this controversy, and all of whom state that the bills of lading were indorsed to secure to Seaman the payment of the draft and not merely its acceptance. Besides, their testimony is in harmony with all the probabilities of the case. It is absurd to talk of security for the acceptance

of the draft. No such security was needed. It might have been accepted before it was discounted. Gilbert Van Pelt was a member of the firm upon which it was drawn, and he was at hand when it was discounted. He might then have accepted it. In addition to this it is significant that the invoice of the sale from Brady & Moses to Van Pelt was made out and receipted as if paid in cash (the draft having been turned into cash by a deduction of discount and exchange), and the advances made upon the draft were at once charged to the Atlanta National Bank. In view of all this it is incredible that the bills of lading were indorsed to Seaman merely to secure what the maker of the draft could have given on the instant. Nor ought the position of Gilbert Van Pelt to be overlooked. If the bills of lading were indorsed as security for payment of this draft, his firm has obtained from the ship delivery of the cotton through a fraudulent representation that they were the consignees, or entitled to the delivery of possession, and they sold it for cash on the day when it was thus wrongfully obtained. He is not, therefore, an unbiased witness. His testimony was given while he was under the influence of a temptation, not unnatural, to vindicate his firm from the guilt of fraudulently abstracting a large amount of property from its rightful owner. Standing as he does, in such a position, his statements are not to be credited when in conflict with the positive testimony of Brady, of Moses, and of Bruen, and when inconsistent with the strong probabilities of the case.

It must be considered, then, that by the indorsement of the bills of lading the libellant became the owner of the cotton, and that by force of the contract with the ship it was deliverable at New York only to him, or to his order. Reference to authorities to show that the effect of the indorsement was to vest such ownership in Seaman is quite unnecessary. We may, however, refer to a few.*

* Conrad *v.* The Atlantic Insurance Company, 1 Peters, 445; Gibson *v.* Stevens, 8 Howard, 384; Thompson *v.* Dominy, 14 Meeson & Welsby, 403; Caldwell *v.* Ball, 1 Term, 205; Wright *v.* Campbell, 4 Burrow, 2051; 1 Lord Raymond, 271; Walter *v.* Ross, 2 Washington's Circuit Court, 283.

Opinion of the court.

The ship arrived with the cotton at the port of New York on Sunday, the 2d day of February, 1868, late in the afternoon, and on the morning of the 3d delivered it to Bennett, Van Pelt & Co. on their demand, without the production of either of the bills of lading which had been given to the shipper, and without any order from Billopp Seaman, who was the indorsee of the bills, and to whom alone, or to whose order, it could rightfully be delivered. It does not appear that any notice of the ship's arrival was given to Seaman, or that the ship made any inquiry to ascertain to whom the cotton was deliverable. It would seem that assuming the mysterious memorandum on the bill of lading retained by the ship was equivalent to an order to deliver to Bennett, Van Pelt & Co., no demand was made for the presentation of such an order, and no further inquiry for the consignee was set on foot. The consequence was that Bennett, Van Pelt & Co., having obtained the property without any right to it, sold it for cash on the day it was delivered to them, and failed within a few days afterwards.

No argument is needed to show, what is most manifest, that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver it to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the indorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made. Want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search.* And if, after inquiry, the consignee or the indorsees of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed, or to store them prudently for and on account of their owner. He may thus

* Fisk *v.* Newton, 1 Denio, 45; Peytona, 2 Curtis, 21.

relieve himself from a carrier's responsibility.* He has no right under any circumstances to deliver to a stranger.

It is said, however, that the libellant delayed presenting the bills of lading which had been indorsed to him, and delayed making any demand for the cotton until after the 19th of February, when the draft had fallen due, and when it had been dishonored. But that delay cannot justify the ship's delivery of the cotton, on the day after its arrival, to persons who had no bill of lading and no authority whatever to receive it. Had the delay been instrumental in causing such a wrongful delivery, had it been active interposition to mislead the ship, a different case might possibly have been presented. But at most the laches of the libellant was mere inaction, and the wrong delivery was in no degree due to it. The delivery was, as we have stated, made on the morning after the ship's arrival in port, and the ship's order for delivery to Bennett, Van Pelt & Co. was issued before the libellant could have known of its arrival. We say this, notwithstanding the testimony of James Van Pelt, which is plainly in conflict with the proved and conceded facts of the case. And as the cotton was sold for cash on the 3d of February, the very day of its delivery, the failure of the libellant to claim it until some weeks afterwards, wrought no injury or loss to the carrier, so far as it appears. We are, therefore, of opinion that the ship is clearly liable for the cotton to the libellant.

And we think that the libel was rightly filed in the name of Billopp Seaman. By the indorsement of the bills of lading the legal ownership of the cotton passed to him, as well as the right to control its delivery. It is a matter of no importance that the beneficial interest may have been in the bank of which he was cashier.† The holder of a legal right may always assert it by suit, though he may be accountable to another for what he may recover. A judgment in his favor may always be pleaded in bar against a suit by the

* Galloway *v.* Hughes, 1 Bailey, 553; 1 Conklin's Admiralty, 196; Fisk *v.* Newton, *supra.*

† Fairfield *v.* Adams, 16 Pickering, 381.

beneficial owner. Besides, it is settled that the agent of absent owners may libel in admiralty, either in his own name or in that of his principals.*

DECREE AFFIRMED.

MAHAN *v.* UNITED STATES.

1. The 4th and 5th rules regulating appeals from the Court of Claims, were designed to enable a party to secure a finding of fact on any point material to the decision by that court.
2. But a failure of the court to find the fact as the party alleges it to be, will not justify the bringing of all the evidence on that subject before this court, though on a refusal of that court to make any finding on the subject, the Supreme Court may remand the case for such finding.

THIS was a motion in a suit which had come here on appeal from the Court of Claims; the case being thus:

Some years ago, by act of Congress, appeals were allowed from the Court of Claims to this court; and this court, in conformity with authority given in the act, prescribed certain rules under which the appeals might be heard. They were thus:

RULE I.

In all cases hereafter decided in the Court of Claims, in which, by the act of Congress, such appeals are allowable, they shall be heard in the Supreme Court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees, as may be necessary to a proper review of the case.

2. A finding of the facts in the case by said Court of Claims, and the conclusions of law on said facts on which the court founds its judgment or decree.

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* Houseman *v.* The Schooner North Carolina, 15 Peters, 49; McKinlay *v.* Morrish, 21 Howard, 355; Lawrence *v.* Minturn, 17 Id. 100.

The finding of the facts and the conclusions of law to be stated separately and certified to this court as part of the record.

The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which those ultimate facts are founded.

RULE II.

In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the Court of Claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule 1 (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the Supreme Court.

RULE III.

In all cases an order of allowance of appeal by the Court of Claims, or the chief justice thereof in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.

These rules not being found quite sufficient, this court at a later date (December Term, 1869) adopted two additional rules, thus:

RULE IV.

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

RULE V.

In all such cases either party, on or before the hearing of the

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

In this state of the rules, Mrs. E. Mahan claiming certain property in the treasury of the United States, and having made a claim and produced her evidence in the Court of Claims, filed a written request to the court, before its decree was rendered, that it would find, as a matter of fact, that the title and ownership of the property in question was in her, and that she was entitled to recover the proceeds thereof. The court refused to do this, but found, to the contrary, that she was not the owner of the captured property, and was not entitled to the proceeds of it in the treasury.

Having set forth these facts in this court, where the case had now been brought by her on appeal, her counsel, *Mr. R. M. Corwine*, now moved to remand the case for further findings, maintaining that, under Rule 5, above quoted, regulating appeals from the Court of Claims, she was entitled to have all the evidence which was before the Court of Claims brought here, and have this court decide the question which she propounded to that court.

And it was argued by him that these rules, especially the 4th and 5th rules, were adopted in order and to the end that disputed questions of fact might be brought here for review.

Mr. B. H. Bristow, *Solicitor-General*, *contra*.

Mr. Justice MILLER delivered the opinion of the court.

The view taken by the appellant's counsel of the rules regulating appeals from the Court of Claims, is a total misconception of their spirit if not of their letter. It is not possible to look at the three first rules adopted when the appellate jurisdiction of this court was first exercised, without seeing that the purpose was to bring nothing here for review but questions of law, leaving the Court of Claims to exer-

cise the functions of a jury in finding facts, equivalent to a special verdict, and with like effect.

In practice it was found that the Court of Claims did not, in many cases, make the necessary finding of facts until after they had rendered their decree, and complaints were made here that the findings were often insufficient to present the law points on which parties relied, and of which they desired a review in this court.

To remedy these evils the 4th and 5th rules were adopted at the December Term, A.D. 1869.

The fourth requires the Court of Claims to make and file their finding of facts in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment. The fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. He has only to file a written request that, as to that point, the court will make a finding. But it was never supposed that the party would ask or the court must find the fact to be as the party claimed it, and if they did not, that he could, for that reason, bring the whole testimony here to show that he was right. To do this would be to render useless all the rules adopted by this court, and to reverse the system on which we have proceeded from the first.

The rule does say that if the Court of Claims refuses to find as prayed, the prayer and refusal must be made part of the record. The remedial purpose of this rule is that when a party has, in writing, indicated a specific question of fact on which he desires the Court of Claims to make a finding, and the court has neglected or refused to do so, this court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding.

In the present case the Court of Claims did make a very explicit finding on the question of fact presented by the request of plaintiff, and this is all the rule required, though the finding is contrary to her averment.

MOTION OVERRULED.

FOULKE *v.* ZIMMERMAN.

1. A probate in Louisiana of the will of a person who died domiciled in New York is valid until set aside in the Louisiana court, though the order of the surrogate in New York has been reversed in the Supreme Court of that State, on which the Louisiana probate was founded.
2. A purchaser from the devisee of such will of real estate in Louisiana, while the order of the Louisiana court establishing the will remains in force, is an innocent purchaser, and is not affected by a subsequent order setting aside the will, to which he is not a party.
3. Such an order, founded on a verdict and judgment in New York declaring the will void, obtained by collusion between the devisee under the will and the heirs-at-law, cannot affect the purchaser from the devisee, made in good faith before such verdict and judgment.

ERROR to the Circuit Court for the District of Louisiana.

These were two suits in the court below, in the nature of actions of ejectment to recover certain lots in New Orleans, and also rents and profits. That court gave judgment in both cases for the defendants, and to these judgments the present writs of error were taken.

The case was submitted on briefs, *by Mr. W. W. Handlin, for the plaintiff in error, and Mr. E. C. Billings, contra.*

Mr. Justice MILLER stated the case and delivered the opinion of the court.

The plaintiffs claim, as heirs-at-law of Elizabeth Clew, who died in New York in the year 1859, and there seems to be no question that they are her next of kin, or purchasers from them, and that she died seized of the property.

The defendants claim as purchasers from John F. Clew, husband of said Elizabeth, under a will of said Elizabeth, probated in the proper court of New Orleans in January, 1861, which will declared him to be her sole heir and universal legatee.

This will was admitted to probate in Louisiana on the strength of an order of the surrogate of New York admitting it there, as her last will and testament, and the record of the Surrogate Court of New York, on which the will was pro-

bated in New Orleans, showed that an appeal had been taken from the order establishing the will. This appeal was prosecuted to success, so that in February, 1861, very soon after the probate in New Orleans, the Supreme Court of New York reversed the order of the surrogate and made up certain issues of fact to be tried by a jury. The case in New York seems to have remained in this condition until November, 1866, when the trial was had and verdict and judgment rendered that the supposed will had been revoked and that Elizabeth Clew died intestate.

In the meantime John F. Clew had administered upon the estate in Louisiana, and in August, 1864, filed his final account, and on the 29th March, 1866, received from the Probate Court an order of final discharge, placing him in possession of the property as universal legatee of Elizabeth Clew. On that day, and on the 11th day of April, 1866, just after this order, John F. Clew sold at public auction the lots now claimed, by two separate sales, to Phelps and to Laymond, under whom defendants claim, and the deeds were duly recorded in the proper office, one on the 11th and the other on the 13th day of April. All this was before the verdict and judgment declaring the will void in New York.

It also appears that in the year 1864, three years after the issues of fact had been ordered by the Supreme Court of New York, and two years before those issues were tried, the plaintiffs, or the heirs of Elizabeth Clew, under whom they claim, made a compromise with John F. Clew, and for the consideration of $30,000 he made them a quit-claim deed of all his interest in the estate of Elizabeth Clew, of which compromise and deed the New Orleans purchasers had no notice, and which was not recorded in Louisiana until after their purchase and after their deeds had been recorded. Nor does it appear that they were parties or had notice of the proceedings in New York by which the will of Mrs. Clew was held void.

These facts are all found by the court as the foundation of its judgment, with others which we do not deem material. For instance, it is found that proceedings were taken by the

heirs to have the probate of Elizabeth Clew's will in New Orleans set aside, but as this was after the purchase under which the defendants claim, and without notice to them, we think they cannot be bound by it.

Nor do we think that the collusive trial in New York between John F. Clew and the heirs of Mrs. Clew can have any effect on the rights of the defendants derived under the probate of the will in New Orleans.

The facts found by the court show beyond doubt that this trial was had two years after Clew had sold out the subject of litigation to the other parties to the suit, and eight months after the defendants had, in ignorance of this sale, bought of him, as the rightful owner, so established by the New Orleans court. There can be but little doubt that Clew defrauded both parties, and that the defendants were innocent purchasers from him, and that plaintiffs might have protected both themselves and the defendants by recording their quit-claim deed, which they had withheld from record for two years, and that their failure to do this enabled him to commit the fraud. Finding that they had thus lost the lots in controversy, so far as any claim through that deed was concerned, they revive the suit in New York which had slumbered for five years on the issues ordered for a jury, and now having both sides of the litigation in their own hands they procure a verdict setting aside the will, to enable them to claim the land as heirs of Elizabeth Clew, instead of purchasers under John F. Clew.

We think that this cannot prevail, though supported by an *ex parte* proceeding in the New Orleans court by which the former orders probating Mrs. Clew's will and recognizing John F. Clew as sole heir and legatee were set aside. The defendants were innocent purchasers without notice of anything wrong, being justified by the judgment of the Probate Court in the assumption that they purchased the legal title; and if, by making them parties to a proper proceeding, this probate and sale could, under any circumstances, be set aside, we are of opinion that the proceedings in New

York, on which the Louisiana court revoked its former action, were collusive and fraudulent as against the defendants, who, under the facts found by the court, are entitled to be protected in their possession.

As this was the conclusion of the Circuit Court, its judgment is

AFFIRMED IN BOTH CASES.

THE BRIDGEPORT.

1. A steamer navigating the East River, opposite Corlaer's Hook, New York, by night, condemned in a collision case for injury done by her to a ship lying in a recess in the Hook, two hundred feet and more outside of the open channel, and three hundred or four hundred feet from the ordinary track of steamers; it being held to be no excuse for the collision that the steamer was rounding the Hook and going into her dock about three-quarters of a mile below; that her officers could not see in consequence of a fog which suddenly rolled up, and that they *supposed* they were far enough off the shore and far enough advanced to change their course for rounding the Hook.
2. Where a boat is fastened to the shore, and out of the proper path of vessels navigating a port, she is not bound, in the absence of harbor regulations requiring it, to keep a light on deck.

APPEAL from the Circuit Court for the Eastern District of New York.

On a September night of 1865, the ship Margaret Evans, having a night watchman on board, but no light on deck, lay at a wharf at Corlaer's Hook, on the East River side of New York. She was not lying at the front of the wharf in the open stream, but at the end or return thereof, in a rectangular recess, as if she were inside of a pier, the wharf projecting some thirty or forty feet beyond her into the river, and a large sloop of war lying outside of that. She was thus more than two hundred feet outside of the open channel, and three hundred or four hundred feet from the ordinary track of steamers passing along the East River in their usual course.

Statement of the case.

The river, which is about a mile broad here, makes nearly a right angle. Vessels from Long Island Sound come down on a southerly course to this point, and having rounded the Hook they then pursue a westerly and southwesterly course to gain the lower part of the city.

On the night referred to the steamer Bridgeport was coming down the Sound, on her regular trip from Bridgeport, Connecticut, to the city of New York, bound for her berth at Peck slip, which is about three-quarters of a mile below Corlaer's Hook. She arrived off the Houston Street ferry, in the East River, half a mile above Corlaer's Hook, about three o'clock in the morning. The night was sufficiently clear for the persons in charge of the steamer to see their location and to maintain their usual speed up to this point. But here they struck a fog bank, which, as they entered it, shut out the view of the shore. They could discern the nearest lights and hear the bells at the ferry slips. The steam was shut down and the vessel proceeded slowly on her course. The tide being flood, and pretty strong, she had to work against it; but this gave her sufficient steerageway without necessitating much absolute speed. The vessel was making three or four miles an hour. When she passed the Grand Street ferry, only three or four hundred feet above Corlaer's Hook, the ferry lights on the New York side were observed, and the bell was distinctly heard. Neither lights nor the bells on the Williamsburg (or Long Island) side were noticed. The vessel was thus shown to be nearer to the New York than to the other shore; and must of course have been hugging the New York shore closely for so dark a night, in so crowded a place. When they saw the lights of the Grand Street ferry, the wheelsman commenced turning for the purpose of rounding the point. "We judged ourselves," he testified, "well enough off to make our way; pretty close in, but far enough to clear her." Unfortunately, they shaved the point a little too closely. In less than two minutes after passing the ferry lights, and about a minute and a half after the wheelsman began to hold up for a change of course, the bow of the steamer struck the Margaret

Evans on her starboard side, just abaft the forerigging, severely injuring her. Her owners accordingly libelled the Bridgeport for damages. The District Court held that there was negligence on the part of the master,

1. In not *knowing* the proper time and place when and where to round the point.

2. In commencing to turn when opposite Grand Street ferry, which he should not have done until she had passed some two hundred and sixty feet below the ferry, and

3. In drawing in too close to the New York shore.

The decree in the District Court was accordingly for the libellants; a decree which the Circuit Court affirmed. The case was now here for review.

Mr. E. H. Owen, for the appellants:

The court below decided the case on facts and circumstances as they appeared *in the light of the event*, whereas they should have decided it upon the facts and circumstances as they existed, and as they appeared to the master at the time and place of the accident. The master's judgment as to the proper mode of navigating the boat had to be formed at night, in a thick fog suddenly coming upon him, when he could not see, and when the officers of the boat supposed that they were far enough off from shore and far enough advanced to change their course for rounding the Hook. No witness pretends to say that the judgment was unwisely or improperly formed.

The Margaret Evans was lying in harm's way, having no light on her deck. This should be regarded as a fault on her part. Even if it were not a fault, it is a circumstance to be taken into consideration in deciding whether there was any fault or negligence on the part of the steamboat.

Mr. D. D. Lord, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The point where the Margaret Evans was struck by the steamer was over two hundred feet outside of the open

channel or passage-way for vessels, and three or four hundred feet from the track which the steamer ought to have pursued. The latter had got that much out of her way in one and a half or two minutes, whilst running not more than five or six hundred feet. It seems almost impossible that she could have gone so far astray in so short a time, with points of observation so near at hand, without great want of skill, or great inattention to the compass and other indicia of course and position. When off the Grand Street ferry her officers must have known nearly her precise position in the river. Her deviation from the channel seems utterly inexcusable. The only excuse which her officers proffer is, that it was so dark they could not see, and they *supposed* they were far enough off from shore, and far enough advanced, to change their course for rounding the Hook.

An attempt is made, indeed, to throw the blame on the Margaret Evans herself, because she did not have a light, and because she had no anchor watch. The fact is, she had a night watchman on board, and as to a light, we think it is hardly necessary for a vessel lying at a wharf, more than two hundred feet outside of the channel, to anticipate the visit of stray steamboats in the night-time and to make provision for such an exigency. In *Culbertson* v. *Shaw*,* Mr. Justice McLean states the law to be: "When a boat is anchored in the path of vessels, a light is indispensable; but it is not required where the boat is fastened to the shore, especially at a place set apart for such boats." If it were shown that the local harbor regulations required it, the case might be different. But there is no proof that the harbor regulations of New York required vessels moored at a wharf, out of the track of other vessels, to carry a light; and without an express regulation to that effect the law does not make it incumbent on them to do so. In the case of *The Granite State*,† it was shown that the harbor regulations of New York did not make it obligatory on barges moored at a wharf to have either a light or a watch; and the colliding

* 18 Howard, 584.

† 3 Wallace, 310.

steamer in that case was held liable, though it was so dark that the barge could not be seen till close to her, and though at the time the steamer was seeking to avoid contact with other vessels coming out of their docks. Where the question of fault in a collision lies between a vessel at anchor, or at a wharf, out of the track of other vessels, and not derelict in duty, and a steamer navigating a channel of sufficient width for her to move and stop at pleasure—there being no unusual stress of weather or superior force to drive the latter out of her course—it was held in the case just cited that the fault, under almost any circumstances, would be held to be with the steamer. In this case we see no fault at all in the Margaret Evans. She had a competent night watchman on board, and was entitled to be considered as safe from any collision from vessels navigating the East River.

DECREE AFFIRMED WITH INTEREST AND COSTS.

ARMSTRONG *v.* MORRILL.

1. Judgment in ejectment, in favor of a single plaintiff, sustained, where some counts in the declaration alleged a possession in himself alone, at the time of the ouster, though other counts alleged the possession to have been in him jointly with others; there having been no motion in arrest of judgment or other objection made below to the judgment in the form mentioned, which was one upon a verdict thus finding.
2. The mere making of a deed to one as trustee does not vest the trustee with title if he never in any form have accepted the trust; and to show that the trustee did not accept it, a declaration, not under seal, but signed by him, nine years after the deed, making known to all whom the matter concerned, "that immediately on his receiving notice of the conveyance he did positively refuse to accept, or to act under the trust intended to be created, and that he had at no time since accepted the trust or acted in any wise as trustee in relation to it," is proper evidence to show the fact, the party being dead and his handwriting proved.
3. Under the act of Virginia, of June 2d, 1788, authorizing the governor to issue grants with reservation of claims to lands included within surveys then made, the reservation in patents granted under the act excludes from the operation of the patent all lands held by prior claimants at the date of the survey, within the exterior boundary of the patent, whether the title was only inchoate or had been perfected by grants.

Statement of the case.

4. Where the lands of A. in the adverse possession of B. were forfeited to the State of Virginia under its act of 27th February, 1835, declaring forfeitures for non-payment of taxes, but were allowed by a subsequent and private act to be redeemed by the original owner, *held* that the forfeiture to the State broke, in point of law, the continuity of the adverse possession, and that such adverse possession (though it might have been, in fact, continuous) having been, in law, thus broken, was neither restored upon the redemption so as to be continuous in law, nor was it so affected as that the persons holding adversely could tack the adverse possession prior to the forfeiture to the adverse possession subsequent to the redemption and *so* make out a term of adverse possession which a statute required in order to give title.

ERROR to the District Court of the United States for West Virginia; the case having been thus:

Lot M. Morrill brought ejectment, on the 15th of April, 1857, in the District Court for the Western District of Virginia (now the court below), both having circuit court jurisdiction, against Armstrong and others, to recover 1500 acres of land. In one count Morrill alleged that he was possessed of it when the defendants wrongfully entered; in another, that James Dundas and Benjamin Kugler were so possessed. An amended declaration alleged, in its first count, the possession to have been jointly in Morrill, Dundas, and Kugler; and in its second, to have been in Morrill alone. In a new count still, the possession was alleged to have been in William M. Tilghman.

The plaintiff's title rested on a survey to Albert Gallatin, dated June 12th, 1770, for a large tract (of which that in controversy was said to be part), followed by a patent dated February 10th, 1786, for the tract described in the survey. In 1794 Gallatin conveyed to Robert Morris, of Philadelphia, who, in 1795, made a deed of the tract to Thomas Willing, John Nixon, and John Barclay, and the survivors and survivor in fee, in trust for a land association, called the North American Land Company. Messrs. Nixon and Barclay accepted the trust. Mr. Willing's action appeared before the court no otherwise than by a paper which the plaintiffs offered in evidence, thus:

"I, Thomas Willing, of the city of Philadelphia, do hereby

declare and make known unto all whom it doth or may concern, that immediately on my receiving notice that Robert Morris had conveyed certain estates of land to John Nixon, John Barclay, and myself, in trust for the North American Land Company, I did positively refuse to accept or to act under the trust so intended to be created, and that I have at no time since accepted the said trust, or acted in any wise as trustee in relation thereto.

"Witness my hand, this 19th day of December, 1806.

"THOMAS WILLING."

The death of Mr. Willing, who was president of the first Bank of the United States, and otherwise, in his day, one of the best known characters in Philadelphia, and the genuineness of his signature, were sworn to *ex parte*, by one of his sons and by two other witnesses, and the signature was certified by the examiner of the Supreme Court of Pennsylvania, in 1844, to have been "proved" before him in due form of law. The instrument had also, along with the affidavits and the examiner's certificate of probate, been admitted to record by the clerk of Cabell County, Virginia, where apparently some of the lands lay.

The title being in this state, the legislature of Virginia, on the 27th of February, 1835, passed an act, by whose second section it was enacted that all lands not then in the actual possession of the owner, by himself or his tenant in possession, and which had not been entered for taxation on the books of the commissioners of the revenue, on which the taxes had not been paid, shall become "*forfeited* to the Commonwealth," after July 1st, 1836.

The 3d section of the act ran thus:

"That all right, title, and interest which may hereafter be vested in the Commonwealth by virtue of the provisions of the section of this act next preceding herein, shall be transferred and vested in any and every person or persons (other than those for whose default the same have been forfeited and their heirs or devisees), who are now in possession of said lands, or any part or parcel of them, for so much thereof as they have just title or claim to, legal or equitable, *bonâ fide* claim held or derived under grants from the Commonwealth dated prior to

April 1st, 1831, who shall have discharged all taxes duly assessed and charged against her, him, or them upon such lands, and all taxes that ought to have been assessed and charged thereon, from the time when he, she, or they acquired his, her, or their title thereto, whether legal or equitable."

Under this act, the land conveyed by Mr. Morris became forfeited.

In 1844 the legislature passed "An act for the relief of James Dundas and Benjamin Kugler," who had apparently become large shareholders of the North American Land Company, and who by sundry conveyances were then vested with whatever estate *Nixon* had been vested with by the deed of 1795, of Mr. Morris to Messrs. Willing, Nixon, and Barclay. By this act of 1844, Dundas and Kugler were authorized to redeem the lands forfeited under the already-quoted act of 1835; on which redemption by them the title vested by the forfeiture was released by the terms of the act to them for the benefit of the land company.

The act contained, however, in its second section, this proviso:

"*Provided*, however, that nothing herein contained shall be construed to deprive any persons having a *legal* or *equitable* title to these lands, by virtue of a subsequent grant from the Commonwealth, *or otherwise*, of his, her, or their right, title, or interest, *but the rights of such claimants shall remain the same as if this act had never been passed.*"

Dundas and Kugler having, in May, 1845, redeemed the land, now put in evidence the certificate of the Auditor of Public Accounts of Virginia, to show that the taxes had been paid in pursuance of the act of 1844, and in 1845 the heirs of Barclay, who had survived Nixon, conveyed all his estate in the lands to Dundas and Kugler, as trustees of the North American Land Company. These two conveyed to Morrill, the plaintiff.

So far as to the plaintiff's title; as to which it will be observed that *if* any title passed to Mr. Willing by the deed of Mr. Morris to him, Nixon, and Barclay, and had not passed

from him by his disclaimer of 1806, then *his* estate, whatever it was, had not been conveyed to any one.

Now as to the defendant's title. Surveys having been made in different parts of the State, subsequent to the treaty of 1783, which included within their exterior boundaries smaller tracts of prior claimants, and these being reserved to such claimants in the certificates granted by the surveyors, doubts arose as to the authority of the governor to grant patents in such cases. The legislature of Virginia accordingly passed, June 2d, 1788,* an act to authorize the governor to issue them. This act made a recital and enactment thus:

"Whereas sundry surveys have been made in different parts of the Commonwealth, which include in the general courses thereof, sundry smaller tracts of *prior claimants*, and which, in the certificates granted by the surveyors of the respective counties, *are reserved to such claimants;* and the governor or chief magistrate is not authorized by law to issue grants upon such certificates of surveys."

And it enacted:

SECTION 1. "That it shall and may be lawful for the governor to issue grants *with reservation of claims* to lands included within such surveys, anything in any law to the contrary notwithstanding."

With this statute in force, one Samuel M. Hopkins obtained a survey and patent from the State of Virginia, dated July 1st, 1796.

The survey was for 200,000 acres, and gave boundaries including a much larger area, closing with this statement, to wit:

"An allowance of 227,460 acres is made in the calculation of area of this plat for prior claims included within boundary thereof."

The patent followed the boundaries of the survey in its grant of the 200,000 acres, and concluded as follows:

* Second Revised Code of Virginia, p. 434, ch. 58.

Statement of the case.

"But it is always to be understood that the survey upon which this grant is founded includes 227,460 acres, exclusive of the above quantity of 200,000 acres, all of which having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants; and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same as before mentioned and reserved, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Samuel M. Hopkins (except as before excepted) and his heirs forever."

This title of Hopkins became afterwards vested in one Watson.

Evidence was given tending to show that the patent to Hopkins embraced within its exterior boundaries the entire tract claimed by the plaintiffs, and that the defendants and those under whom they claimed had paid the taxes and assessments thereon, from the month of September, 1834, to the year 1840.

In addition to this paper-title the defendants set up also one founded on adverse possession. They had taken actual *bonâ fide* possession of the land in 1827, and had kept possession up to November 1st, 1836, when the premises in controversy were forfeited to the State, and they continued to occupy them throughout the term that the title was vested by the forfeiture in the State, and so also after May, 1845 (when by the redemption the tract was revested in its original owners), to the time when the suit was instituted, April 15th, 1857. Such possession before the forfeiture was, however, it will be observed, not for the term of fourteen years, the time then required by law in Virginia to bar a recovery, nor did such possession subsequent to the date of the revestiture, and before the bringing of this suit continue long enough to bar a recovery. The term before the forfeiture and the term after the revestiture tacked together constituted, however, an adverse possession of fourteen years, and would maintain the defence.

The defendants below—who had objected to the reception

in evidence of what was called the disclaimer of Mr. Willing (the paper printed *supra*, pp. 121–2), and had excepted to its admission—maintained:

I. As related to the construction of the patent to Hopkins.

1. That by *its terms it covered* all lands lying within its exterior boundaries, except such as came within the reservation contained therein; and that the burden was on the plaintiff to show himself within the reservation, which he had not done.

2. That only lands held by inchoate equitable title, not carried into grant when Hopkins's entry and survey were made, come within the reservation.

3. That lands lying within the exterior boundaries of the Hopkins grant, which had been patented prior to Hopkins's entry, survey, and grant, would, upon becoming forfeited to the State of Virginia, by virtue of the act of 27th February, 1835, inure to and vest in those holding under the Hopkins patent, provided such owner had complied with the other conditions mentioned in said act.

II. As related to their second ground of defence, namely, adverse possession, the defendants contended:

1. That the continuity of adverse possession as against the prior owners was not broken by the forfeiture and vesting in the State, November 1st, 1836, and continuance till redeemed by Dundas and Kugler in 1845.

2. That if it was broken, it was restored upon the principle of *remitter* or relation upon the redemption by Dundas and Kugler. And if neither—

3. That it was competent for the defendants to tack the adverse possession prior to the forfeiture to that subsequent to the redemption, in order to make out the fourteen years required by the statute to bar the action.

The defendants accordingly asked the court to charge:

"*First.* That the reservation in the patent to Hopkins, was of lands the titles to which were inchoate, and not of lands which had been granted by patent previous to the date of Hopkins's survey and entry.

"*Second.* That the patent covered all lands lying within the

exterior boundary of the survey, for which patents had issued previous to Hopkins's entry, survey, and patent, and became a junior grant to that issued to Gallatin.

"*Third.* That if Watson was the owner of the land described in the patent to Hopkins at the time the land in controversy became forfeited to the Commonwealth; and if he was, on the 27th of February, 1835, and up to the time of the forfeiture, in the actual *bonâ fide* possession, by himself or tenant, of the land in controversy, or any part thereof, under the patent to Hopkins; and if he, Watson, had, at the date of the forfeiture, discharged all taxes upon the land, then that the Gallatin title inured to and vested in Watson, and that the plaintiffs could not recover.

"*Fourth.* That if the jury are satisfied, from the evidence, that adversary possession commenced before 1st of November, 1836, and the same possession continued during the time of the forfeiture, as well as from the 8th of May, 1845 (the time of redemption), up to the time of the institution of this suit, and by adding the time of adversary possession before forfeiture to the adversary possession after redemption, makes a period of fourteen years, then they must find for the defendants, or such of the defendants as make out the fourteen years aforesaid.

"*Fifth.* That the act of 1844, which authorized Dundas and Kugler to redeem the lands therein specified, did not so operate as to relieve them from the effect of the statute of limitations, which had commenced running for the defendants before the forfeiture, for the time the land in controversy was so forfeited, if the jury believe the defendants continued their possession without interruption during the forfeiture and up to the time of redemption, and that the defendants continued the possession to the time of the institution of this suit."

The court refused these instructions, and charged that:

"The grant to Hopkins, embracing within its exterior boundaries 227,460 acres of land, which is reserved and excepted to prior claimants, does not operate to divest them of their title, unless they fail to show themselves entitled to the land under said reservation; nor does the grant pass any legal title to the grantee of the lands so reserved and excepted by it, where the same have been previously appropriated and granted by the Commonwealth, inasmuch as it appears that the patentee gets

all the lands he paid for, or for which he is chargeable with taxes.

"To secure to the defendants the benefit of the forfeiture of the Gallatin title, the jury must be satisfied that the Hopkins grant is the younger, covers and includes the land in controversy, and that Watson and those claiming under him were in the actual possession of the land, claiming the same in good faith, having discharged all the taxes due the State duly assessed and charged against said land, as well as all taxes that should have been assessed and charged against the same from the date of the deed from Hopkins to Watson; otherwise, the forfeiture of the Gallatin title would not, under the act of 1835, be transferred to Watson or to those claiming under him.

"To defeat a recovery in this cause, under the statute of limitations, the defendants must have held *unbroken and uninterrupted adverse* possession of the premises in controversy, for a period of fourteen years prior to the institution of this suit."

[The nature of this possession was explained by the court to the jury.]

"If Watson or those claiming under him entered upon the land claimed by the plaintiffs in 1832, '33, '34, '35, or '36, and the same became forfeited by the failure of the owners to enter the same upon the books of the commissioner of the revenue of the proper county and pay the taxes properly chargeable thereon, the same became vested in the Commonwealth by operation of law on the first day of November, 1836, and the possession of the defendants upon the said first day of November, 1836, terminated, and the possession of the land passed into and remained in the Commonwealth until the same was transferred to Dundas and Kugler by the act of the 12th of February, 1844; and the adverse possession acquired by the said defendants before the first day of November, 1836, cannot be connected with the adverse possession acquired by the defendants after Dundas and Kugler became revested with the title of the Commonwealth, under the act passed for their relief on the 12th of February, 1844."

The defendants excepted to the ruling of the court refusing to give the instructions asked by them and in giving the instructions given.

Argument for the plaintiff in error.

The jury found a verdict for *Morrill;* the verdict containing nothing about Dundas, Kugler, or Tilghman. And no motion in arrest of judgment being made, nor any objection to the finding for Morrill alone, judgment was entered on the verdict. The defendants brought the case here.

Messrs. B. H. Smith, W. M. Evarts, and S. A. Miller, for the plaintiffs in error:

1. There is error in the form of the verdict. The code of West Virginia requires that the jury shall find *for or against all* the parties to the record. The present verdict fails to find *at all* as to Dundas, Kugler, and Tilghman, who were co-plaintiffs with Morrill.*

2. The writing purporting to be signed by Mr. Willing was made near eleven years after Mr. Morris's deed to him. It has no seal. It was thus not a *deed;* or as such operating to reconvey the estate previously vested in him. Neither was it *testimony* to prove that he did not become a trustee. In no view then is it of value. It had none of the forms and requisites of a deposition, competent to prove his renunciation of the trust prior to the estate's vesting, nor was it sufficient in law to divest him of the estate when it had once become vested.

3. The first three instructions asked by us have reference to the same legal question, and should be considered together. By the act of June, 1788, a person having a survey, including in its bounds *prior claims* of others, might have a patent according to the bounds of such survey, excepting in the patent all such prior claims. Such patents were numerous under that act, and became known to the country and the courts as "inclusive surveys." The patent of Hopkins shows the form of the reservation adopted by the executive of Virginia. That form is common to all inclusive grants. The exception necessarily excludes from its operation a patent which is older than the entry or survey on which the exclusive grant is founded.

* Chapter 90, §§ 23, 24, p. 520.

Argument for the plaintiff in error.

The words "prior claims," in the statute, refer to entries and surveys which precede a patent, and constitute only equitable or inchoate titles, which would be defeated by the first patent, giving the elder legal title, without the exception. No such exception is necessary to protect an existing patent. But the elder legal title protects itself. The words "prior claims," used in the statute, had thus received, by prior use in Virginia legislation about lands, a distinct and definite application to equitable titles.*

If the patent to Gallatin, dated in 1786 (nine years before the entry of the inclusive grant), is not within the exception, then Hopkins's patent secures to the patentee the same title to the land that a junior patent located on an elder patent would secure. It is a title well known and well understood in Virginia legislation. The whole of West Virginia was covered with large elder grants, and occupants under junior grants have been sedulously protected against such large unsettled surveys, on which elder grants have been issued. Where these elder grants have been forfeited for non-payment of taxes and non-entry, the law casts the forfeited title on the junior grant. As the land of Hopkins or Watson was not forfeited, the taxes paid and the land occupied, the forfeited Gallatin title, which is the land in controversy, inured to Watson and those holding under him as the junior grantee.

We therefore contend that the first, second, and third instructions ought to have been given.

4. As to the adverse possession: The court erred in not giving the fourth and fifth instructions asked for.

The fourth instruction asked to unite the adversary possession which occurred before forfeiture with the possession after redemption. This indeed falls short of the legal rights of the defendants, for when time commences to run there is no law that stops it. But suppose that it stops for the State, it does not follow that it stops for the defaulter. So far as it

* Second Revised Code of Virginia, pp. 34-8-9, 382-5-7-8, 392-7; Wilds v. Serpell, 10 Grattan, 406; Staats v. Board, Ib. 400; Atkins v. Lewis, 14 Id. 30.

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has run, it is valid. After the redemption, the time run is also valid. Is it not just then to unite them? By the instruction asked for by us the plaintiff gained the time of the forfeiture; but that gain, obtained by sheltering himself under the State, has no such merit as to avoid the valid time which preceded the forfeiture.

The fifth instruction should also have been given. If this was a suit with the State, or a purchaser from the State, the statute might not be a bar. But it is a suit between individuals, one of whom for a time had lost his estate by neglect of duty; yet, by the leniency of the government, he is allowed to be remitted to his former estate without prejudice to his rights by the State. He pays taxes and redeems. He does not hold under the State, but under his own title, which he has redeemed. He pays no consideration to the State. He pays the debt for which the State held a lien on the land. He cannot and ought not to be permitted to thrust the State between him and the defendants.

5. There is also error in the instructions actually given by the court, and excepted to by the defendants.

Mr. G. D. Camden, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Absolute title and the right of possession are claimed by the plaintiff to the tract of land in controversy, and the actual possession of the same being in the four defendants named in the declaration, he brought an action of ejectment against them to recover possession of the tract. He alleges in the first count of the original declaration that on the day therein named he was possessed in fee simple of the tract; that on the eighth of October following the defendants entered into the premises, and that they unlawfully withhold from him the described tract. Quite unlike that, the second count alleges that the primary possession of the tract was in one James Dundas and one Benjamin Kugler, and that the defendants unlawfully withhold the possession from those parties. Process was served and the defendants appeared

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and demurred to the declaration, and the court sustained the demurrer as to the second count but overruled it as to the first. Leave to amend was granted, and an amended declaration was filed, containing three counts, of which the first is in the name of the plaintiff and the other two persons named in the second count of the original declaration. All three sue in that count as joint plaintiffs, but the second count corresponds in all respects with the first count in the original declaration, which renders it unnecessary to describe the third, except to say that the other two persons are alleged to have been the primary possessors of the tract, and that the claim to recover possession is made in their names as well as the claim for damages. Both parties acquiesced in the decision of the court overruling the demurrer to the first count and sustaining it as to the second of the original declaration, and the defendants pleaded to the merits that they were not guilty of withholding the premises as alleged in the new counts filed by leave of court. Issue was tendered and joined, but the plaintiffs, before trial, obtained leave to file a fourth count, in which it is alleged that one William M. Tilghman was the primary possessor of the tract, and the charge, in that count, is that the defendants unlawfully withhold from him the actual possession of the same described tract of land. Subsequently the parties went to trial and the verdict was for the plaintiff, as described in the first count of the original declaration, and also in the second count of the amended declaration.

By the verdict the jury found that the plaintiff, Lot M. Morrill, had an estate in fee simple in the premises, except as to a small parcel therein described, and they also assessed nominal damages for the plaintiff. Judgment was duly rendered against the first three defendants, the death of the other having been suggested before the trial, and the survivors sued out a writ of error and removed the record into this court.

To sustain the issue on their part the plaintiffs gave in evidence: (1.) A copy of a survey made by the surveyor of the proper county of the State for Albert Gallatin, assignee

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of Stephen Lacoste, of fifteen hundred acres of land, part of a land-office warrant of five thousand acres, dated June 27th, 1770, bounded as therein described. (2.) Copy of the patent to Albert Gallatin, dated February 10th, 1786, for the tract of land described in the survey. (3.) Also copy of a deed from Albert Gallatin, dated May 7th, 1794, to Robert Morris, conveying the same land. (4.) Deed from Robert Morris and others to Thomas Willing, John Nixon, and John Barclay, dated March 5th, 1795, conveying the premises to them and the survivor and survivors of them, and the heirs of the survivor in trust, as more fully set forth in the deed exhibited in the record. (5.) Certificate of William F. Taylor, auditor of public accounts for the State, showing that James Dundas and Benjamin Kugler, trustees as aforesaid, on the eighth of May, 1845, redeemed the lands in question by the payment of the required sum into the treasury, in manner and form as more fully set forth in that certificate, and certain others also introduced by the plaintiff and exhibited in the bill of exceptions. (6.) Disclaimer of Thomas Willing, dated December 19th, 1806, in which he states that he did positively refuse to accept or act under the trust, and that he has not at any time since accepted the said trust, or acted in any wise as trustee, under that deed. (7.) Also deed dated June 17th, 1845, from John M. Barclay and others to James Dundas and Benjamin Kugler, conveying to them all the right, title, and interest of the two trustees who did accept the trust created by the preceding deed. (8.) Deed dated December 1st, 1854, from James Dundas and Benjamin Kugler, trustees of the North American Land Company, to the plaintiff in whose favor the judgment was rendered.

Evidence was also introduced by the plaintiffs showing that the land in controversy, on the 1st day of November, 1836, became forfeited to the State by virtue of the second section of the statute of the State passed on the 27th of February, 1835, as construed by the Supreme Court, or Court of Appeals, of that State.* Forfeiture in such a case became

* Sessions Acts, 1835, p. 12; Staats *v.* Board, 10 Grattan, 400.

absolute and complete by the failure to enter and pay the taxes on the land and the damages, in the manner therein prescribed, and no inquisition or judicial proceeding or inquest or finding of any kind was required to consummate such a forfeiture.* Owners or proprietors of any tract of land lying west of the Alleghany Mountains, granted by the State before the first day of April, 1831, were required by the act of the twenty-seventh of February, 1835, to enter or cause to be entered, on or before the first day of July of the succeeding year, on the books of the Commissioners of the Revenue for the county wherein any such tract or parcel of land may lie, all such lands as he or they owned or claimed, through title derived, mediately or immediately, from the State, and have the same charged with all taxes and damages in arrear or properly chargeable thereon. They were also required to pay and satisfy all such taxes and damages which would not have been relinquished and exonerated by the second section of the act of the tenth of March, 1832, had they been returned for their delinquency prior to the passage of that act, and the provision was that if they failed to comply with those requirements "all such lands or parcels thereof not then in the actual possession of such owner or proprietor, by himself or his tenant in possession, *shall become forfeited to the Commonwealth* after the first day of July, eighteen hundred and thirty-six, except only as hereinafter excepted."

Provision is also made by the third section of the act that all right, title, and interest vested in the State by the preceding section of the act shall be transferred and absolutely vested in any and every person or persons, other than those for whose default the same have been forfeited, their heirs, or devisees, now in actual possession of said lands, or any part or parcel of the same, for so much thereof as such person or persons have just title or claim to, legal or equitable, *bonâ fide* claimed, held, or derived from or under any grant of the State bearing date previous to the period of time

* Wild's Lessee *v.* Serpell, 10 Grattan, 405; Hale *v.* Branscum, Ib. 418.

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mentioned in the preamble to the second section, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed and charged thereon from the time he or they acquired title thereto, whether legal or equitable. Appended to that section, however, is a proviso that nothing therein contained shall be so construed as to impair the right or title of any person or persons who have obtained grants from the State for the same land and have regularly paid the taxes thereon.

Section four provides, among other things, that the proprietors of such lands, their attorney or agent, of the land returned delinquent for non-payment of taxes for the years eighteen hundred and thirty-two and the succeeding year, may pay the taxes and charges upon said lands for each of those years to the sheriff of the county where the lands lie, and take his receipt therefor and deliver the same, on or before the first day of November, 1836, to the clerk of the County Court of said county.*

Beyond all doubt the lands described in the deed of Robert Morris and others to the grantors of the plaintiff, became forfeited to the State by reason of the failure to enter the same on the books of the Commissioners of the Revenue, as recited in the preamble to the act of the twelfth of February, 1844, in which it is also stated that the grantors of the plaintiff petitioned "the General Assembly for permission to redeem the said lands upon the payment of all the taxes and damages due thereon."† By the first section of that act they were empowered "to redeem the whole or any part of the aforesaid lands by having the same entered upon the books of the Commissioners of the Revenue of the county wherein the land may lie, and assessed with all taxes due thereon, to be ascertained in the same manner that the back taxes on omitted lands are now ascertained by the several commissioners of delinquent and forfeited lands, and paying into the treasury of the State, on or before the first day of

* Sessions Acts, 1835, pp. 12, 13. † Sessions Acts, 1843-4, p. 108.

June" of the succeeding year, "the amount of the taxes so assessed, together with six per centum per annum damages thereon." They complied with those conditions, and the second section of the act provided, "that upon the payment of the taxes and damages aforesaid, all the right, title, and interest which may have vested in the president and directors of the Literary Fund, by the said forfeiture, to such part or parts of the said lands as may be redeemed as aforesaid, shall be and the same are hereby released unto the said James Dundas and Benjamin Kugler, . . . for the use and benefit of the shareholders of the said North American Land Company." Annexed to that, however, is a proviso that nothing herein contained shall be construed to deprive any person or persons having a legal or equitable title to any of these lands by virtue of a subsequent grant from the State or otherwise, of his or their right, title, or interest, but the rights of such claimants shall remain the same as if this act had never been passed.

Documentary evidences of title were also introduced by the defendants, as follows: (1.) The plat and certificate of a survey made for Samuel M. Hopkins for two hundred thousand acres of land in the county of Kanawha, dated the tenth of December, 1795, as more fully set forth in the record, which contains the following certificate: "Surveyed for Samuel M. Hopkins two hundred thousand acres of land in the county of Kanawha, by virtue of two land-office treasury warrants, each for one hundred thousand acres;" and then follows the boundaries, at the close of which is the following statement: "An allowance of two hundred and twenty-seven thousand four hundred and sixty acres is made in the calculation of the area of this plat for prior claims contained in (the) boundary thereof." (2.) The patent, dated July 1st, 1796, issued on that survey to Samuel M. Hopkins for two hundred thousand acres by the governor of the State. Founded, as the patent is, upon the certificate of survey, it contains the same boundaries and concludes as follows: "But it is always to be understood that the survey upon

which this grant is founded, includes two hundred and twenty-seven thousand four hundred and sixty acres," exclusive of the above quantity of two hundred thousand acres, "all of which having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants," and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same, as before mentioned and reserved, with the appurtenances. (3.) Deed from Oliver Wolcott and others to James T. Watson, dated June 22d, 1808, conveying to him, among other things, the lands embraced in the patent to Samuel M. Hopkins. (4.) Evidence tending to show that the patent to Samuel M. Hopkins embraced within its exterior boundaries the entire tract claimed by the plaintiff, as shown by certain plats which were also introduced. (5.) Parol evidence was also introduced by the defendants tending to prove that James T. Watson, claiming under the patent to Samuel M. Hopkins and the deed to himself, took actual and *bonâ fide* possession, in the year 1827, of the lands in controversy, as well as of the coterminous surveys of Savary and Gallatin, previously introduced in evidence, and that he, as early as the month of September, 1834, discharged all taxes and damages rendered against him upon said two hundred thousand acres of land, and all that ought to have been charged against him up to the year 1840, as the same became due. (6.) Other evidence was also introduced by the defendants, deraigning the title from the last-named grantee to them or one of them, which it is not important to notice, as it is not the subject of controversy.

First objection to the judgment has respect to the form of the verdict, because it does not find for or against all the parties mentioned in the different counts of the declaration, but the court is of the opinion that the objection is without merit, as the finding conforms to the first count in the original declaration and to the second count in the amended

declaration. No motion in arrest of judgment was made, and as no such question was raised in the court below, and as the finding is fully justified by two of the counts and by the evidence reported, the objection is overruled.

Adopting the order of events at the trial, the next question arises from the exception of the defendants to the ruling of the court in admitting in evidence the paper-writing called the disclaimer of Thomas Willing, in which he states, under date of the nineteenth of December, 1806, to the effect that he positively refused to accept the trust intended to be created by the before-mentioned deed to John Nixon, John Barclay, and himself, and that he never did accept the same or in anywise act as trustee under that instrument. Before offering that paper the plaintiff introduced the deed to which it relates, and having proved the signature of the signer, the plaintiff offered the paper as tending to show that the signer never accepted the trust described in that deed. Two objections were made to the admissibility of the paper: (1.) That it was insufficient as a disclaimer as it was not under seal, but the paper was offered merely as evidence to show that the signer never accepted the trust, and not as an instrument releasing a vested right, which is all that need be said in reply to that objection. (2.) That it was not admissible as evidence that he never accepted the trust, because it was not under oath. Appended to that paper are the affidavits of three witnesses proving that the signature of the signer is genuine. Annexed to that is the certificate of an examiner of the Supreme Court of the State of Pennsylvania, dated the third of March, 1844, that the signature of the signer of the paper was proved before him in due form of law, and also the certificate of the clerk of Cabell County Court, Virginia, under date of the twenty-ninth of March, 1856, that the instrument, together with the certificates of proof, was admitted to record.

Authorities are hardly necessary to show that the mere making of a trust deed, like the one in question, without any acceptance, express or implied, by the trustee, is not

sufficient to vest in the trustee the title to the land mentioned in the deed, and that parol proof is admissible in such a case to show that the trust was never accepted. On the other hand, it is equally clear that if the trust is accepted, though but for a moment, parol proof to show a release of the title to the trust estate cannot be admitted.* Offered as the paper-writing was, not as the release of a vested right, but merely as evidence tending to prove that the signer never accepted the trust created by the deed, no doubt is entertained that the evidence was properly admitted, as it is well-settled law that every conveyance which depends upon the act of the parties is imperfect for vesting the title without the assent of the parties to the same, either express or implied.† Two of the trustees accepted the trust and proceeded to execute it, but it does not appear that the signer of the certificate ever joined with them in any act, either in managing or disposing of the estate. Obviously the weight of the evidence was for the jury, nor does it appear that other testimony to the same point was not introduced, as only so much is reported in the bill of exceptions as was necessary to raise the question of law. Admitted as it was, as a verbal act tending to show that the trust was not accepted, no doubt is entertained that the ruling was correct.

Exceptions were also taken by the defendants to the refusal of the court to instruct the jury as requested, and also to the instructions given in respect to the merits of the controversy. Very great doubts are entertained whether the evidence introduced by the defendants was such that the court would have been warranted in giving the first, second, or third instructions as requested, but the judgment of the court will not be placed upon that ground, as it is clear that the instructions given, if correct, were in all respects suf-

* Lewin on Trusts (4th ed.), 150; Robinson *v.* Pett, 3 P. Williams, 251; Doe *v.* Harris, 16 Meeson & Welsby, 517; Doyle *v.* Blake, 2 Schoale & Lefroy, 239; Stacey *v.* Elph, 1 Mylne & Keene, 195; Tiff. & Bull. on Trusts, 532.

† Smith *v.* Wheeler, 1 Ventris, 128.

ficient to dispose of the controversy, and as the verdict was for the plaintiff the only material inquiry remaining is whether the law was correctly given to the jury in those instructions.

Two hundred and twenty-seven thousand four hundred and sixty acres of land were embraced in the patent to Samuel M. Hopkins which was reserved and excepted to prior claimants, and the court, in its fourth instruction, told the jury that the patent did not operate to divest such prior claimants of their title unless they failed to show themselves entitled to the land under the said reservation; that the patent did not pass any legal title to the patentee of said lands, so reserved and excepted by it, where the same had been previously appropriated and granted by the State, inasmuch as it appeared that the patentee got all the lands he paid for or for which he was charged with taxes. What the defendants claimed was that the title under the Gallatin patent was forfeited and merged in the Watson claim under the act of the twenty-seventh of February, 1835, but the jury were instructed that the defendants could not derive any benefit from the supposed forfeiture unless the jury were satisfied that the patent of Hopkins, which was the junior patent, covered and included the land in controversy, and that Watson and those claiming under him were in the actual possession of the said land, claiming the same in good faith, having discharged all the taxes due to the State, duly assessed and charged against the same, from the date of the deed from Hopkins to Watson.

Apart from the merits the defendants set up the statute of limitations, and insisted that the action could not be maintained because, as they alleged, they had "held unbroken and uninterrupted adverse possession of the premises in controversy for a period of fourteen years prior to the institution of the suit." Pursuant to that claim the jury were instructed, in the first place, that the defendants, to sustain that defence, "must have held possession of the premises by residence, improvement, cultivation, or other open, notorious, and habitual acts of ownership, for fourteen years" before

the commencement of the action; but if the jury find that the defendant, Armstrong, resided there and was the owner of a lot in the town of Ripley, and in the immediate vicinity thereof he owned a tract of woodland, part of the land in controversy, from which land, claiming it as his own, he, for the time mentioned, openly cut and hauled his necessary supply of fuel, and also the timber necessary for the construction of various houses on the lot, and also inclosed certain portions of the land, such acts and use are equivalent to adversary possession from the time such acts and use were commenced.

But the evidence showed that the land, on the first day of November, 1836, became forfeited to the State, as matter of law, by the failure of the owners to enter the same upon the books of the Commissioners of the Revenue of the proper county, and pay the taxes properly chargeable thereon, and the court upon that subject instructed the jury that if they so found from the evidence, and that the possession passed into and remained in the State until the title was transferred to the grantors of the plaintiff, the defence under the statute of limitations was not sustained, as the adverse possession acquired by the defendants before the first day of November, 1836, cannot be connected with the adverse possession acquired by them after the grantors of the plaintiff became vested with the title of the State, under the before-mentioned act of the Assembly passed for their relief.

Two principal errors are alleged in the instructions: (1.) That the court did not instruct the jury that the land, when it became forfeited for non-entry on the books of the Commissioners of the Revenue, and for non-payment of taxes and damages, was transferred to and became vested in the owners of the Hopkins patent, under the third section of the act declaring the forfeiture. (2.) That the court erred in the instruction to the jury that the statute of limitations ceased to run when the land became forfeited to the State, and that the period of adverse possession before the forfeiture took place could not be added to the period which elapsed before the suit was commenced, subsequent to the time the title

under the act of the Assembly was conveyed to the plaintiff's grantors, to make the required term of fourteen years to bar the title.

Such a construction of the act of Assembly as the one first claimed, certainly could not have been adopted unless it can be held that the proviso embraced in the Hopkins patent does not afford any protection to the owners of lands included in that survey, where the patents had been previously issued, which is the construction assumed by the defendants. They contend that the proviso only excludes from the operation of the grant the "lands within its exterior boundaries, the titles to which *were inchoate*, and not lands which had been granted by patents previous to the date of that survey and entry," which is a construction not to be sustained if another consistent with the language employed can be adopted better calculated to promote justice and to carry into effect the plain intent of the lawgiver.

On the other hand the plaintiff contends that the reservation excludes from the operation of the patent all lands held by them at the date of the survey, within the exterior boundary of the patent, whether the title was only inchoate or had been perfected by grants, which seems to be the more reasonable construction, and not inconsistent with the language employed.

By the terms of the reservation it is stated that the survey includes two hundred and twenty-seven thousand four hundred and sixty acres beyond the quantity granted to the patentee, in respect to all of which "liberty is reserved that *the same shall be firm and valid*, and may be carried into grant or grants," which means that all shall *be firm and valid*, whether held by complete or incomplete titles, but that such parts as are held by incomplete titles may be carried into grant, and that the patent founded on that survey shall be no bar, in either law or equity, to the confirmation of the titles to the reserved lands included within the exterior bounds of that survey.

Surveys had been made in different parts of the State, subsequent to the treaty of peace, that included smaller

tracts of prior claimants within their exterior boundaries, and which were reserved to such claimants in the certificates granted by the surveyors. Doubts arose as to the authority of the governor to grant patents in such cases, and to remove those doubts the General Assembly, June 2d, 1778, enacted that it shall and may be lawful for the governor to issue grants with reservation of claims to lands included in such surveys, anything in any law to the contrary notwithstanding.* Prior to the passage of that law the authority to issue such grants was at least doubtful, even if the power existed at all, and it is clear that the Assembly never intended that any such grant should cover any prior title, whether complete or incomplete, within the exterior boundaries of the survey.† Supported as the proposition is by repeated decisions of the State court it is adopted without hesitation, as any other rule would work very great injustice.‡ Where the exterior boundaries of a survey under that law upon which a patent is founded includes tracts belonging to prior claimants, the patentee cannot in such a case recover in ejectment without showing that the tract claimed by the defendant is not within the bounds of the excluded claims, which is a direct authority that the reserved lands in a case like the present did not pass to the patentee.§ Even more decisive also is the case of *Nichols et al.* v. *Covey*,‖ in which it is determined that where a patent is issued in pursuance of the act of the second of June, 1788, which includes in its general courses a prior claim, it does not pass to the patentee the title of the State to the lands covered by such prior claim. On the contrary, the title of the patentee in respect to such a tract is not only subject to the title of the prior claimant, but if that title is only a prior entry and it becomes vacated by neglect to procure a survey and return the plat, any one may lay a warrant on the same, as in other cases of vacant and unappropriated lands. Exactly the same

* 2 Revised Code of Virginia, 434. † Ib. 350, 483; Ib. 365.

‡ Hopkins et al. *v.* Ward et al., 6 Munford, 38.

§ Madison *v.* Owens, 6 Littell's Select Cases, 281.

‖ 4 Randolph, 865.

rule is laid down by this court in the case of *Scott et al.* v. *Ratliffe et al.*,* in which the opinion was given by the Chief Justice. He said such patents have been always held valid, so far as respects the land not excluded, but to pass no legal title to the land excepted from the grant, as the lands are in this case in the *habendum* of the patent, and not a doubt is entertained that the rule there laid down is the correct rule upon the subject.†

2. Sufficient evidence was introduced by the defendants to show that they or some of them took adversary possession of the premises in controversy prior to the forfeiture of the same to the State, and that they continued to occupy the same throughout the period that the title was vested in the State, and after the State conveyed the tract to the grantors of the plaintiff to the time when the suit was instituted, but it is conceded that such adversary possession before the forfeiture was not for the period of fourteen years, the time then required by law to bar a recovery, nor did such adversary possession subsequent to the date of the conveyance by the State to the grantors of the plaintiff and before the service of process, continue long enough to bar a recovery. Both combined would maintain the defence, and of course if the statute continued to run during the period the title was vested in the State by the forfeiture, the instruction given to the jury was erroneous and the judgment must be reversed. Adverse possession was the defence in the case of *Stoughton* v. *Baker*,‡ where the question arose in respect to the right of the defendant to an ancient grant which was subject to an implied limitation, and it was contended that he had been so long possessed of the premises that the State had no right to interfere in any form of legal remedy. Possession and uninterrupted enjoyment for a very long period was proved in that case, but the court held that the limitation could not be extinguished by any inattention or neglect

* 5 Peters, 86.

† Kenna *v.* Quarrier, 3 West Virginia, 212; Hardman *v.* Boardman, 4 Leigh, 382.

‡ 4 Massachusetts, 526.

in compelling the owner to comply with it, for no laches is to be imputed to the government and against it no time runs so as to bar the public rights, which is no more nor less than another form of words for expressing the ancient rule of the common law, that time does not run against the State.*

Argument to show that the statute of limitations ceased to run when the forfeiture attached and the title became vested in the State can hardly be necessary, as the rule that time does not run against the State has been settled for centuries, and is supported by all courts in all civilized countries.† Suppose that is so, still it is insisted that the two periods, that is, the period of adverse possession before the forfeiture and the period subsequent to the conveyance by the State to the plaintiff or those under whom he claims, may be added together and considered as one entire period, for the purpose of maintaining the defence, and it is clear if that proposition is correct the instruction given was erroneous. But the proposition cannot be admitted, as it is well-settled law that the possession, in order that it may bar the recovery, must be continuous and uninterrupted as well as open, notorious, actual, exclusive, and adverse.‡ Such a possession, it is conceded, "if continued without interruption for the whole period which is prescribed by the statute for the enforcement of the right of entry, is evidence of a fee," and bars the right of recovery. Independently of positive statute law such a possession affords a presumption that all the claimants to the land acquiesce in the claim so evidenced and enforced, or that they forbear for some substantial reason to controvert the claim of the possessor or to disturb him in the enjoyment of the premises. Secret possession will not do, as publicity and notoriety are necessary as evidence of notice and to put those claiming an adverse

* United States v. Hoar, 2 Mason, 312; Lindsey et al. v. Miller, 6 Peters, 673.

† Angell on Limitations, 5th ed. 28.

‡ Cook v. Babcock, 11 Cushing, 210.

interest upon inquiry.* Mere occupation is not sufficient, but the possession must be *adverse*, as seizin and possession are supposed to be coextensive with the right, and that the possession continues till the party is ousted thereof by an actual possession in another under a claim of right.†

Continuity of possession is also one of the essential requisites to constitute such an adverse possession as will be of efficacy under the statute of limitations. Whenever a party quits the possession the seizin of the true owner is restored, and a subsequent wrongful entry by another constitutes a new disseizin, and it is equally well settled that if the continuity of possession is broken before the expiration of the period of time prescribed by the statute of limitations, an entry within that time destroys the efficacy of all prior possession, so that to gain a title under the statute, *a new adverse possession* for the time limited must be taken for that purpose.‡

Beyond all question the case of *Hall* v. *Gittings*, one of the cases just cited, presented the same question as that involved in the case before the court, and the decision was that the forfeiture to the State within the period necessary to give effect to the statute did have the effect to break the continuity of adverse possession, and prevented the operation of the statute bar.§

Viewed in any light the court is of the opinion that there is no error in the record.

JUDGMENT AFFIRMED.

Mr. Justice STRONG, with whom concurred Justices DAVIS and BRADLEY, dissenting.

In the view which a majority of my brethren take of one branch of this case, I am unable to concur.

The plaintiff in the court below claimed title to the land

* Bradstreet *v.* Huntington, 5 Peters, 402; Blood *v.* Wood, 1 Metcalf, 528; Ewing *v* Burnet, 11 Peters, 53.

† Angell on Limitations, 377; Clarke *v.* Courtney, 5 Peters, 354; McIver *v.* Ragan, 2 Wheaton, 29; Kirk *v.* Smith, 9 Id. 288.

‡ Brinsfield *v.* Carter, 2 Kelly, 143; Ringgold *v.* Malott, 1 Harris & Johnson, 316; Hall *v.* Gittings, 2 Id. 112.

§ Taylor *v.* Burnsides, 1 Grattan, 190.

in controversy under a patent of the State of Virginia, granted to Albert Gallatin on the 10th day of February, 1786. It does not appear that any possession was ever taken under this patent, but on the 1st of November, 1836, the lands were forfeited to the State for failure by the owners to make entry thereof upon the commissioners' books, for taxation. On the 12th of February, 1844, however, an act of the legislature was passed for the relief of Dundas and Kugler, who had become the grantees of the Gallatin right, by which they were allowed to redeem the lands, on the payment of all taxes and damages due thereon, and on the 8th day of May, 1845, the redemption was made. The plaintiff has no other title.

The defendants claim as grantees by sundry mesne conveyances through James T. Watson from Samuel M. Hopkins, who also obtained a patent from the State, dated July 1st, 1796.

I agree that neither this patent to Hopkins, nor any legislation of the State affecting it, presents any sufficient defence to the claim of the plaintiff under the earlier patent to Albert Gallatin. But the defendants set up in the court below another defence. It was that they were protected by the statute of limitations. They submitted evidence tending to prove that they, or those through whom they claim, took actual and adversary possession of the lands in 1827, and that such possession had been continued until the institution of this suit. Relying upon this, they presented to the court the following two points (among others), and requested that they might be given as instructions to the jury:

"*Fourth.* If the jury are satisfied from the evidence that adversary possession commenced before the 1st of November, 1836, and the same possession continued during the time of the forfeiture, as well as from the 8th of May, 1845, the time of redemption, up to the time of the institution of this suit, and by adding the time of adversary possession before forfeiture to the adversary possession after redemption makes a period of fourteen years, then they must find for the defendants, or such of the defendants as make out the fourteen years as aforesaid.

"*Fifth.* That the act of 1844, which authorized Dundas and Kugler to redeem the lands therein specified, did not so operate as to relieve them from the effect of the statute of limitation, which had commenced running for the defendants before the forfeiture, if the jury believed the defendants continued their possession without interruption during the forfeiture, and up to the time of redemption, and that the defendants continued the possession up to the time of the institution of this suit."

Both these points the court refused to affirm, and, on the contrary, charged the jury that on the 1st of November, 1836, the possession of the defendants terminated and passed into and remained in the Commonwealth until the same was transferred to Dundas and Kugler by the act of February 12th, 1844, and that the adverse possession acquired by the defendants before November 1st, 1836, could not be connected with the adverse possession acquired by the defendants after Dundas and Kugler became revested with the title of the Commonwealth. Herein, I think, was clear error. Plainly, had there been no forfeiture, the adversary possession of the defendants, kept up continuously during fourteen years, would have protected them against any right of entry by the plaintiff. The forfeiture did not disturb their actual possession, nor their possession under claim of exclusive right in themselves, which is what is meant by adversary. I agree that their possession between the forfeiture and the redemption gave them no right as against the State. This is not because their possession was not adversary, nor because the actual possession was transferred by law to the Commonwealth, but because adversary possession is unavailing to bar any rights of the State, it not being subject to statutes of limitation, unless expressly named. The defendants here are not asserting their adversary possession against the State. The controversy is between them and one claiming under the Gallatin title, which, though at one time forfeited to the State, was allowed to be redeemed. They claim nothing against the State on account of their possession from November 1st, 1836, to May 8th, 1845, though it was

adversary and uninterrupted, either by abandonment or by the entry of the State or of the plaintiff.

But why is not that possession operative against the plaintiff? I think it is. As between him and the defendants, nothing but an entry or an action brought was sufficient to change the character of their possession or break its continuity. It is not, however, necessary to discuss this. It is sufficient for this case that the defendants held actual and continuous possession of the lands from 1827 until 1857, when this suit was brought; that the possession was always adversary to the plaintiff; that he never took any steps to disturb it, and that he has had more than fourteen years within which he might have asserted his right.

Concede that the plaintiff's right of entry was suspended by the forfeiture, still it revived when the lands were redeemed, and if the defendants' possession was adverse to his right, and continuous during fourteen years in which he might have entered or asserted his right by action, I am unable to perceive why he is not barred.

The fact that an owner's right of entry has been suspended, after the statute has commenced running against him, can be of no importance, if he has had the statutory period within which to bring his action against the disseizor in adverse possession. If this is not so, then war might not only suspend the running of the statute, but render of no effect all adverse possession held before the war commenced. This has never been asserted. It is the uninterrupted, adverse possession alone which creates the bar. It is not essential to it that the right to enter or to bring suit should have suffered no interruption.

Every reason for applying the statute, which would have existed had there been no forfeiture, and consequently no suspension of the plaintiff's right to enter, exists in full force now. Statutes of limitation are dictated mainly by two considerations: one, that it is public policy to discourage stale claims; and the other, that it is not to be presumed that one having a right would delay asserting it for a long period in full view of another's wrongful interference with

it. Hence, the period was fixed at fourteen years, in Virginia and West Virginia, within which a party out of possession may bring his action of ejectment against one in possession holding adversely. Assuming that the jury would have found the facts as stated in the points proposed, the plaintiff has had that entire period, and the public policy, as well as the presumptions arising from his laches, which gave birth to the statute, apply, in all their potency, to his case. And the statute is not only a bar to the assertion of a right of entry upon one in adverse possession after the expiration of the period fixed, but it gives a title to the disseizor. The law casts title upon him, and assures to him the privilege of asserting it, either aggressively or defensively. For the acquisition of this right the defendants have done all that the law contemplates. They entered under a claim of exclusive right, that is, adversarily, and they held that adversary possession continuously until this suit was brought. That the Gallatin title was forfeited during their occupancy was no fault of theirs. It was due to the wrongful neglect of the plaintiff, or those under whom he claims, to enter the lands upon the commissioners' books, and to pay the taxes. Can he now make use of a forfeiture, caused by his own neglect, to obtain or preserve rights which, confessedly, would have no existence but for his neglect? Yet this was, in substance, the instruction given to the jury. His laches, resulting in a forfeiture, is to have the same effect as an entry would have had, or as action brought. Thus he is allowed to secure an advantage through his own default. Thus he is allowed to make use of his own unlawful nonfeasance to break the continuity of the defendants' hostile possession. I cannot assent to such a view of the law.

Had the Commonwealth, after the forfeiture of the Gallatin title, granted the land to some other grantee, I agree that such grantee would not be affected by any adverse possession of the defendants held by them before the forfeiture, of less duration than fourteen years. But such was not the case. The holders of the Gallatin title were allowed to *redeem*. The nature of the transaction by which they became

reinvested with the title is plainly seen in the act of February 12th, 1844, passed for their relief. Its preamble recited that the lands had become forfeited by reason of failure to enter the same on the books of the Commissioners of the Revenue for taxation, and that Dundas and Kugler, the trustees of the North American Land Company, for whose use the title had been held, had petitioned for permission to "*redeem*" said lands, on payment of the taxes assessed, together with six per centum per annum damages thereon. The first section authorized them to "*redeem*" on those terms, on or before June 1st, 1845. The second section "*released*" unto them, for the benefit of the shareholders of the company, all the right, title, and interest which had been forfeited upon the payment of said taxes and damages. The third section authorized a judgment against the lands for the amount of costs incurred, and for reasonable compensation to any commissioner of delinquent and forfeited lands by reason of his having prepared the redeemed lands for sale; and the fourth section directed all proceedings by such commissioners to be suspended until after June 1st, 1845. It thus appears that the redemption was not the acquisition of a new title. It was the common case of a waiver of a forfeiture. Dundas and Kugler, after the redemption, held by their old right, the Gallatin patent, and it was this right which the plaintiff gave in evidence and asserted in the present action. No new patent was issued to Dundas and Kugler. The act of 1844 contains no words of grant to them, and its avowed purpose was to place them in the same position, as holders of the title and trustees of the company, which they occupied before the forfeiture.

I am, therefore, of the opinion that the Circuit Court erred in refusing to affirm the defendants' fourth and fifth points, and also in the instruction which was given to the jury respecting the effect of the statute of limitations. For this reason I think the judgment should be reversed, and that a *venire de novo* should be awarded.

EX PARTE NEWMAN.

Certain Prussian sailors libelled a Prussian vessel in New York in admiralty for wages, less in amount than $2000. The master set up a provision in a treaty of the United States with Prussia, by which it was stipulated that the consuls of the respective countries should sit as judges in "differences between the crews and captains of vessels" belonging to their respective countries; and the consul of Prussia, coming into the District Court, protested against the District Court's taking jurisdiction. The District Court, however, did take jurisdiction, and decreed $712 to the sailors. On appeal the Circuit Court reversed the decree, and dismissed the libel because of the consul's exclusive jurisdiction. *Held*, that mandamus would not lie to the Circuit judge to compel him to entertain jurisdiction of the cause on appeal, and to hear and decide the same on the merits thereof; and that this conclusion of this court was not to be altered by the fact that owing to the sum in controversy being less than $2000, no appeal or writ of error from the Circuit Court to this court existed.

PETITION for writ of mandamus to the United States Circuit judge for the Eastern District of New York; the case being thus:

The Constitution ordains* that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction."

The 10th article of the treaty of the United States with the King of Prussia, made May 1st, 1828,† contains this provision:

"The consuls, vice-consuls, and commercial agents shall have the right as such to sit as judges and arbitrators *in such differences* as may arise between *the captains and crews of the vessels* belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country; or the said consuls, vice-consuls, or commercial agents, should require their assistance to cause their decisions to be carried into effect or supported. It is, however, understood that this species of judgment or arbi-

* Article 3, § 2.

† 8 Stat. at Large, 378.

Statement of the case.

tration shall not deprive the contending parties of the rights they have to resort on their return to the judicial authority of their country."

"All treaties made, or which shall be made, under the authority of the United States," it is ordained by the Constitution of the United States,* "shall be the supreme law of the land."

With this treaty thus in force, the mate and several of the crew, all Prussians—who had shipped in Prussia on the Prussian bark Elwine Kreplin, under and with express reference, made in the shipping articles, to the laws of Prussia—got into a difficulty at New York with the master of the bark, who caused several of them to be arrested on charges of mutiny and desertion. They, on the other hand, took the case before the Prussian consul; denying all fault on their part, and claiming wages. The vice-consul heard the case, and decided that on their own showing they had forfeited their wages by the Prussian law applied to their contract of shipment. In addition to this he issued a requisition addressed to any marshal or magistrate of the United States, reciting that the master and crew had been guilty of desertion, and requiring such marshal or magistrate to take notice of their offence.

The mate and men now filed a libel in the District Court at New York against the bark for the recovery of wages (less than $2000), which they alleged were due to them; and the bark was attached to answer. The master of the bark intervening for the interest of the owners answered, and set up various grounds of defence to the claim, some of which arose under the laws of Prussia, and especially he invoked the protection of the clause in the above-quoted treaty between his country and this, and denied the jurisdiction of the District Court, alleging, moreover, that the matter in difference, the claim of the libellants for wages, had already in fact been adjudicated by the Prussian consul at the port of New York.

* Article 6.

Before the cause was tried in the District Court, the consul-general of the North German Union presented to that court his formal protest against the exercise of jurisdiction by that court in the matter in difference.* He invoked therein the same clause in the treaty, and claimed exclusive jurisdiction of such matters in difference; and declared also that, before the filing of the libel the matter had been adjudicated by him, and insisted that his adjudication was binding between the parties, and could only be reviewed by the judicial tribunals of Prussia.

The District Court proceeded notwithstanding to hear and adjudge the case; placing its right to do this, on the ground that the suit before *it* was a proceeding *in rem* to enforce a maritime lien upon the vessel itself, and not a "difference between the captain and crew;" and, also, because the Prussian consul had no power to conduct and carry into effect a proceeding *in rem* for the enforcement of such a lien, and had not in fact passed at all and could not pass upon any such case. Accordingly after a careful examination of the facts, that court decreed in favor of the libellants $712. The case then came by appeal to the Circuit Court. This latter court considered that the District Court had given to the treaty too narrow and technical a construction. The Circuit Court said:

"The master is the representative in this port of the vessel and of all the interests concerned therein. He is plainly so regarded in the treaty. The matter in difference in this cause is the claim for wages. That arises between the crew and the master, either as master or as the representative here of vessel and owners. The lien and the proceeding *in rem* against the vessel appertain only to the remedy. The very first step in this cause is to settle the matter in dispute. If the claim be estab-

* The consul-general of the North German Union was commissioned by the King of Prussia, Prussia being one of the States composing the North German Union; and by certificate of the Secretary of State of the United States, under the seal of that department, it appeared that the Executive Department of the United States recognizes the consuls of the North German Union as consuls of each one of the sovereign States composing that Union, "the same as if they had been commissioned by each one of such States."

lished, then, as incident to the right to the wages, the lien and its enforcements against the vessel follow. The District Court can have no jurisdiction of the lien, nor jurisdiction to enforce it if it has no jurisdiction of the difference or dispute touching the claim for wages. To hold that the jurisdiction of the consul is confined to cases in which there is no maritime lien, and in which no libel of the vessel could, apart from the treaty, be maintained, is to take from the treaty much of its substance."

The Circuit Court adverted to and relied on the fact, that the Prussian consul had moreover actually heard the mate and sailors, and pronounced against them.

The Circuit Court accordingly, while it expressed on a general view of the merits its sympathy with the sailors, and a strong inclination to condemn the conduct of the master in the matter, yet was "constrained to the conclusion that the treaty required that the matter in difference should have been left where the treaty with Prussia leaves it, viz., in the hands and subject to the determination of their own public officer." The result was the dismissal of the libels by the Circuit Court for want of jurisdiction.

Thereupon Newman and the others, by their counsel, *Messrs. P. Phillips and D. McMahon*, filed a petition in *this* court for a writ of mandamus to the Circuit judge, commanding him "to entertain jurisdiction of the said cause on appeal, and to hear and decide the same on the merits thereof." The judge returned that the Circuit Court had entertained the appeal, and had heard counsel on all the questions raised in the case, and had decided it; and that the said court had decided that the matter in controversy was within the jurisdiction of the consul under the treaty, and that in the exercise of the jurisdiction so given him, he had decided the matter, and that therefore the court had dismissed the libel.

The question now was whether the mandamus should issue.

The reader will of course remember the provision in the 13th section of the Judiciary Act, by which it is enacted:

"That the Supreme Court shall have power to issue writs of

mandamus, in cases warranted by the principles and usages of law, to any courts appointed or persons holding office under the authority of the United States."

And also the provision of the 22d section, extended by an act of 1803 to appeals in admiralty, by which it is enacted:

"That final judgments and decrees in civil actions . . . in a Circuit Court . . . removed there by appeal from a District Court, where the matter in dispute exceeds the sum or value of $2000, exclusive of costs, may be re-examined and reversed or affirmed in the Supreme Court."

Messrs. D. McMahon and P. Phillips, in support of the motion:

The mandamus should issue:

1st. Because the treaty stipulation is unconstitutional. It strips the courts of the United States of the admiralty jurisdiction conferred on them by the Constitution of the United States. It is well settled that admiralty courts have jurisdiction, at their discretion, over foreign vessels within their jurisdiction, and actions *in rem* against them brought by foreign seamen. If then the treaties attempt to confer on a foreign officer exclusive jurisdiction of cases already within the control of admiralty, they violate the Constitution, and are so far null.

2d. The treaty with Prussia has no reference to suits or proceedings *in rem*, and in that respect differs from the case mentioned in the treaty, of a difference between the master and seamen. The proceeding is against the vessel to foreclose a lien, and the owners are brought in incidentally. The master, as such, has no interest, nominal or otherwise, in the suit in question, and it is a misnomer to call the present case a controversy between a master and his crew.

3d. The Prussian consul made no adjudication in the matter *now* in difference, between the libellants and the master.

4th. The treaty is with the kingdom of Prussia, and the tribunals referred to in it are the consuls, vice-consuls, and commercial agents of that government. Now, at the time

of the occurrence of the facts here in controversy, there were no consuls, or vice-consuls, or commercial agents of the kingdom of Prussia in the city of New York, or in the United States, though there are such officers of the North German Union. A treaty stipulation to maintain tribunals independent of our own, in this country, is contrary to the spirit of our institutions, as its effect may be to create in our midst many tribunals independent of our national courts. It should, therefore, be construed strictly.

5th. The consul is estopped from asserting his exclusive jurisdiction, because that he appealed in his "requisition" to our marshals and other magistrates, and prayed them to take cognizance of the case. He cannot be permitted, after doing so, to avail himself of the benefit of the treaty stipulations.

Messrs. Salomon and Burke, contra:

This is an attempt to cause this court to review the decision already rendered in the Circuit Court and to direct the Circuit judge to change his decision, and to render a different judgment in a case which cannot be brought before this court by appeal, because the amount in controversy is less than $2000. This cannot be done.

Mandamus cannot perform the functions of a writ of error or of an appeal. This court will never direct in what manner the discretion of an inferior tribunal shall be exercised; but will only, in a proper case, require the inferior court to decide. If the Circuit judge had refused to decide the case, or to enter a decree therein, this court might compel him by mandamus to decide or to enter a decree; but even then it could not by such process have commanded him how to decide it, or what decree to enter. A revision of his judicial decision can only take place by appeal. But here the applicants do not complain that the judge has refused to decide the case, or that he has refused to enter judgment, but they complain that his decision upon some of the questions involved therein, and which were fully argued before, and have been carefully considered and adjudged by him, is

erroneous, and that consequently this court should overrule his judgment in this case.

Now, strictly speaking, this court cannot look into the opinion of the Circuit judge for the purpose of ascertaining on what ground his decision is based with a view of revising it.

It can look only to the record, which shows only that the Circuit Court has entertained the appeal, heard and tried it, and upon such hearing and trial, after due consideration, has ordered that the decree of the District Court be reversed and the libel dismissed. How can this court, then, upon an application for a mandamus, compel him to decide differently?

But, waiving this, no doubt the question arising under the treaty with Prussia has from the beginning been the material question in the controversy. That under the treaty the Prussian consul had exclusive jurisdiction, and had exercised that jurisdiction and decided between the parties, was set up by the claimant in his answer; it was brought before the District Court by the consul's protest; upon that, mainly, the appeal was taken to the Circuit Court. The question involved not only the proper construction of the treaty, but also the examination and adjudication of important facts and circumstances relating to the consul's action in the case. All the points were argued before the Circuit Court, and that court, after consideration, has decided upon the facts and the law. This is in no proper sense a case in which the Circuit Court has refused to entertain or to exercise jurisdiction. It has, in fact, entertained the appeal from the decree of the District Court, and upon consideration has decided that the decree appealed from should be reversed, on three grounds:

First. That under the treaty with Prussia, the Prussian consul had jurisdiction of the matter in difference involved in the litigation.

Second. That that jurisdiction of the Prussian consul was exclusive.

Third. Upon the proofs the court found and decided, that

Reply.

the Prussian consul *had* adjudicated the matter in difference involved in the litigation, and that the libellants were bound by that adjudication.

If this court can by mandamus review this decision of the Circuit Court, then it can in this manner review every case in which a suit is dismissed on the ground of a former adjudication of the subject-matter between the same parties.

Admiralty courts generally decline to interfere between foreigners concerning seamen's wages, except where it is manifestly necessary to do so to prevent a failure of justice, and then only where the voyage has been broken up, or the seamen have been discharged.* Now, if for this reason, in the proper exercise of his judicial discretion, the Circuit judge, on appeal, had ordered a dismissal of the libel, can it be maintained that by mandamus this court could compel him to reverse his own decision? *Non constat* that, if the Circuit judge had not ordered the dismissal of the libel on account of the treaty and the exercise of the consular jurisdiction, he would not have so ordered on this ground of comity between nations.

The application is for a mandamus directing the Circuit judge to hear the appeal and to decide the same on the merits thereof. What are the *merits* of the controversy? Is not this question of the jurisdiction of the Prussian consul and his decision a part of them? Will this court, by mandamus, determine what is and what is not of "the merits of a controversy?"

Reply: The law will leave no one remediless, and the amount in controversy not being $2000, and no appeal existing, and there being no other remedy, the remedy in the premises must be by mandamus. The writ is issued to inferior courts to enforce the due exercise of these judicial powers; "and this not only by restraining their excesses, but also by quickening their negligence and obviating their denial of justice."† While this court will not restrain nor

* Gonzales *v.* Minor, 2 Wallace, Jr., 348.

† Ex parte Bradley, 7 Wallace, 375.

direct by mandamus in what manner the discretion of the inferior tribunal should be exercised, it will, in proper cases, require the court to hear and decide. The "principles and usages of law," give the right to a mandamus where a party has a legal right, and no other remedy to enforce it.*

In the case at bar the proposed mandamus does not usurp the functions of a writ of error or appeal, for no appeal lies, the amount being less than $2000.

The case is this. The Circuit judge refuses to consider and determine, on the merits, a cause over which he has ample jurisdiction, he entertaining the opinion that he has no jurisdiction, because of the terms of treaty with Prussia. In this court it is submitted that his conclusion is erroneous. No appeal, however, lies. A Circuit judge entertaining very strict notions of the extent of admiralty jurisdiction, might, in a contest between State and National courts, paralyze the commerce of a great commercial port like New York. Can there be no correction for this? Is a party to be dismissed in a case like this, with the allegation that the writ of mandamus cannot usurp the function of a writ of error, therefore there is no correction?

While it is conceded that the writ of mandamus cannot be used to correct an erroneous judgment of a court of acknowledged jurisdiction, yet it can be invoked to compel a court to exercise its jurisdiction, even though such court be of the opinion it had not jurisdiction. The distinction between the two classes of cases is obvious. The distinction lies between a direction to an inferior tribunal to act, and direction to it how to act. We do not seek to control the Circuit Court's judgment by the mandamus, but only to compel it to entertain jurisdiction of the cause, and then to hear and decide according to the law and the allegations and proofs.

Authorities are clear on the right of a superior tribunal to compel an inferior tribunal to hear a cause and decide it

* Phillips's Practice, p. 230.

even after the latter has declined to entertain the cause because of an alleged want of jurisdiction.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Attempt was made in the first place to prosecute the suit in the name of the mate for himself and as assignee of the crew, but the court before entering the decree suggested an amendment, and the crew were admitted as co-libellants, which will render it unnecessary to make any further reference to that feature of the pleadings.

Proceedings *in rem* were instituted in the District Court against the bark Elwine Krepline, by the mate, for himself and in behalf of the crew of the bark, on the twenty-fourth of August, 1870, in a case of subtraction of wages civil and maritime, and they allege in the libel, as amended, that the bark is a Prussian vessel, and that they are Prussian subjects, and that they were hired by the master and legally shipped on board the bark for a specified term of service, and that they continued well and truly to perform the duties they were shipped to fulfil, and that they were obedient to the lawful commands of the master, until they were discharged. They also set forth the date when they were shipped, the length of time they had served, the wages they were to receive, and the amount due and unpaid to them respectively for their services, and aver that the owners of the bark refuse to pay the amount.

Process was issued and served by the seizure of the bark, and the master appeared, as claimant, and filed an answer. He admits that the appellants shipped on board the bark at the place and in the capacities and for the wages alleged in the libel, but he avers that they signed the shipping articles and bound themselves by the rules, regulations, and directions of the shipping law and rules of navigation of the country to which the bark belonged, and he denies that they well and truly performed their duties, or that they were

* Rex *v.* Justices of Kent, 14 East, 395; Hull *v.* Supervisors of Oneida, 19 Johnson, 260; Judges of Oneida County *v.* The People, 18 Wendell, 92 and 95.

Restatement of the case in the opinion.

obedient to his lawful commands. On the contrary, he alleges that they, on the day they were discharged, were guilty of gross insubordination and mutinous conduct, that they resisted the lawful commands of the master, and refused to obey the same, and interfered with him in the performance of his duty, and with force and threats prevented him from performing the same, and thereafter, on the same day, deserted from the vessel.

Apart from the merits he also set up the following defences:

1. That the court had no jurisdiction of the matter contained in the libel, because the bark was a Prussian vessel, owned by Prussian citizens, and because the libellants were Prussian subjects belonging to the crew of the vessel, and were also citizens of that kingdom.

Support to that defence is derived from the tenth article of our treaty with that government, which provides that consuls, vice-consuls, and commercial agents of the respective countries, in the ports of the other, shall have the right, as such, to sit as judges and arbitrators in such differences as may arise between the captains and crews of the vessels belonging to the nation whose interests are committed to their charge, without the interference of the local authorities, unless the conduct of the crews, or of the captain, should disturb the order or tranquillity of the country, or the consuls, vice-consuls, or commercial agents should require their assistance to cause their decisions to be carried into effect.*

He set up that provision of the treaty, and prayed that he might have the same advantage of it as if the same was separately and formally pleaded to the libel.

2. That the libellants in signing the shipping articles bound themselves, under the penalty of a forfeiture of wages, not to sue or bring any action for any cause, against the vessel, or the master, or owners thereof, in any court or tribunal except in those of Prussia.

* 8 Stat. at Large, 382.

Restatement of the case in the opinion.

3. That the consul-general of the North German Union, resident in the city of New York, which government included Prussia and other sovereignties, heard and examined the questions of difference between the libellants and the claimant and adjudicated the same; that the libellants appeared before the court on the occasion and presented their claim to be discharged and their claim for wages, and that the consul, in his character as such, heard and examined their said claims and adjudged that the libellants should return to the vessel, and that no wages were due them or would be due them until they complied with the contract of shipment.

Testimony was taken in the District Court, and the District Court entered a decree in favor of the libellants for the amount due them for their wages, and referred the cause to a commissioner to ascertain and report the amount. Subsequently he reported that the amount due to the libellants was seven hundred and forty-three dollars and forty-one cents. Exceptions were filed by the claimant, and the District Court upon further hearing reduced the amount to seven hundred and twelve dollars and thirty-two cents, and entered a final decree for that amount, with costs of suit. Thereupon the claimant appealed to the Circuit Court, and the record shows that the appeal was perfected, and that the cause was duly entered in that court.

On the fifth of the last month the petition under consideration was filed in this court in behalf of the appellees in that suit, in which they represented that the cause appealed was fully argued before the Circuit Court on the same pleadings and proofs as those exhibited in the District Court, and that the Circuit judge reversed the decree of the District Court and dismissed the libel for want of jurisdiction in the District Court to hear and determine the controversy; that the Circuit judge declined to entertain the cause or to consider the same on the merits, and that no final decree on the appeal has been entered in the Circuit Court or signed by the Circuit judge.

His refusal to entertain jurisdiction and to hear and de-

cide the merits of the case was placed, as they allege, upon the ground that the matter in difference, under the tenth article of the treaty, was within the exclusive cognizance of the consul, vice-consul, or commercial agent therein described, and in consequence thereof that the District Court was without any jurisdiction, which they contend is an error for the following reasons:

(1.) Because the treaty stipulation, if so construed, is unconstitutional and void.

(2.) Because that article of the treaty applies only to disputes between the masters and crews of vessels, and has no reference to suits *in rem* against the vessel.

(3.) Because the record in this case shows that the Prussian authorities refused to entertain jurisdiction of the controversy.

(4.) Because the treaty is with Prussia, and it appears that her government has no consul, vice-consul, or commercial agent at that port.

(5.) Because that the consul who acted in the case requested the District Court to take jurisdiction of the matter in difference.

Hearing was had on the day the petition was presented, and this court granted a rule requiring the Circuit judge to show cause on the day therein named why a peremptory writ of mandamus should not issue to him directing him to hear the appeal of the petitioners and decide the same on the merits. Due service of that rule was made, and the case now comes before the court upon the return of the judge to that rule. He returns, among other things not necessary to be reproduced, as follows: That the cause of the libellants proceeded to a decree in their favor in the District Court; that an appeal from that decree was taken in due form to the Circuit Court for that district; that the Circuit Court did not refuse to entertain the appeal nor did the Circuit Court refuse to decide the case on the appeal nor hold or decide that the Circuit Court had no jurisdiction to hear or decide the same, as required by the proofs or by the law. On the contrary, the Circuit Court did entertain the appeal,

did hear the counsel of the parties fully on all the questions raised in the case, and did decide the same. But in making such decision the said court did hold and decide that the matter in controversy was within the jurisdiction of the consul, under the treaty, and that the consul, in the exercise of that jurisdiction, after hearing the parties, had decided the matter. Pursuant to those views the Circuit Court, as the return shows, did thereupon direct that the decree of the District Court be reversed, and that the libel of the petitioners be dismissed.

Power to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by the thirteenth section of the Judiciary Act, in cases warranted by the principles and usages of law.* When passed, the section also empowered the court to issue such writs, subject to the same conditions, to persons holding office under the United States, but this court, very early, decided that the latter provision was unconstitutional and void, as it assumed to enlarge the original jurisdiction of the court, which is defined by the Constitution.†

Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy, or where such a court, having heard the cause, refuses to render judgment or enter a decree in the case, but the principles and usages of law do not warrant the use of the writ to re-examine a judgment or decree of a subordinate court in any case, nor will the writ be issued to direct what judgment or decree such a court shall render in any pending case, nor will the writ be issued in any case if the party aggrieved may have a remedy by writ of error or appeal, as the only office of the writ when issued to a subordinate court is to direct the performance of a ministerial act or to command the court to act in a case where the court has jurisdiction and refuses to act, but the

* 1 Stat. at Large, 81.

† Marbury *v.* Madison, 1 Cranch, 175; Ex parte Hoyt, 13 Peters, 290.

supervisory court will never prescribe what the decision of the subordinate court shall be, nor will the supervisory court interfere in any way to control the judgment or discretion of the subordinate court in disposing of the controversy.* Where a rule is laid, as in this case, on the judge of a subordinate court, he is ordered to show cause why the peremptory writ of mandamus shall not issue to him, commanding him to do some act which it is alleged he has power to do, and which it is his duty to do, and which he has improperly neglected and refused to do, as required by law. Due service of the rule being made the judge is required to make return to the charge contained in the rule, which he may do by denying the matters charged or by setting up new matter as an answer to the accusations of the relator, or he may elect to submit a motion to quash the rule or to demur to the accusative allegations. Matters charged in the rule and denied by the respondent must be proved by the relator, and matters alleged in avoidance of the charge made, if denied by the relator, must be proved by the respondent.† Motions to quash in such cases are addressed to the discretion of the court, but if the respondent demurs to the rule, or if the relator demurs to the return, the party demurring admits everything in the rule or the return, as the case may be, which is well pleaded, and if the relator elects to proceed to hearing on the return, without pleading to the same in any way, the matters alleged in the return must be taken to be true to the same extent as if the relator had demurred to the return.‡ Subordinate judicial tribunals, when the writ is

* Insurance Co. *v.* Wilson, 8 Peters, 302; United States *v.* Peters, 5 Cranch, 135; Ex parte Bradstreet, 7 Peters, 648; Ex parte Many, 14 Howard, 24; United States *v.* Lawrence, 3 Dallas, 42; Commissioner *v.* Whitely, 4 Wallace, 522; Insurance Co. *v.* Adams, 9 Peters, 602.

† Angell & Ames on Corporations, 9th ed., § 727; Cagger *v.* Supervisors, 2 Abbott's Practice, N. S. 78.

‡ Tapping on Mandamus, 347; Moses on Mandamus, 210; Com. Bank *v.* Commissioners, 10 Wendell, 25; Ryan *v.* Russell, 1 Abbott's Practice, N. S. 230; Hanahan *v.* Board of Police, 26 New York, 316; Middleton *v.* Commissioners, 37 Pennsylvania State, 245; 3 Stephens's Nisi Prius, 2326; 6 Bacon's Abridgment, ed. 1856, 447.

addressed to them, are usually required to exercise some judicial function which it is alleged they have improperly neglected or refused to exercise, or to render judgment in some case when otherwise there would be a failure of justice from a delay or refusal to act, and the return must either deny the facts stated in the rule or alternative writ on which the claim of the relator is founded, or must state other facts sufficient in law to defeat the claim of the relator, and no doubt is entertained that both of those defences may be set up in the same return, as in the case before the court.* Several defences may be set up in the same return, and if any one of them be sufficient the return will be upheld.†

Evidently the District judge was inclined to adopt the proposition, advanced by the libellants, that the suit for wages, as it was prosecuted by a libel *in rem*, was not within the treaty stipulation, nor a controversy within the jurisdiction of the consul, but he did not place his decision upon that ground. He did, however, rule that the treaty did not have the effect to change the jurisdiction of the courts, except to require them to decline to hear matters in difference between the masters and crews of vessels in all cases where the consul had acted or perhaps was ready to act as judge or arbitrator in respect to such differences. Beyond doubt he assumed that to be the true construction of the treaty, and having settled that matter he proceeded to inquire whether the consul had adjudicated the pending controversy, or whether the evidence showed that he was ready to do so, and having answered those inquiries in the negative he then proceeded to examine the pleadings and proofs, and came to the conclusion in the case which is expressed in the decree from which the appeal was taken to the Circuit Court.

All of those matters were again fully argued in the Circuit Court, and the Circuit judge decided to reverse the decree of the District Court upon the following grounds: (1.) That

* Springfield *v.* Harnden, 10 Pickering, 59; People *v.* Commissioners, 11 Howard's Practice, 89; People v. Champion, 16 Johnson, 61.

† Wright *v.* Fawcett, 4 Burrow, 2041; Moses on Mandamus, 214.

the Prussian consul, under the treaty, had jurisdiction of the subject-matter involved in the suit in the District Court. (2.) That the jurisdiction of the consul under the treaty was exclusive. (3.) That the proofs showed that the consul heard and adjudicated the matter involved in the suit appealed to the Circuit Court, and that the libellants were bound by that adjudication.

Such questions were undoubtedly raised in the pleadings, and it is equally certain that they were decided by the District Court in favor of the libellants. Raised as they were by the pleadings, it cannot be successfully denied that the same questions were also presented in the Circuit Court, and in view of the return it must be conceded that they were decided in the latter court in favor of the respondent. Support to that proposition is also found in the opinion of the Circuit judge, and in the order which he made in the case. Suffice it, however, to say, it so appears in the return before the court, and this court is of the opinion that the return, in the existing state of the proceedings, is conclusive.

Confessedly the petitioners are without remedy by appeal or writ of error, as the sum or value in controversy is less than the amount required to give that right, and it is insisted that they ought on that account to have the remedy sought by their petition. Mandamus will not lie, it is true, where the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error. Such remedies are not given save in patent and revenue cases, except when the sum or value exceeds two thousand dollars, but the writ of mandamus will not lie in any case to a subordinate court unless it appears that the court of which complaint is made refused to act in respect to a matter within the jurisdiction of the court and where it is the duty of the court to act in the premises.

Admiralty courts, it is said, will not take jurisdiction in such a case except where it is manifestly necessary to do so to prevent a failure of justice, but the better opinion is that, independent of treaty stipulation, there is no constitutional

or legal impediment to the exercise of jurisdiction in such a case. Such courts may, if they see fit, take jurisdiction in such a case, but they will not do so as a general rule without the consent of the representative of the country to which the vessel belongs, where it is practicable that the representative should be consulted. His consent, however, is not a condition of jurisdiction, but is regarded as a material fact to aid the court in determining the question of discretion, whether jurisdiction in the case ought or ought not to be exercised.*

Superior tribunals may by mandamus command an inferior court to perform a legal duty where there is no other remedy, and the rule applies to judicial as well as to ministerial acts, but it does not apply at all to a judicial act to correct an error, as where the act has been erroneously performed. If the duty is unperformed and it be judicial in its character the mandate will be to the judge directing him to exercise his judicial discretion or judgment, without any direction as to the manner in which it shall be done, or if it be ministerial, the mandamus will direct the specific act to be performed.†

Power is given to this court by the Judiciary Act, under a writ of error, or appeal, to affirm or reverse the judgment or decree of the Circuit Court, and in certain cases to render such judgment or decree as the Circuit Court should have rendered or passed, but no such power is given under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to re-examine the judgment or decree of the subordinate court. Such a writ cannot perform the functions of an appeal or writ of error, as the superior court will not, in any case, direct the judge of the subordinate court what judgment or decree to enter in the case, as the writ does not vest in the superior court any power to give

* 2 Parsons on Shipping, 224; Lynch *v.* Crowder, 2 Law Reporter, N. S. 355; Thomson *v.* Nanny, Bee, 217; The Bee, Ware, 332; The Infanta, Abbot's Admiralty, 263.

† Carpenter *v.* Bristol, 21 Pickering, 258; Angell & Ames on Corporations, 9th ed., § 720.

any such direction or to interfere in any manner with the judicial discretion and judgment of the subordinate court.*

Viewed in the light of the return, the court is of the opinion that the rule must be discharged and the

PETITION DENIED.

THE SCOTIA.

1. Although it is the clear duty of an ocean steamer sailing at night to keep out of the way of a sailing vessel, yet if the course of the sailing vessel, when first seen, is such, that compared with her own no collision is probable, the steamer is not bound to change her course. She need but watch and see that the courses of the two vessels are preserved. It is only when the sailing vessel does change *her* course, so as to render a collision possible, that the steamer must change hers also; and if she then makes the proper manœuvres to take herself from the sailing vessel, and when collision becomes more probable slows, stops, and backs, all as the best judgment that can be formed in the emergency suggests, she is not liable for the collision.
2. The statutes of the United States and the orders in council of Great Britain having each prescribed the sort of lights which, on the one hand, their steamers are to carry at night, and the different sort which, on the other, their sailing vessels are to carry, and both nations adopting in this form the same distinction in the sorts of lights for the two sorts of vessels respectively, the court declares that where a British steamer and an American sailing vessel are navigating at night in the known path of vessels navigating between the United States and Great Britain, so that there is a reasonable probability that vessels in that path would be either American or British, a steamer may, in the absence of knowledge, act upon the probability that a vessel whose light she sees while she cannot distinguish at all the vessel herself, is such a vessel as her light indicates, and apply the rule of navigation common to the two countries accordingly.
3. Under the existing statutory regulations of the United States and Great Britain (stated more fully *infra*, pp. 171–2), both of which on the one hand require sailing vessels to carry colored lights and not to carry a white one, and both of which on another require steamers to carry a white light at their mastheads,—when an American sailing vessel carries in mid-ocean at night a white light hung at her bow, fastened low

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* Ex parte Crane, 5 Peters, 194; Ex parte Bradstreet, 7 Id. 634; Insurance Co. *v.* Wilson, 8 Id. 304; Ex parte Many, 14 Howard, 25.

down, and carries no colored lights anywhere, a British steamer, not able to discover what she really is, may be excused for mistaking her for a steamer, and a steamer at a distance instead of near at hand.

4. *Semble* that the navigation laws of the United States requiring different sorts of vessels to carry different sorts of lights, bind American vessels on the high seas as well as in American waters, and that the people of other nations navigating the high seas may properly sue our citizens in our courts for injuries occurring through the disregard of them.
5. The rules of navigation established in the British orders in council, of January 9th, 1863 (prescribing the sorts of lights to be used on British vessels), and in our act of Congress of 1864 having, before the close of the year 1864, been accepted as obligatory by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, were in April, 1867, to be regarded, so far as relates to the vessels of these states, as laws of the sea. And of the historical fact that by common consent of mankind they have been acquiesced in as of general obligation, courts may take judicial notice.
6. These rules having prescribed that sailing vessels should not carry a white light, and that steamers should carry one at their masthead, a sailing vessel which carried a white light low down, so that she looked like a steamer yet at a distance, was held to be without remedy where she had collided with a steamer which mistook her for another steamer and manœuvred accordingly.

APPEAL from the Circuit Court for the Southern District of New York, in a case of collision between the American ship Berkshire and the British steamer Scotia, by which the ship was sunk and totally lost.

On the 9th of January, 1863, a British order in council, authorized by virtue of the Merchant Shipping Amendment Act of July 29th, 1862 (25 and 26 Victoria), made a body of "Regulations for preventing collisions at sea." Among these were "Rules concerning lights," and "Steering and sailing rules."

In the first class were these:

LIGHTS FOR STEAMSHIPS.

ART. 3. Sea-going steamships when under way shall carry—

(*a*) At the foremast head, a bright white light . . . of such a character as to be visible on a dark night, with a clear atmosphere, at a distance of at least five miles.

(*b*) On the starboard side a green light, &c., visible on a dark

night, with a clear atmosphere, at a distance of at least two miles.

(*c*) On the port side a red light, &c., visible on a dark night, with a clear atmosphere, at a distance of at least two miles.

(*d*) The said green and red side-lights shall be fitted with inboard screens, projecting at least three feet forward from the light so as to prevent these lights being seen across the bow.

LIGHTS FOR SAILING SHIPS.

ART. 6. Sailing vessels under way . . . shall carry the same lights as steamships under way, *with the exception of the white masthead lights, which they shall never carry.*

In the steering and sailing rules was this one—

SAILING SHIP AND SHIP UNDER STEAM.

If two ships, one of which is a sailing ship and the other a steamship are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

All these regulations, as originally promulgated by Great Britain, were made applicable to all ships, whatever their nationality, within the limits of British jurisdiction, and to British and French ships whether within British jurisdiction or not. The Merchant Shipping Amendment Act, in virtue of which these regulations were passed, provided also that whenever it should be made to appear to the British government, that the government of any foreign country was willing that these regulations should apply to the ships of such country, when beyond the limits of British jurisdiction, Her Britannic Majesty might, by order in council, direct that such regulations should apply to the ships of such foreign country, whether within British jurisdiction or not.

On the 29th April, 1864,* the Congress of the United States passed *its* "act fixing certain rules and regulations for preventing collisions on the water," and these rules as respects sea-going vessels being, to all intents, identical with those above quoted from the British act, the British govern-

* 13 Stat. at Large, 58.

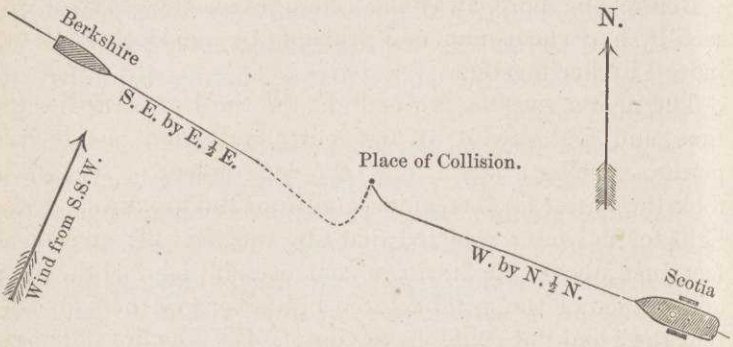
ment regarded the act of Congress as an expression by our government, that it was willing that the British regulations should apply to our ships when beyond the limits of British jurisdiction. The British government accordingly, by order in council, directed that the regulations should apply to all sea-going vessels of the United States, whether within British jurisdiction or not.

The governments of various other countries soon also manifested their willingness that the British regulations should apply to their ships respectively, when beyond the limits of British jurisdiction; and orders in council accordingly directed that such regulations should apply to the ships of such countries respectively, whether within British jurisdiction or not. The countries referred to were Austria, the Argentine Republic, Belgium, Brazil, Bremen, Chili, Denmark proper, the Republic of the Equator, France, Greece, Hamburg, Hanover, the Hawaiian Islands, Hayti, Italy, Lubeck, Mecklenburg-Schwerin, Morocco, the Netherlands, Norway, Oldenburg, Peru, Portugal, Prussia, the Roman States, Russia, Schleswig, Spain, Sweden, Turkey, Uruguay. These orders in council were published at various dates, from January 13th, 1863, to February 6th, 1866. All countries named except Denmark, Greece, the Hawaiian Islands, Schleswig, and the United States, adopted the regulations in 1863.

With these various statutes and orders in existence, the Scotia, a British steamer of the Cunard line, steering west by north one-half north, was sailing about midnight on the 8th of April, 1867, near mid-ocean, from Liverpool towards New York. Her lookouts were properly set, and her lights rightly stationed, that is to say, a white light was at her masthead, a green light on her starboard or right side, and a red light on her port or left side; all burning brightly.

Sailing at the same hour, equally about mid-ocean, the Berkshire, a sailing ship belonging to the American marine, was on her voyage from New Orleans to Havre, and with a wind free, blowing from about south-southwest, was pursuing a course southeast by east one-half east, as indicated by the

following diagram. The courses of the two vessels thus intersected at an angle of exactly one point.



The Berkshire had no colored lights anywhere; nor any light but a white light, and this was at her bow, fastened to her anchor-stock, and raised about four feet above her deck. Of course, if the Scotia should mistake this light for a light fastened on the *masthead* of the Berkshire, she would infer from its apparent proximity to the water that the Berkshire was far off.

The Scotia was first seen from the Berkshire bearing one point or so off the ship's port bow, at a distance apparently of five or six miles. Then the steamer's white masthead light only was seen.

Immediately on her sighting the steamer, which was at most from fifteen to twenty minutes before the collision, her mate gave an order to luff, and she did luff, so as to head more into the wind. The effect of this was to make her go further to the south and thus diverge farther from the course of the steamer. She continued in this new direction ten or fifteen minutes, when, moving at the rate at which it was proved that the vessels were moving, she could not have been more than one or two miles from the Scotia. Her helm was then suddenly put to starboard, then steadied for a brief period, then put hard a-starboard and kept there, thus pointing her directly across the bow of the approaching vessel. By keeping her helm hard a-starboard she was made to

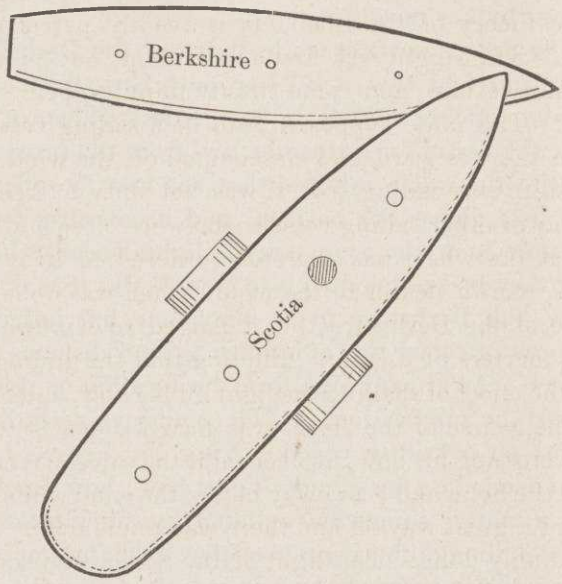
change her course constantly. The diagram on the preceding page may perhaps assist the reader's comprehension. The dotted lines represent the Berkshire's movements.

Before she bore away the red light of the steamer was seen by her wheelsman, and probably by her lookout, if not indeed by her master.

The Scotia saw the white light on the Berkshire in due time, and first saw it off her port bow, from one to two points. Seeing a white light, the deck officer of the Scotia took the vessel for a steamer, and from the proximity of the light to the water inferred that she was far off; coming in fact just above the horizon, and accounting for the non-appearance of the usual colored lights because he supposed that they had not come up to view.* He thus not only supposed the Berkshire to be a steamer, but judged that the supposed steamer was at a much greater distance than it was in fact. As already signified, the location of the light warranted the supposition, and its color gave no indication that it was on a sailing vessel. After its discovery the ship's light opened on the steamer's port bow; how much it opened was a matter somewhat agitated by the witnesses and the counsel, though this court considered that matter immaterial, because if it receded at all it indicated that there was then no danger of collision without some change of course, and consequently no necessity to take measures to avoid one. The weight of the evidence was that the ship had not then turned her course northward, but if she had it was still proved that her light opened on the Scotia's port side, after it was first seen, and before the steamer's course was changed. Soon after, and because of the ship's change of course, her light began to close in on the steamer's bow, and then for the first time was there any apparent danger of collision. Then the Scotia's helm was immediately ported, then hard ported, and observing that the ship's light still closed in, orders were given, in quick succession, to half-speed, slow, reverse, and

* The "Rules concerning Lights," it will be remembered, see *supra*, pp. 171-2, requires the white light of steamers to be such as shall be visible five miles off; while the colored lights need be visible but two miles off.

back, but notwithstanding these orders, which were all promptly obeyed, the vessels came together in the position indicated on the diagram, and the Berkshire with her cargo went right down in mid-ocean.



The owners of the Berkshire, one Sears and others, now for themselves and the owners of the cargo, filed their libel in the District Court at New York, to recover the loss sustained by the collision. The libel charged, of course, that the collision occurred through the fault of the Scotia. The District Court decreed for the respondents. The view of that court was, that courts of admiralty were now required to take judicial notice of the existence of the British orders in council, and of the fact that so numerous maritime states had accepted them; that so general an adoption by such states of one rule had made a rule and usage of the sea; that by this rule and usage—in other words, by the law of the sea as it existed at the time of the collision—the Berkshire was bound to exhibit colored lights, and colored lights alone; and that as she had not done so, she had no remedy.

The decree, therefore, was, that the libel be dismissed; and the Circuit Court affirming this decree, the case was now here for review.

Mr. J. C. Carter, for the appellants:

The theory of the libellants is readily perceived. The Scotia's white light was first made about one point on the Berkshire's bow, and some twenty minutes before the collision. The mate supposed it to be a sailing vessel standing to the westward and closehauled on the wind. As the Berkshire was sailing free, it was her duty to keep out of the way of other sailing vessels who were closehauled. The man at the wheel was therefore ordered to keep his luff, that is, to run nearer to the wind, which was done, and the course of the Berkshire thus changed to windward about three-quarters of a point. Finding that the luffing did not have the effect of shaking the light off his bow, and supposing that the course of the vessel was nearly opposite to his, but really crossing his bow, he deemed it the safest course to starboard the helm and bear away before the wind while the light was yet a great way off and there was ample time. This was accordingly done. The light of the Scotia was soon under the effect of the starboarding brought upon the starboard side. The ship was kept away under her starboard helm until the light was brought abaft the beam on the starboard side, and then the helm was steadied. Soon after a red light was discovered, and then they were satisfied that the vessel was a steamer. The helm was ordered again hard a-starboard, but the steamer came up with rapidity and struck the ship, breaking her open.

Now we think that this is a view which ought to exculpate the ship. She did just what it was natural for her to do, and, in the darkness of the night, proper. It is perfectly settled in this court that it is the duty of steamers to keep clear of sailing vessels. No rule of the sea has been as emphatically declared of late times. We need not quote authorities to that point. The Scotia, in view of the great liability to error as to the position and distance of lights on the

water at night, ought to have somewhat changed her course or slowed up, so soon as she saw how nearly the courses met.

The argument of the other side of course will be that we did not carry the side lights prescribed by the act of Congress and by the British admiralty regulations. This is admitted by us. Thus it is said that we violated our statutes. But the act of Congress prescribing the lights which sailing vessels are to carry is but a municipal regulation of the United States; and the Scotia cannot avail herself of such a statute to convict an American vessel of a *tort* on the high seas. All the questions in controversy are to be determined without reference to the municipal laws of either nation, and solely according to the general maritime law; and by that law there was no obligation on the Berkshire to exhibit any side lights, or not to exhibit a white light.

This precise question has arisen in England, and has been determined by a series of decisions of the highest authority. The question has arisen in every variety of form; sometimes the defendants, foreigners, seeking to bind the plaintiffs, British citizens, by the provisions of British statutes, and at others, British plaintiffs claiming the benefit of British statutes against foreign defendants. But the decision has been the same in all.*

Nor is the position tenable, that inasmuch as the obligations resting on the Scotia by a British statute relating to lights were the same with those resting upon the Berkshire, the rule should be enforced in this suit on some principle of *reciprocity*. That question is strikingly concluded by authority. It happened to the principal libellant (Mr. Sears), to invoke in his own behalf, in a British tribunal, on this

* Sir William Scott, in the Carl Johann, referred to in the Dundee, 1 Haggard's Admiralty, 113; Nostra Signora de los Dolores (Lord Stowell), 1 Dodson, 290; The Zollverein (Dr. Lushington), Swabey, 96; Cope *v.* Doherty (Vice-Chancellor Sir William Page Wood), 4 Kay and Johnson, 367; S. C., on appeal, 2 De Gex and Jones, 626; The Saxonia (Dr. Lushington, and on appeal to P. C.), 1 Lush. 410; The Chancellor, 4 Law Times, New Series, 627.

very notion of reciprocity, in a collision cause, in which his ship was libelled by British citizens, the protection of a British statute; and he supported his claim by proof that the United States had made a like enactment. The question was most elaborately considered by Dr. Lushington, and determined against him.* In the face of this decision, it would be a singular exhibition of *reciprocity*, to yield to the claim of the Scotia.

There can be no reasonable doubt that this case is to be governed, not by the municipal law of either the United States or Great Britain, but by the maritime law. The main question is, what is that law? It is conceded that, at least until a recent period, it imposed no obligation upon either of the vessels to carry colored lights, or precluded either from carrying a white light. Now, has this law been changed? No change has been proved, nor any evidence offered tending to show such a change. Indeed, it is believed to have been the practice at the time, and to a great extent is now, for sailing vessels *not* to exhibit colored lights when away from the shore. But, conceding that any number of municipal ordinances were proved, they do not make any change in the maritime law. The high seas are outside of the territory of municipal powers, and their laws have no force there. Nor can any force be derived from them when taken together. It cannot be maintained when the laws of Great Britain, the United States, and France have, neither separately nor collectively, any effect whatever on the sea, that still if the concurring statutes of substantially all other maritime states were added, the combined effect would be to give to them effect there. How many nations must join? Who is to determine what is a maritime state, in order to know whether all have joined? Who or what is to apprise the unlettered mariner that the municipal statutes of all nations have at last been brought into harmony?

The municipal ordinances relied on by the District Court

* The Wild Ranger, 7 Law Times, N. S. 725 and 729; S. C., 1 Lushington, 553.

do not constitute a body of statutes enacted by the nations collectively, nor do they constitute anything in the nature of a convention or treaty; at all events, not so far as the United States are concerned, and the other powers, save Great Britain. They are municipal statutes, and nothing more. Great Britain, indeed, by her act, seems to indicate that in her view, as soon as other nations pass acts similar to her own, *she* will deem this to be an assent to a proposition made by her, and will then regard a convention as agreed upon, which her courts are to respect; and it may be very proper for her courts to act accordingly. But the United States have never done anything of the kind.

On the view of the District Court, that these concurring municipal enactments change the law of the sea, the question arises, at what point does this change become effectual? Is it when two, or three, or four, or what number of maritime states have concurred in the legislation? In the absence of any authoritative declaration by his own country, when is the American navigator to know that the law springs into operation? In short, the whole view of the District Court, whose decree was affirmed in the Circuit Court, is so embarrassed with difficulty, that however plausible it may be it cannot be safely maintained in practice.

Messrs. D. D. Lord and E. C. Benedict, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is plain that had the ship continued on her course after she first saw the steamer's bright light, there could have been no collision. And, still more, had she not afterwards and when near the steamer put her helm to starboard she would have been out of all danger. Even when she first sighted the Scotia she had passed the point at which her course and that of the steamer intersected. This is a necessary sequence from the facts that the angle between the courses of the two vessels was exactly one point, and that the light of the steamer, when first seen, bore from a point to a point and a half off her port bow. Besides, when the

ship was first seen from the steamer, her bearing, it is clearly proved, was from a point to two points off the steamer's port bow. Such a bearing was impossible unless the ship had already crossed the line of the Scotia's course, and passed the point at which the vessels could have come together unless one or the other had taken a new direction. They must have passed with a wide berth between had the ship made no change of her helm, or had she kept her luff in obedience to the mate's order. But by putting her helm hard a-starboard she was made to change her course constantly till the collision occurred. Even before she bore away the red light of the steamer was seen by her wheelsman, and probably by her lookout, if not indeed by her master, doubtless in time even then to escape harm. Had it not been then for the unfortunate order of the master to starboard her helm, and bear away before the wind, this case could not have arisen.

It must, however, be conceded that this, of itself, is not sufficient to excuse the Scotia, if she failed to adopt such precautions as were in her power, and were necessary to avoid a collision. Meeting a sailing vessel proceeding in such a direction as to involve risk, it was her duty to keep out of the way, and nothing but inevitable accident, or the conduct and movements of the ship, can repel the presumption that she was negligent, arising from the fact of collision. But this duty of the steamer implies a correlative obligation of the ship to keep her course, and to do nothing to mislead. Nor is a steamer called to act, except when she is approaching a vessel in such a direction as to involve risk of collision. She is required to take no precautions when there is no apparent danger.

Was, then, the Scotia in fault? If she was, the fault must have been either that she did not change her helm sooner, or that she ported, or that she was unjustifiably late in slackening her speed and reversing her engines. No other fault is imputed to her. We have already said that she was not bound to take any steps to avoid a collision until danger of collision should have been apprehended, and we think

there was no reason for apprehension until the ship's light was seen closing in upon her. Assuming for the present that she had no right to conclude that the light was on a steamer and to manœuvre accordingly, and, therefore, that it was her duty to keep out of the way, it is still true that all her duty at first was to watch the light in order to discover certainly what it was, and to observe its course and notice whether it crossed her own course. It is not the law that a steamer must change her course, or must slacken her speed the instant she comes in sight of another vessel's light, no matter in what direction it may be. With such a rule navigation cannot be conducted. Nor is such a rule necessary to safety. It is, therefore, no fault that, seeing the ship's light off her port bow, apparently at a distance of several miles, the Scotia continued on her course without slackening her speed, until that light began to close in upon her. Then she ported her helm, the obvious effect of which was to take her farther away from the approaching vessel. Then she slowed her engines, stopped and backed, until, at the time when the collision took place, she had almost, if not entirely, ceased to move through the water. Had she starboarded, instead of porting, the movement would have turned her toward the Berkshire, and apparently would have rendered collision more probable. Of the propriety of her slowing her engines, stopping, and backing, there can be no doubt. If, now, it be considered that she had been misled by the nature and location of the light on the Berkshire, which indicated that the ship was at a much greater distance than she was in fact; that consequently the peril came upon her suddenly, leaving short time for deliberation, and if it be considered that she had been brought into this extremity, first, by the ill-judged and causeless change of the ship's course, and, second, by the persistent effort of the ship's master to cross her bow after he had seen her red light, and discovered certainly that she was a steamer, it would be unjust to impute to her as a fault that she did what she ought to have done, had the approaching vessel been in fact a steamer, and that which at all events seemed

most likely to avoid a collision. Certainly it was not her fault that she did not know the Berkshire to be a sailing vessel. And in all human probability the measures taken by her to avoid a collision would have been successful if they had not been counteracted by the constant veering of the Berkshire, with her helm kept hard a-starboard.

Independently, therefore, of any statutory regulations, and looking to the facts with reference to the old maritime law alone, as it was before any modern legislation, we think the Scotia was not chargeable with fault.

But we think the Scotia had a right to conclude that the Berkshire was a steamer rather than a sailing vessel, and that, when first seen, she was at the distance of four or five miles, instead of being near at hand. Such was the information given her by the ship's white light, fastened as it was to the anchor-stock on deck, and no watchfulness could have enabled her to detect the misrepresentation until it was too late. Both vessels were moving under similar regulations. The Berkshire was an American ship, belonging to the mercantile marine, and she was required by the act of Congress of April 29th, 1864, to carry green and red lights, which she did not carry, and she was forbidden to carry the white light, which she did carry. By exhibiting a white light, she, therefore, held herself forth as a steamer, and by exhibiting it from her deck, instead of from her masthead, she misrepresented her distance from approaching vessels. It is clear the Scotia would have been justified in taking her for a steamer had she been known to be an American ship. But it is insisted on behalf of the appellants that, inasmuch as the act of Congress is a mere municipal regulation, obligatory as a statute only upon American vessels, the Scotia, a British steamer, cannot avail herself of it to fault an American ship, or to justify her own conduct. Waiving for the moment consideration of the question whether this position is well taken, it is yet true that the Berkshire was under the statute, though on the high seas, and that the Scotia was subject to and sailing under similar regulations (the British orders in council of January 9th, 1863); that the collision

happened in the known path of vessels navigating between the United States and Great Britain, and that there was a reasonable probability that vessels in that path would be either American or British, and would, therefore, carry the lights prescribed by the laws of those countries. The steamer might well, therefore, in the absence of knowledge, act upon that probability, and in the emergency into which she had been brought, might, without fault, apply the rule of navigation common to the ships of both countries.

But, to return to the question, we think that independently of the act of Congress, considered as a mere municipal regulation, the Berkshire was bound to show a green light on her starboard, and a red light on her port side, without exhibiting any white light; and that the Scotia may set up in defence her failure to carry such green and red lights, as also the fact that she did improperly show a white light. And we think that her breach of duty in these respects misled the officers of the steamer, and caused them to act on the assumption that she was a steamer, and therefore under obligation to pass on the port side. If so, the collision was solely due to the fault of the ship. We rest this conclusion not solely, or mainly, upon the ground that the navigation laws of the United States control the conduct of foreign vessels, or that they have, as such, any extra-territorial authority, except over American shipping. Doubtless they are municipal regulations, yet binding upon American vessels, either in American waters or on the high seas. Nor can the British orders in council control our vessels, though they may their own. We concede also that whether an act is tortious or not must generally be determined by the laws of the place where the act was committed. But every American vessel, outside of the jurisdiction of a foreign power, is, for some purposes at least, a part of the American territory, and our laws are the rules for its guidance. Equally true is it that a British vessel is controlled by British rules of navigation. If it were that the rules of the two nations conflicted, which would the British vessel, and which would the American, be bound to obey? Undoubtedly the rule

prescribed by the government to which it belonged. And if, in consequence, collision should ensue between an American and a British vessel, shall the latter be condemned in an American court of admiralty? If so, then our law is given an extra-territorial effect, and is held obligatory upon British ships not within our jurisdiction. Or might an American vessel be faulted in a British court of admiralty for having done what our statute required? Then Britain is truly not only mistress of the seas, but of all who traverse the great waters. It is difficult to see how a ship can be condemned for doing that which by the laws of its origin, or ownership, it was required to do, or how, on the other hand, it can secure an advantage by violation of those laws, unless it is beyond their domain when upon the high seas. But our navigation laws were intended to secure the safety of life and property, as well as the convenience of commerce. They are not in terms confined to the regulation of shipping in our own waters. They attempt to govern a business that is conducted on every sea. If they do not reach the conduct of mariners in its relation to the ships and people of other nations, they are at least designed for the security of the lives and property of our own people. For that purpose they are as useful and as necessary on the ocean as they are upon inland waters. How, then, can our courts ignore them in any case? Why should it ever be held that what is a wrong when done to an American citizen, is right if the injured party be an Englishman?

But we need not affirm that the Berkshire was under obligation to show colored lights, or to refrain from showing a white light, merely because of an act of Congress, nor need we affirm that the Scotia can protect herself by setting up the ship's violation of that act. Nor is it necessary to our conclusions that the British rules in regard to lights are the same as ours, though that is an important consideration. We are not unmindful that the English courts of admiralty have ruled that a foreigner cannot set up against a British vessel, with which his ship has collided, that the British vessel violated the British mercantile marine act, on the

high seas, for the reason, as given, that the foreigner was not bound by it, inasmuch as it is beyond the power of Parliament to make rules applicable to foreign vessels outside of British waters. This decision was made in 1856, in the case of *The Zollverein*.* A similar rule was asserted also in *The Dumfries*,† decided the same year; in *The Saxonia*,‡ decided in the High Court of Admiralty in 1858, and by the Privy Council in 1862. The same doctrine was laid down in 1858, in the case of *Cope* v. *Doherty*,§ and in *The Chancellor*,‖ decided in 1861. All these decisions were made before the passage of the Merchant Shipping Amendment Act, which took effect on the 1st day of June, 1863. By that act the same rules in regard to lights and movements of steamers and sailing vessels on the high seas were adopted as those which were prescribed by the act of Congress of 1864, and by the same act it was provided that the government of any foreign state might assent to the regulations, and consent to their application to the ships of such state, and that thereupon the Queen, by order in council, might direct that such regulations should apply to ships of such foreign state when within or without British jurisdiction. The act further provided that whenever an order in council should be issued applying any regulation made under it to the ships of any foreign country, such ships should in all cases arising in British courts be deemed to be subject to such regulations, and for the purpose thereof be treated as British ships. Historically, we know that before the close of the year 1864, nearly all the commercial nations of the world had adopted the same regulations respecting lights, and that they were recognized as having adopted them. These nations were the following: Austria, the Argentine Republic, Belgium, Brazil, Bremen, Chili, Denmark, Ecuador, France, Great Britain, Greece, Hamburg, Hanover, Hawaii, Hayti, Italy, Lubeck, Mecklenburg-Schwerin, Morocco,

* 1 Swabey, 96. † Ib. 63. ‡ 1 Lushington, 410.
§ 4 Kay & Johnson, 367; 2 De Gex & Jones, 626.
‖ 4 Law Times, 627.

Netherlands, Norway, Oldenburg, Peru, Portugal, Prussia, Roman States, Russia, Schleswig, Spain, Sweden, Turkey, United States, and Urugnay—almost every commercial nation in existence.* Had this libel then been filed in a British court, the Berkshire must have been found solely in fault, because her white light and her neglect to exhibit colored lights signalled to the Scotia that she was a steamer, and directed the Scotia to do exactly what she did.

It must be conceded, however, that the rights and merits of a case may be governed by a different law from that which controls a court in which a remedy may be sought. The question still remains, what was the law of the place where the collision occurred, and at the time when it occurred. Conceding that it was not the law of the United States, nor that of Great Britain, nor the concurrent regulations of the two governments, but that it was the law of the sea, was it the ancient maritime law, that which existed before the commercial nations of the world adopted the regulations of 1863 and 1864, or the law changed after those regulations were adopted? Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world. Many of the usages which prevail, and which have the force of law, doubtless originated in the positive prescriptions of some single state, which were at first of limited effect, but which when generally accepted became of universal obligation. The Rhodian law is supposed to have been the earliest system of marine rules.

* See Holt's Rule of the Road, page 2.

It was a code for Rhodians only, but it soon became of general authority because accepted and assented to as a wise and desirable system by other maritime nations. The same may be said of the Amalphitan table, of the ordinances of the Hanseatic League, and of parts of the marine ordinances of Louis XIV. They all became the law of the sea, not on account of their origin, but by reason of their acceptance as such. And it is evident that unless general assent is efficacious to give sanction to international law, there never can be that growth and development of maritime rules which the constant changes in the instruments and necessities of navigation require. Changes in nautical rules have taken place. How have they been accomplished, if not by the concurrent assent, express or understood, of maritime nations? When, therefore, we find such rules of navigation as are mentioned in the British orders in council of January 9th, 1863, and in our act of Congress of 1864, accepted as obligatory rules by more than thirty of the principal commercial states of the world, including almost all which have any shipping on the Atlantic Ocean, we are constrained to regard them as in part at least, and so far as relates to these vessels, the laws of the sea, and as having been the law at the time when the collision of which the libellants complain took place.

This is not giving to the statutes of any nation extra-territorial effect. It is not treating them as general maritime laws, but it is recognition of the historical fact that by common consent of mankind, these rules have been acquiesced in as of general obligation. Of that fact we think we may take judicial notice. Foreign municipal laws must indeed be proved as facts, but it is not so with the law of nations.

The consequences of this ruling are decisive of the case before us. The violation of maritime law by the Berkshire in carrying a white light (to say nothing of her neglect to carry colored lights), and her carrying it on deck instead of at her masthead, were false representations to the Scotia. They proclaimed that the Berkshire was a steamer, and

Statement of the case.

such she was manifestly taken to be. The movements of the Scotia were therefore entirely proper, and she was without fault.

DECREE AFFIRMED, WITH COSTS.

THE JAVA.

1. Though a steamship pursuing, in a crowded harbor, for her own greater convenience in getting into dock in a particular state of the harbor, a channel not entirely the ordinary one for vessels of her size, be bound to more than ordinary precaution, yet if she has a right to use that channel and do take such more than ordinary precaution, she is not responsible for accidents to other vessels that, with it all, were inevitable.
2. Hence, where such a steamship pursuing in such a case such a channel, with the utmost care, had occasion to cross at an acute angle the stern of a large school-ship that stood high out of water (so obstructing view), and thus struck and injured a small schooner that drifting along on the other side of the school-ship, emerged suddenly at its stern—the steamship not having before seen the schooner, nor the schooner the steamship—*held* that the steamship was not responsible; the more especially as the schooner which was going out of port had just cast away her tug, was drifting along with the tide, and having all her hands engaged in hoisting sail, had no sails set so as to make her specially visible, nor any lookout to see ahead.

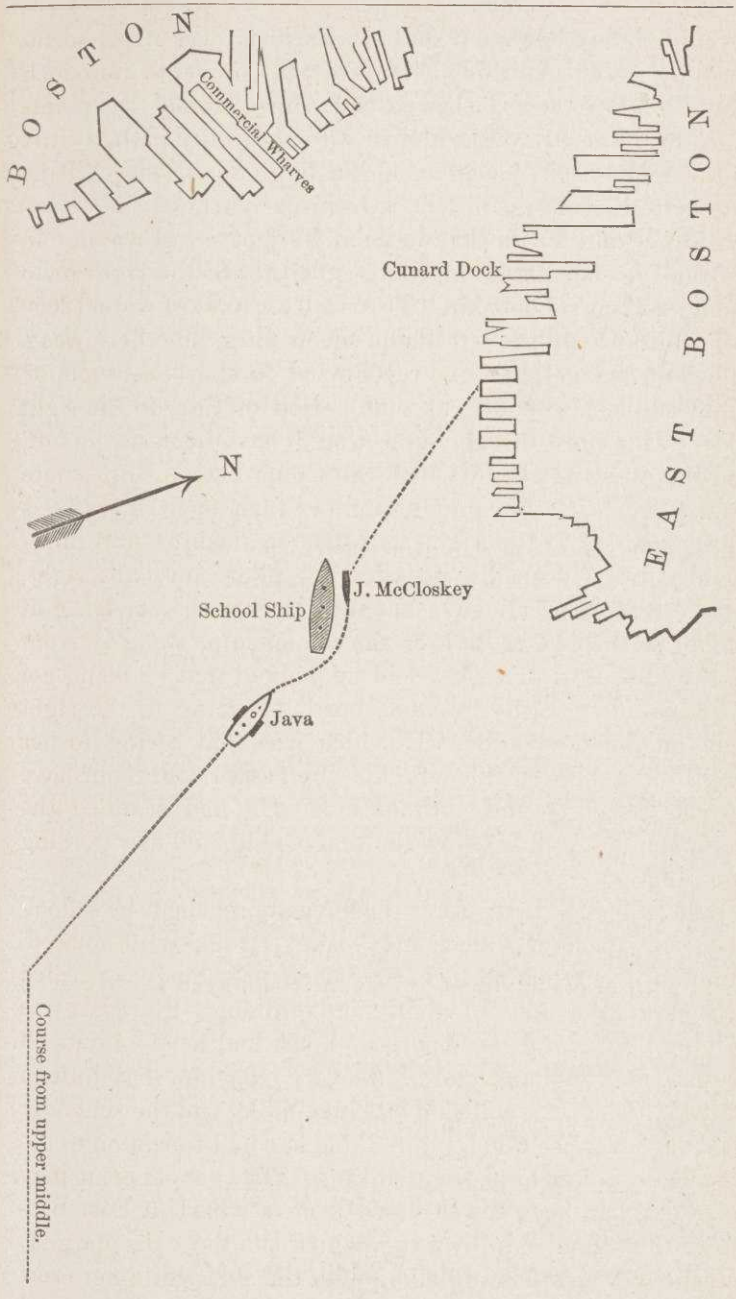
APPEAL from the Circuit Court for the District of Massachusetts.

On the 7th of November, 1866, the Cunard steamer Java, a screw-steamship of large size, drawing nineteen feet water, and about 360 feet long (more than usual length), entered Boston harbor (a diagram of part of which is on a page following), about noon, in fine, clear weather, the tide being about one hour's ebb, and the wind blowing a three or four knot breeze from the west. Her berth and point of destination was a wharf at East Boston, about 2000 feet east of the Boston Commercial Wharves. Her proper course in coming up from what is called the Upper Middle until she arrived within about a mile of the Commercial Wharves, and

seven-eighths of a mile from her own dock, was about northwest by west. At this point, a direct course to her dock would require her to change her course about two points more to the north. But almost directly in her path, a little to the right of it, lay at anchor a large school-ship for the instruction of boys, nearly two-thirds of the distance between her and her dock, and about 17 feet out of water. In getting into her berth she could go either to the right or to the left of this school-ship. The main expanse of water (2000 feet wide) was to the left of the school-ship, but there was a sufficient channel, and one recognized on charts as such, of about 500 feet in width, at that period of tide, to the right of it. Her most direct course would have been to the left, and this was the one by which the Cunard steamships more usually went in; but they had, more than once, it was testified, gone in on the right, as other steamships not unfrequently did, and on this occasion the pilot chose the right, for the reason, as alleged, that several vessels were lying at anchor to the left or west of the school-ship, along in front of the East Boston docks; and he judged that he could get the Java more easily into her berth by going to the right than on the other side. His idea was that owing to her length, if going on the left side the vessel could not have turned herself round without aid. He had scanned the channel about a mile below the school-ship, and saw nothing opposing.

It so happened that just as the Java approached the school-ship, the schooner James McCloskey, laden with linseed, came out from behind it, having been previously concealed by it (her sails not being up), and although the Java was only making about two knots an hour, had her lookouts all in place and vigilant, and used every exertion that human skill could devise, a collision was inevitable, and the schooner and cargo were so much injured that she had to run on to the East Boston flats to prevent sinking. The schooner, it may be added, had been towed down from a wharf at East Boston to the school-ship by a tug, which she there discharged; and she was now floating along with the tide while her crew

Diagram of the port of Boston.



were hoisting her sails; and not having at the moment any lookout. This suit was brought by the owners of the James McCloskey to recover the damage to vessel and cargo.

The question was, whether the Java was in fault. No fault was seriously suggested but that of going to the right hand of the school-ship. The District Court decided in favor of the Java. From that decision an appeal was taken to the Circuit Court. It was there argued that, as matter of fact and on the evidence before the court, the Java had pursued an unusual course in attempting to go to her dock by the passage to the right of the school-ship, and that for having taken this unusual course she was liable for what had happened. The learned judge who delivered the opinion of that court, in answer to this argument, said:

"A vessel is not to be considered in fault merely because she takes, for reasons of her own convenience or necessity, an unusual course; but when there is a usual and an unusual course, the vessel taking the unusual course for her convenience *does it at her peril, and is bound to see that she does it in safety.*"

Again he said:

"The school-ship for many years had been constantly, during the winter months, kept moored in the same position near the edge of the channel. She was large and high out of water. The pilot of the Java knew her position, and that the view of a small sailing vessel might be shut out by the school-ship. The steamer was bound to guard against the emergency. If she went under the stern of the school-ship at an acute angle under such circumstances, she was bound by law to proceed so slowly and with so much vigilance that she could keep out of the way of a sailing vessel."

The Circuit Court accordingly reversed the decree of the District Court, and decreed for the libellants. The owners of the Java now brought the case here.

Mr. Richard Henry Dana, for the libellants, and in support of the ruling below:

It is a well-settled rule of admiralty law, one enforced by

statute,* that if a steamer approach a sailing vessel, the steamer is required to take the necessary measures to avoid collision; and if collision occurs, and it is not shown to have been inevitable, the steamer is, *primâ facie*, in fault.† Inevitable accident is not simply when it is too late, but it must appear that its being too late was not the fault of either side. It must be understood to mean "a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent its occurrence."‡ It is an equally settled rule that a steamer, in entering a harbor, is bound to great caution. The vigilance is thrown on her. Ordinary care will not excuse her. Steamers, in such instances, have been held in fault for not using precaution, although they may have done their utmost at the time.§ If the night is too dark to distinguish a small vessel in season, a large steamer should not attempt to go down the harbor.‖ This court indeed always holds a steamer responsible for the selection of her course. If she takes an unusual course, or one that involves more risk than another, when she has an election, or voluntarily puts herself in a position where, if a sailing vessel shall happen to come in the way, she cannot avoid her, or cannot do so without extreme measures on her part, she is responsible for the damage. And, in such cases, it is not an excuse to show, that *but for some mere error*, not a fault, in the other vessel, or some accident to her, the collision *might* not have occurred; it not being made clear that the collision was occasioned by a fault of the other vessel to which the course taken by the steamer did not contribute.¶

Now, to apply these principles to this case, the Java had the usual broad channel, and deliberately elected to go through a narrow passage, very seldom used by screw-steamers of her

* Act of 1864, ch. 69, art. 15, 13 Stat. at Large, 60.

† The Carroll, 8 Wallace, 302; The Oregon, 18 Howard, 570.

‡ The Pennsylvania, 24 Id. 313. § The Southern Belle, 18 Id. 587.

‖ The R. B. Forbes, 1 Sprague, 329.

¶ The Isaac Newton, 18 Howard, 581; The Southern Belle, Ib. 584; Fretz v. Bull, 12 Id. 466.

length and draft, for her own convenience solely. In doing this, she took upon herself the risk, if ill consequences ensued. Such a vessel as she was—a steamer of great length and draft, for which the passage inside was hazardous, in case any craft should be in her way there—ought not to have gone through that passage unless she knew that the passage was clear.

At the place where she ported her helm to go that way, the Java could not see the course inside the school-ship. Still, if she had kept close on the right side of the channel, the course would have been more open to her view. In going through the passage, therefore, she had an election, and chose to keep in the middle of the channel so as to bring her to such an angle with the school-ship that she could not see objects on the other side, or on the starboard bow of the school-ship. She is chargeable with negligence in this election; for it is clear that as soon as she saw the McCloskey, a collision was inevitable. Neither her helm, nor her machinery, nor her ground-tackle, nor all together, could prevent it.

The Java could never be sure that small vessels, tugs, boats, barges, and scows, might not come into the passage at any moment. They, on the other hand, had no reason to expect that such a vessel as the Java would be there. Some large steamers go inside, but not those we may reasonably affirm like the Java; and it is to be presumed that they keep on the north side, in order to keep the passage open to view, so that they can both see and be seen. Therefore, if a small vessel left a wharf in East Boston to go inside, and saw no steamer in view, she was justified in supposing she should not meet one until she got clear of the school-ship. This crossing the stern of the school-ship by a huge screw-steamer was a surprise.

The collision was not inevitable; for there were two other courses open to the Java, in one of which it could not, and in the other probably would not, have occurred. Nothing happened that she was not bound to anticipate as possible or probable.

Argument for the appellants.

The Circuit Court, though not receiving as of great weight our argument that the Java pursued an unusual course, and was therefore in fault, yet takes a ground which was what in effect we meant to urge, to wit, that "when there is a usual and an unusual course, the vessel taking the unusual course for her convenience does it at her peril, and is bound to see that she does it in safety." So again, when saying that the school-ship for many years had been, during the winter months, "kept moored in the same position near the edge of the channel; that she was large and high out of water; that the pilot of the Java knew her position, and that the view of a small sailing vessel might be shut out by the school-ship, and that the steamer was bound to guard against the emergency." These were the views, in truth, meant to be presented by us, and we rely on them as true ones.

Mr. W. G. Russell, contra.

We admit the obligation of a steamship to avoid a sailing vessel; that the omission so to do renders the steamship *primâ facie* liable; that precaution on the part of the steamship must be seasonable; that extreme caution is required in entering a port; that a departure from a course required by established usage is a fault; but we contend that the obligation to avoid a sailing vessel only arises where the vessels are in sight of each other, unless their failure to see each other results from previous fault of the steamer; that the *primâ facie* case against the steamer may be overcome by affirmative proof of due care; that the burden of proof is on the libellants, and that there is no liability where fault is disproved.

The Circuit Court erred in law by imposing liability where there was no fault; or, in fact, by assuming that the steamer might reasonably have anticipated meeting the schooner, when, in fact, she had no reason to expect to meet her.

The facts show due care on the part of the Java. Neither vessel was seen by the other till the collision was inevitable.

The school-ship concealed each vessel from the other. This fact also determines the course of the two vessels.

The Java was not in fault for not sooner discovering the schooner. Her lookout was sufficient, well stationed, vigilant. The schooner was not discovered, because without canvas and in range of the school-ship. She was seen as soon as visible.

The Java was not in fault in her course or the manner in which she pursued it. The Cunard steamships are not excluded from taking their course inside the school-ship by *non user*. Usage of Cunarders not to take that course would be inadmissible in law, and if it were admissible no *non user* is proved. Contrariwise, there was a not wholly infrequent use by Cunard ships and a quite frequent use by all other steamships. The course of the schooner was not influenced by her not expecting to meet the steamer.

Inside the school-ship was the proper course enough. The Java took the course with all possible precaution. The channel is shown on charts. That it is safe and proper is proved by this fact; and, still more, by its frequent use by all classes of steamships; and there was the special reason for taking it here that there were several vessels anchored ahead of the school-ship, obstructing the outside course to the Java's dock, and which would have obliged her to make a great circuit and to go into dock in a way which without tugs it would have not been easy to do. Then the Java took her course inside with all due caution. Caution was observed in her equipment, management, and speed. The vigilance of her lookout is proved. The pilot at only a mile below the school-ship had scanned the whole inside passage and found it clear. She had all appliances in readiness for manœuvring rapidly, and her speed, when she discovered the schooner, was not over two knots. All this is indeed admitted.

The Circuit judge assumes that the Java might reasonably have expected to meet the schooner where, and as she in fact met her. This was an error arising from neglect to observe the proved fact, that the pilot, only ten minutes before,

had scanned the whole passage and found it clear. There was an extreme improbability that any vessel could come into the passage unobserved. Any vessel under sail must have been seen, and any vessel, except upon the exact line taken by the schooner, would have been seen. The collision was impossible, except by exactly such a combination of circumstances as occurred. Such a combination, so improbable, that the Java was not bound to govern her course by anticipating it.

The Java took all proper measures, with all diligence, after discovering the schooner. Upon this point no fact is found against the Java in the Circuit Court. In every case cited, where a steamship has been charged, it has been for specific fault. In the case of the Java every fault charged is disproved. So far as the Java is concerned, the case is one of inevitable accident.

Then, on the other hand, the schooner was herself in fault. She should have sooner discovered the steamer. She had no lookout. This was in itself negligence. The Java could have been seen more readily than the schooner. The schooner was, moreover, in fault in thrusting herself helpless in the way of the steamer from behind the schoolship.

The learned judge, who gave the opinion of the Circuit Court, while denying the position taken before him by the libellants' counsel, that the Java having taken (as was assumed) an unusual course, yet falls into a mistake almost as considerable. His view, that a vessel taking an unusual course, even for her greater convenience, does it "*at her peril*, and is bound to see that she does it safely," and bound to proceed "*so* slowly and with *so* much vigilance" as to make accident absolutely impossible—is a view entirely too broad. It would oblige a vessel to follow what from her structure or from the circumstances in which she might happen to be would be a most inconvenient course, though one commonly used by other vessels, or by herself in other circumstances, and make her liable for even inevitable accident.

Mr. Justice BRADLEY delivered the opinion of the court.

If the expressions of the learned judge who delivered the opinion of the Circuit Court, in answer to the argument that the Java pursued an unusual course in attempting to go to her dock by the passage to the right of the school-ship, and which have been commented on at the bar, mean that she was bound to use more than ordinary precaution by reason of taking an unusual route, they are correct; but if they mean that she was liable at all events, whatever precautions she took, we cannot concur in the position. A small vessel might have been concealed by the school-ship, and might have come out upon the Java unawares, whichever side of the school-ship she had gone. It was shown by the evidence that the Cunard steamers had before passed in by the same route which the Java took, and it seems on this occasion to have been the preferable one, inasmuch as the Java, from her great length, could not, by herself, have turned into her dock had she taken the other route and gone around the vessels lying at anchor. She had a perfect right to go by the passage which she took, as much so as the James McCloskey had to come out by that passage; and in doing so, she was not liable at all events; she was only bound to use that degree of care and precaution which the particular circumstances of the case demanded. There is not the slightest evidence that in this regard anything was wanting, or that there was any lack of skill or vigilance on the part of the pilot and crew of the Java.

On the other hand, the James McCloskey was not without fault. She had been towed down from one of the East Boston wharves to the school-ship, and there discharged her tug, and floated along slowly with the tide, without having her sails up (her crew being engaged in hoisting sail), without being under control, and entirely concealed from the view of the Java by the intervention of the school-ship. She came out from behind the latter without any notice or warning. If either ship is to blame, we think the blame rests with her, rather than with the Java.

It is contended that the Java ought to have anticipated

the possibility of a small vessel lying behind the school-ship. The answer is, that she took every reasonable precaution which the circumstances required. She proceeded very slowly, only two knots an hour; she had lookouts posted in every proper place; as soon as the schooner was seen, she took every means in her power to stop and back and avoid the collision. How could she anticipate the possibility of a vessel lying behind the school-ship, without sails hoisted, incapable of being seen in a bright, clear day, drifting along helplessly with the tide, ready to drop under the Java at her approach? Is it not applying too severe a rule to the Java, to require her to anticipate all this, and to require the schooner to anticipate nothing?

It seems to us that if this was not an inevitable accident, so far as the Java was concerned, it would be very difficult to imagine a case of inevitable accident not caused by external force, as of winds and waves.

The decree of the Circuit Court is REVERSED, with directions to

DISMISS THE LIBEL.

THE MERRIMAC.

1. The fact that a steamship is in charge and under the control of a pilot taken on board conformably to the laws of the State, is not a defence to a proceeding *in rem* against her for a tortious collision; the laws of the State providing only that if a ship coming into her waters, refuse to receive on board and pay a pilot, the master shall pay the refused pilot half pilotage, and no penalty for the refusal being prescribed. *The China* (7 Wallace, 58) affirmed.
2. A steamship of 2000 tons having a tug, each of 500 tons, on each side, condemned as guilty of a rash act for sailing in a place from 70 to 75 feet wide, which was little or no more than the width of the ship and tugs abreast, between a buoy which indicated an entire obstruction of navigation, and a ship aground with a steamtug on each side.

APPEAL from the Circuit Court for the District of Louisiana, in a case of collision condemning the Merrimac for damages done to the Gladiator.

Statement of the case in the opinion.

Mr. J. Hubley Ashton, for the appellants; Mr. Conway Robinson, contra.

Mr. Justice CLIFFORD stated the facts, and delivered the opinion of the court.

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

Damages were claimed in the libel in this case, which was filed in the District Court by the owners of the steamtug Gladiator, to recover compensation for injuries the tugboat received on the eleventh of January, 1867, by a collision which occurred on that day in the Mississippi River at the Southwest Pass, between the Gladiator and the steamship Merrimac, of the burden of two thousand tons, in tow of two tugboats, to wit, the Calhoun, of five hundred tons, lashed to her starboard side, and the Harry Wright, of the same tonnage, lashed to her port side. They instituted the suit *in rem* against the steamship and the two tugs which had her in tow, and they charged in the libel that the damage to the Gladiator was done by the three steamers made respondents in the libel. Service was made by seizing the three respondent steamers, and the respective owners of the same appeared and filed separate answers. By leave of court a bond for value was given in each case, and each of the respondent steamers was released when the bond for value was filed. Testimony was taken on both sides and the parties went to hearing, and the District Court entered a decree dismissing the libel, and the libellants appealed to the Circuit Court, where the parties were again heard, and the Circuit Court affirmed so much of the decree as dismissed the libel as to the two steamtugs, but reversed the decree as to

the steamship, and pronounced for damages as against her in favor of the libellants.

Courts, under such circumstances, may estimate the damages without a reference, or they may send the cause to a commissioner for that purpose, in the exercise of their discretion.* Pursuant to that rule the Circuit Court estimated the damages without a reference, and found the amount to be four thousand six hundred and ninety-seven dollars and forty cents, with five per cent. interest from the time the libel was filed in the District Court. Whereupon the owners of the steamship appealed to this court, and the only question presented is whether the decree of the Circuit Court awarding damages to the libellants against the steamship is correct, as none of the other parties have appealed.†

By the pleadings and evidence it appears that the steamtug of the libellants was made fast to the larboard side of the ship Celuta, bound to the port of New Orleans, and which, in endeavoring to pass up the river, had grounded some twelve hours before on the bar of the Southwest Pass. Her master had employed the Gladiator and the steamtug Switzerland, which was lashed to the starboard side of the Celuta, to assist the crew of the ship in getting her over the bar, and at the time of the collision these three vessels, lashed together in the manner described, were lying on the bar, the port side of the Gladiator being at the distance of seventy to seventy-five feet from a certain buoy indicating the place on the bar where was a certain "wreck" which entirely obstructed navigation. Under these circumstances the Gladiator was unable to move, as she was lashed to the ship Celuta and the ship was aground on the bar, and it was while the Celuta and her two steamtugs were in that situation that the steamship Merrimac and the two steamtugs which had in her tow, also bound to New Orleans, came up and attempted to pass between the Gladiator and the buoy which indicated the location of the wreck, and the pleadings and evidence show that the steamtug Calhoun was lashed to

* Silsby et al. *v.* Foote, 20 Howard, 386.

† The Bagaley, 5 Wallace, 412; The Quickstep, 9 Id. 665.

the port side of the steamship, and having a considerable list to port her starboard guard was elevated and passed over the rail of the Gladiator, striking the latter vessel with great violence, raking her from stem to stern, and carrying away all her upper works. By the collision the cabin, cook-house, pilot-house, and engine-room of the Gladiator were entirely smashed and carried from the port side over to the starboard side of the steamtug. Her boiler was knocked out of place, her steam-drum broken to pieces, her lever and exhaust-pipe broken, and much other damage was done to the engine and other parts of the steamtug, as more fully set forth in the record.

Two defences were set up by the owners of the steamship: (1.) That the steamship and the two steamtugs which had her in tow were in the charge and under the control of a branch pilot, taken on board conformably to the requirements of the law of the State, and they allege that the owners of the vessels, while they were under the control and management of such a pilot, are not in any way responsible for their navigation. (2.) That there was sufficient space to allow the steamship and her two tugs to pass up between the wreck and the Gladiator, and that they came up in a skilful and proper manner; that as they were passing the Gladiator and touched shoal water the Calhoun careened two points, which made it impossible to prevent a collision, which was an event wholly unforeseen and which could not have been anticipated by the most skilful seamanship.

Much discussion of the first defence, since the decision in the case of *The China*,* is entirely unnecessary, as the whole subject was there very carefully considered. By the law of the State it is provided that if the master of any ship or vessel coming to the port of New Orleans shall refuse to receive on board and employ a pilot, the master or owner of such ship or vessel shall pay to such pilot who shall have offered to go on board and take charge of the vessel half-pilotage.†

* 7 Wallace, 58. † Revised Statutes of Louisiana, 1856, pp. 403, 404.

State pilot laws which compel the owners of vessels to pay half-pilotage in cases where the pilot offers his services and they are refused, where the law is not enforced by any penalty, are not regarded as compulsory, and therefore the fact that the vessel was in charge of a pilot under such a law at the time of the collision is no defence to a libel for damages, if it appears that the collision was occasioned by negligence or unskilful navigation.* Port regulations are supposed to be known to the shipowner before he sends his vessel on the voyage, and the general rule is that in sending her to any particular port he elects to submit to the lawful regulations established at that port, and that the vessel, in case she unlawfully collides with another vessel engaged in lawful commerce, shall be responsible.† Where the law is not enforced by any penalty it is not regarded as compulsory, and if not compulsory the defence that the ship was in charge of a pilot is not a valid defence, which is all that need be said upon the subject.‡

2. Other defences failing, it is quite common to set up the defence of inevitable accident. Most collisions are inevitable at the moment they occur, but the primary rule is that precautions must be seasonable, as all experience shows that in order to be effectual they must be seasonable, and if they are not so, and a collision ensues in consequence of the delay, it is no valid defence to say that nothing could be done at the moment to prevent the two vessels from coming together. Inability to prevent a collision usually exists at the time it occurs, but it is generally an easy matter to trace the cause of the disaster to some negligent or unskilful act, or to some antecedent omission of duty on the part of one or the other or both of the colliding vessels.§ Few cases arise where there is less difficulty in answering such a defence or in pointing to the antecedent error than in the case under consideration, as it is quite clear to any one acquainted with the rules of navi-

* The Marcellus, 1 Clifford, 490. † The Carolus, 2 Curtis, 69.
‡ Martin *v.* Hilton, 9 Metcalf, 371; Hunt *v.* Carlisle, 1 Gray, 257.
§ The Governor, 1 Clifford, 97.

gation that it was a rash act for the steamship with her two tugs, one on her larboard side and the other on her port side, to attempt to pass between the Gladiator and the wreck, even if the space between those objects was somewhat wider than the three steamers abreast, which, to say the least of the proposition, is very doubtful.

Beyond doubt it was the duty of the steamship to keep out of the way, both because she was astern and because the Celuta to which the Gladiator was lashed was aground, and it is no answer to say that it was possible to pass, and that the attempt would have been successful if the Calhoun, when she reached shoal water abreast of the Gladiator, had not careened, as alleged in the answer. Under the circumstances it must be assumed that those in charge of the steamship knew that it was their duty to keep out of the way, and if they did not know that the water shoaled where the Celuta was grounded, it only furnished additional evidence to support the conclusion that the attempt to pass between the Gladiator and the wreck was a rash act and that the owners of the steamship are responsible for the consequences. Such being our conclusion, it is unnecessary to examine the other questions discussed at the argument.

DECREE AFFIRMED.

THE MABEY AND COOPER.

1. Although the general rule is that a party who does not appeal cannot be heard in opposition to the decree, still where it appeared—the suit below being a libel for collision against a tug and her tow—that an appeal from the District Court to the Circuit Court had been taken from the entire decree, by the owners of the tow who had ordered the tug, and who had undertaken her defence as well as their own, and thus represented the entire interest of the losing party in the suit, an appeal by the tug from the Circuit Court to this court was entertained here, though the court observes that doubt might perhaps exist as to the regularity of the proceeding.

Statement of the case.

2. Where a ship ordered a tug to tow her out of the East River to sea in an unfavorable state of the wind and tide, and when the navigation was made in that state dangerous by ice, and the master of the tug remonstrated against setting off in the then condition of the wind and tide, and finally went only on the ship's owners insisting on her towing, and on their agreeing to take the risk of all accident, both ship and tug were held liable for a collision, there being in addition some evidence of faulty navigation.
3. An amended answer setting up an improbable defence, and one quite departing from that set up in the answer, treated unfavorably.

APPEAL from the Circuit Court for the Eastern District of New York; the case being thus:

The ship Helen Cooper, lying at her dock in the East River, at Brooklyn, near the gas-works there, on Saturday the 17th of February, 1866, with her stern towards the river but ready for sea, applied to the captain of the steamtug Mabey to tow her out. Immediately opposite, at pier 45, on the New York City side, was lying at the same time and well in her dock, another ship, the Isaac Chapman. The wind on that day was somewhat high, the East River on the Long Island side of it was filled more or less with ice, and the day generally was not favorable for a sailing vessel's getting out of that part of the East River for sea. The Isaac Chapman, at least, like the Helen Cooper, was on that day and at that hour ready for sea, but was afraid to go out, and remained waiting till the river by slack water should be made less dangerous from ice. Other sailing vessels, however, *in other parts of the East River and at a different hour* sailed, on the 17th, and many from the North River. The captain of the Mabey when desired to tow out the Helen Cooper, remarked upon the state of the tide and unpropitious character of the day generally, and advised her owners to wait till the tide changed and the river got more free of ice. The owners seeing no danger, and wanting the Mabey to get off, resolved to go, and ordered the tug to proceed. "We will take," said their agent, "the risk of all accidents." Accordingly the Mabey attached her hawser and pulled the Helen Cooper out, stern foremost, into the middle of the stream; cutting the hawser there and attaching it in a new way.

From this point and before the operation of getting her under the intended way was completed, she shot straight into the Isaac Chapman, near the main rigging, cutting her down to the water's edge, carrying away her back-stays and mizzen-stay, mashing her boats, starting her deck, and disabling her generally.

The owners of the Chapman hereupon libelled both the tug and ship. The tug answered on the 7th of May, 1867, setting forth that her master informed the owners that it was not safe to proceed to sea in the then condition of the weather and tide. That the agent of the owners *insisted* that the vessel should go to sea; that he yielded to the orders of the agent of the ship, he agreeing that the owners would assume all risk; that the collision was occasioned by disobedience of the orders of the pilot and bad navigation of the ship; that the order of the pilot was not to cast off the hawser by which the ship was moored but only to slacken it until the head of the ship was swung round; that the order was disobeyed, and that the hawser was cast off before the ship came round, which sent the ship over to the New York shore; and that the ship, when she had reached the middle of the stream, *and was headed down stream*, put her helm hard aport, so that she took a sheer to starboard, which caused her to run into the Chapman.

As the master of the tug had acted in the whole matter against his own judgment, and had set out at all only upon the request of the owners of the ship Helen Cooper, and on their agreeing to take upon themselves all risks, *they* now largely took upon themselves the management of the defence. They had already, May 2d, 1867, put in an answer. By the answer they set up,

"That they had a Sandy Hook pilot on board; that by his direction the tug took the ship in tow by hawser; that at this time the ship was lying at the wharf with her bows up and her stern out; that the hawser was made fast to her bows on the port side of the ship, and passed along aft, and there made fast by stops, and that the ship was towed stern foremost into the stream; that, as she passed out into the stream, the stop at the

stern was cut, so as to allow her bow to turn around and head down the river; that while in the act of turning, both the ship and tug were unexpectedly caught in an immense field of floating ice, which, in spite of the tug, set both the ship and tug towards the New York shore; that, finding that the field of ice was too powerful for the tug to control, both anchors of the ship were let go, with a large amount of chain, notwithstanding which, the ice carried the ship and tug across and down the river, so that the head of the ship having finally got pointed down the river, was carried by the ice so that her bows were carried inside pier 45, and into the side of the Chapman; thus causing any damage that was done. That the field of ice in which the ship became entangled was too powerful to be controlled; and that all which she could do, was to drop her anchors with a view to stop her headway; which, however, being done, failed to bring her up; that the collision was thus the result of inevitable accident; or if not of inevitable accident, then certainly that it arose from no fault of the ship, or her officers, or crew."

An *amended* answer was as follows:

"That, at the time there was considerable floating ice on the Brooklyn side of the East River, but that the river was clear for a considerable distance out on the New York side; that, owing to the floating ice, the ship was turned with more difficulty than it would otherwise have been; that the tug had got the ship's head turned down the river, angling towards the New York shore, and with most of the ship in clear water, free from ice; that, while the tug was thus successfully towing the said ship, and angling well off her port bow so as to keep her head turning down the stream, until she should head directly down, *a ferry-boat suddenly and improperly crossed the bows of the tug*, and in order to prevent the striking the said ferry-boat the headway of the tug was suddenly slowed, but that with the impetus which the ship had, she shot ahead towards the piers on the New York side; that, the instant the pilot discovered that the tug had slowed he waved her on, but that she could not go on without running into the ferry-boat; that, instantly upon the slowing of the tug it was seen that the tug had lost, by slowing, the control of the ship; that both anchors were at once let go, they being all ready for that purpose, but that

owing to the character of the ground the ship overran her anchors, and dragged them both, and came upon the Chapman; that the wheel of the ship was hard astarboard from the time she left the pier at Brooklyn to the time of coming into contact with the injured vessel Chapman."

Though both the master of the Helen Cooper and the pilot swore positively to this ferry-boat's shooting out of her dock in the way described, and that this—by compelling the tug to slow, and so to slack her hawser, and let the ship drift without motive power on a wrong course—was the cause of the whole difficulty, yet some other testimony went to show that the collision was caused primarily by setting out in an unfavorable state of the tide, and when the ice rendered navigation difficult; in proceeding with too much rapidity, and in towing with too long a hawser; and from the causes set forth in the answers of the owners of the tug.

The District Court condemned both tug and ship; and the owners of the ship, who had undertaken and managed the whole defence, appealed to the Circuit Court, where the decree was affirmed. From the decree of affirmance the owners of both the tug and of the ship appealed to this court.

Messrs. Beebe, Donohue, and Cooke, for the appellants:

There is no sufficient positive testimony that the day was an unsafe one. It was a Saturday, when, of course, five ocean steamers set off. Some sailing vessels also set off. On the other hand, there is sufficient and most positive testimony that the tug was embarrassed by a ferry-boat suddenly shooting out of dock, passing ahead of her, and that by the tug stopping, the ship, which had considerable way on, and had not got headed around, was left without motive power to keep her in the right course; and so that she could not avoid the collision, although she made all the efforts in her power, by dropping her anchor, and otherwise.

The East River opposite New York is not so wide as that you can turn a large ship in the middle of the river, and if

you could not run near the opposite shore you could never turn.

The cause of the collision was an inevitable accident, and such a one as neither tug nor ship could guard against. It was no fault of either that the ferry-boat embarrassed the tug, and had there not been a cake of ice in the river, or had the hawser been the shortest, that embarrassment would have been equally as great. Indeed, if the hawser had been shorter the ship would have been into the tug and both into the ferry-boat; and perhaps all into the Chapman.

The ship was under the control and management of the tug, and she is not responsible for the acts or faults of the tug. It is no cause to hold her responsible that the owners of the ship assumed the defence of the tug, because if the collision happened by the ship's fault, the tug should be discharged. Yet she is held. It is not good sense to hold both the ship and the tug responsible. If the fault is on the one or the other the court must say so.

If both the tug and ship are in fault, the loss should be equally divided between them.

Messrs. Benedict and Benedict, contra:

As to the appeal taken by the tug. No appeal was taken in her behalf from the decree of the District Court. The ship having assumed her defence, she had no further care of the controversy and took no appeal. She is, therefore, in no situation to take an appeal from the decree of the Circuit Court, and her appeal ought to be dismissed.

As to the ship's appeal. The sole defence set up in the ship's answer was that the ship was "unexpectedly caught in an immense field of floating ice." The amended answer entirely abandons this defence, even contradicting it in material points, and sets up as a defence that "a ferry-boat suddenly and improperly crossed the bows of the tug," caused her to stop and *thus* caused the collision. This new defence was clearly an afterthought. The ship's codefendant, the tug, sets up no such defence. Yet the defence is one which must be applicable to both the tug and the ship, if it had

any existence at all. It is one whose existence must have been better known to the tug than to the ship, and the fact that the tug does not set it up but charges the collision to be the result of negligence on the part of the ship, throws the strongest suspicion upon it. This suspicion is still further strengthened by the subsequent conduct of the cause. The tug having made this charge upon the ship, the latter, by agreement, takes upon herself all the responsibility of the litigation, and then fails to put before the court any evidence from the tug as to the occurrence in question. The inference is irresistible that her owners knew that those witnesses would not sustain their theory of the defence, but would show negligence on the part of the ship, and that they took this course to keep this evidence from the knowledge of the court. This they have succeeded in doing, but they cannot avoid the conclusions to which such a course of conduct on their part necessarily exposes them.

It is vain to say that the matter of the ferry-boat was after discovered. It is not credible that the owner of the ship had never inquired the cause of the collision; nor is it credible that, having inquired, he should have heard nothing of this ferry-boat, or should have forgotten all about her, if she was the cause of it. And how is the fact to be accounted for, that, while the witnesses from the tug must have been, from their position, the best witnesses to prove the existence and movements of this ferry-boat, and that while the ship, by assuming the responsibility of the defence, had done all in her power to make those witnesses disinterested, she failed to call one of them to support her allegations? It is plain that this alleged ferry-boat, of whom no one can tell the name, whence she came, or whither she went, had no real relation to the disaster. Independently of all which the court is asked to hold that an ordinary movement of a Brooklyn ferry-boat is an inevitable accident, and that this ship is not liable for the consequences, resulting to an innocent third party from her failure to provide for and guard against such ordinary movement.

It is plain from the general aspect of the case that the ship

desired as soon as possible to get out of the ice into the clear water, which led them to go over to the New York side, and then the tug had not sufficient power in that narrow space to keep the ship off from the docks.

It was recklessness on the part of the ship to go to sea at all when she did. It does not in the least alleviate this to show that steamers sailed, as ocean steamships do, from the *North* River on the same day, or that other vessels left other —the lower—parts of the East River at slackwater, no doubt, before the ice began to run.

If the ship had to go to sea at the hour when she did, it was negligence not to have had a second tug. If the condition of things was such in the river that the ship was compelled to go in such dangerous proximity to the piers, and that the crossing of a ferry-boat, which is always to be expected in that part of the river, made the difference between safety and the injury which she actually wrought, that should have been foreseen and guarded against by having a tug alongside. A tug alongside would have averted the collision.

Both vessels must take the consequences of the negligence. The ship was the *dux facti*. It was her doing; but the tug, undertaking the service at the risk of the ship, is none the less to blame. She had no right, no matter what guarantees she had, to undertake this dangerous service, single-handed, in a port whose piers were lined with valuable ships and cargoes, fastened fore and aft, and helpless alike to resist or to escape.

The case falls within what is said in *The Bridgeport*.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Controversies growing out of collisions between ships arise where the colliding vessel was in charge of a tug in which both the tug and the tow are liable for the consequences, as when the officers and crews of both vessels jointly participated in their control and management and where those in charge of both vessels are deficient in skill,

* *Supra*, 116.

Restatement of the case in the opinion.

omit to take due care, or are guilty of negligence in their navigation. Cases also arise where the tow alone is responsible, as where the tug is employed as the mere motive power to propel the tow from one point to another, and both vessels are under the exclusive control and management of the officers and crew of the tow. Other cases also arise where the tug is solely responsible, as where the tug, under the charge of her own master and crew, undertakes to transport another vessel from one point to another, which, for the time being, has neither her master nor crew on board, as in that case her officers and crew direct and control the navigation of both vessels.*

Compensation is claimed in this case by the owners of the ship Isaac Chapman for injuries which the ship received in a collision between the ship of the libellants and the ship Helen Cooper and the steamtug R. L. Mabey, which had the latter ship in tow. As alleged in the libel, the collision occurred on the seventeenth of February, 1866, in the harbor of New York, while the ship of the libellants was moored on the upper side of pier forty-five in East River, and the proofs show that she lay with her head towards the shore, her stern being twenty feet inside of the outer end of the pier. She had a cargo of merchandise on board and was ready for sea, but those in charge of her did not deem it prudent to leave the wharf at that time as the tide was ebb with a strong current and there were large masses of floating ice in the stream.

Different views, however, were entertained by those in charge of the ship Helen Cooper, which was also loaded and ready to sail for a Southern port. By the answer as originally filed it appears that she was lying at the wharf of the gas-works, on the Brooklyn side of the river, with her head towards the shore and her stern towards the stream; that while in that situation those in charge of the steamtug R. L. Mabey made fast to her bows on the port side by a hawser

* Sturgis *v.* Boyer et al., 24 Howard, 122.

which was passed aft and there fastened by stops, and by that means she was towed into the stream stern foremost, the tide having just commenced to ebb, and the statement of the answer is that as the ship passed out into the stream the stop at the stern was cut so as to allow the ship to turn and head down the river, and that both the ship and the steamtug, while the ship was in the act of turning, were unexpectedly caught in an immense field of floating ice, which, in spite of the power of the steamtug, set both vessels towards the opposite shore and carried them down and across the river so that the bows of the ship passed inside of pier forty-five and struck the side of the ship of the libellants and caused whatever damage the libellants' ship received by the collision. Proof of the collision, therefore, is unnecessary, as the allegation is admitted, but the respondents allege that the ship is not liable, as the collision was the result of inevitable accident.

Prompt appearance was also entered by the claimant of the steamtug, and he filed a separate answer, in which he alleges that the master of the steamtug when applied to on that day to tow the ship of the respondents to sea informed the owners that it was not safe to proceed to sea in the then condition of the weather and tide. Had he himself been governed by that opinion the case of the steamtug would be quite different, but the proofs show that he yielded to the importunity of the owners or agent of the ship and took her in tow, the owners of the ship agreeing to assume the risk of all accidents and dangers. Apart from that he also charges that the collision was occasioned by disobedience of the orders of the pilot and faulty navigation of the ship; that the order of the pilot was not to cast off the hawser by which the ship was moored but only to slacken it until the head of the ship was swung round; that the order was disobeyed, and that the hawser was cast off before the ship came round, which had the effect to set the ship over to the opposite shore towards the ship of the libellants; and he also charges that those in command of the respondents' ship, when she had reached the middle of the stream "and

was headed down stream," put her helm hard aport so that the ship took a sudden sheer to starboard, which caused her to run into the ship of the libellants.

Leave was granted to the owners of the respondent ship to file an amended answer, in which they still insist that the collision was the result of inevitable accident, but of a widely different character from that described in the original answer filed more than five months earlier. They now allege that the river was clear of ice for a considerable distance on the opposite side of the river; that owing to the ice on the side where the ship lay it was more difficult than it otherwise would have been to turn the ship so that she would head down the river, and that while the steamtug was endeavoring to accomplish that object a ferry-boat suddenly and improperly crossed the bows of the steamtug, and in order to prevent striking the ferry-boat it became necessary that the steamtug should be suddenly slowed, which had the effect to turn the ship towards the opposite shore and caused the collision, in the manner more fully described in the amended answer.

Both parties took testimony and were fully heard in the District Court, and the District Court being of the opinion that both the tug and the tow were in fault, entered a decree for the libellants against both the respondent vessels, and the owners of the ship appealed from the whole decree to the Circuit Court, where the parties were again heard upon the same pleadings and proofs, and the Circuit Court affirmed the decree of the District Court, holding that both the respondent vessels were in fault. Whereupon the owners of the respective vessels took separate appeals to this court.

Objection is made that the owners of the steamtug could not properly appeal to this court, as they did not formally appeal from the District Court to the Circuit Court, but it is not necessary to decide that question, as it is quite clear that the decree must be affirmed against the tug as well as the tow. Nor is the court prepared to admit the validity of the objection, as the record shows that the owners of the tow

signed a written stipulation before the decretal order was entered in the District Court, that they, as the owners of the ship, would assume the entire conduct of the defence and that they would answer and pay whatever sum the libellants should recover in the case against both vessels. Undoubtedly the general rule is that a party who does not appeal cannot be heard in opposition to the decree. Still it appears in this case that an appeal from the District Court to the Circuit Court was taken from the entire decree, and by a party who represented the entire interest of the losing party in the suit. Well-founded doubt may, perhaps, arise as to the regularity of the proceeding, but it is not necessary to solve that doubt in the present case.

Suppose the appeal is correctly here, we are all of the opinion that the decree of the court below was correct.

Where the collision occurs exclusively from natural causes, and without any negligence or fault on the part of either party, the rule is that the loss must rest where it fell, as no one is responsible for an accident which was produced by causes over which human agency could exercise no control. Such a doctrine, however, can have no application to a case where negligence or fault is shown to have been committed on either side. Inevitable accident, as applied to a case of this description, must be understood to mean a collision which occurs when both parties have endeavored, by every means in their power, with due care and caution, and a proper display of nautical skill, to prevent the occurrence of the accident, and where the proofs show that it occurred in spite of everything that nautical skill, care, and precaution could do to keep the vessels from coming together.*

Want of due care is shown in the fact that the ship went to sea at a moment when the master of the tug which had her in tow knew that it was not safe in view of the condition of the weather and tide; nor can the tug be held blameless any more than the ship, because as the master ultimately

* The Pennsylvania, 24 Howard, 313; The Morning Light, 2 Wallace, 556.

yielded to the importunities of the owners of the ship and assumed the risk, subject to his claim on the owner of the ship for indemnity. Faulty navigation is also shown, which of itself is a sufficient answer to the defence of inevitable accident.

Palpable error is shown to have been set up in the original answer filed by the owners of the ship, and the court is not satisfied that the defence set up in the amended answer is entitled to any more credit. Such a defence as that set up, that a ferry-boat suddenly and improperly crossed the bows of the steamtug, if founded in fact, could easily be proved by those who were on board the ferry-boat and know what occurred. Instead of that, not even the name of the ferry-boat is given, either in the answer or in the proofs, and not a witness is called except the pilot and the master of the ship, and their statements in that behalf are not satisfactory. No such defence is set up in behalf of the steamtug, and nothing of the kind was alleged in the original answer filed by the owners of the ship shortly after the suit was commenced. Neither of the courts below appear to have given that defence much credence, and this court concurs with the subordinate courts that the defence is not established.

DECREES AFFIRMED.

CAPERTON *v.* BOWYER.

1. A Southern State passed in 1865 a statute of limitations enacting that in computing the time in which any civil suit, proceeding, or appeal should be barred by any statute of limitation, the term of time from the 17th April, 1861, to the 1st March, 1865, should not be computed. It then passed another, enacting that the time from 1st March, 1865, to 27th February, 1866, should not be. The courts of that State were closed to loyal suitors by the rebellion between the 17th April, 1861, and the 27th February, 1866. On suit brought in May, 1866, for a cause of action which arose in 1862, and which but for this deduction of time would have been barred in one year from 1862, by older statutes of limitation, the defendant asked the court to charge that if the jury believed that the right to bring the suit accrued more than one year before the

Statement of the case.

1st of March, 1865, their verdict should be for the defendant. *Held*, in view of previous decisions of this court and of Congressional legislation (referred to *infra*, p. 218), that it could not be inferred that the court meant to declare the State statutes consistent with the Federal Constitution, when it simply told the jury that in computing the statute of limitations they ought to exclude the time between the 17th of April, 1861, and the 27th February, 1866, and that if the cause of action arose in 1862, it was not barred.

2. Although a certificate of the presiding justice of the highest court of a State, that there was drawn in question the validity of an act of the State, on the ground that it was repugnant to the Constitution of the United States, and that the decision was in favor of its validity, is entitled to much weight, yet where evidently that court had nothing before it but an exception taken and signed in the subordinate court which was clearly insufficient to raise such a question, or to show that it was decided in a way to give this court jurisdiction, such certificate is not conclusive to show that a Federal question was raised in the case.

When a certificate of the presiding justice of the highest court of a State mentions that a certain Federal question was raised and decided in his court, and does not state that any other was, this silence justifies the conclusion that none other was; especially when a decision on the matter where a second Federal question is alleged to have been passed on may have been well decided on many other grounds not Federal.

3. A Federal question cannot be assumed to have been raised and passed on in a State court so as to give jurisdiction to this court, under the 25th section, when nothing appears in the record to show on what grounds the decision of the matter in which the Federal question is alleged to be involved was made.

ERROR to the Supreme Court of Appeals of the State of West Virginia; the case being thus:

In July, 1862, the State of Virginia (with the exception of certain counties, not including that of Monroe), being in rebellion against the United States, and being so proclaimed by the President on the 1st of that month, one Caperton, provost marshal under the Confederate forces of Monroe County (in which martial law had been declared by Jefferson Davis, March 29th, 1862), caused a certain Bowyer, who had remained faithful to his allegiance, to be arrested and thrown into prison, and there kept for a considerable time, upon a charge of giving information to the forces of the United States.

At this time the right to bring civil suits for false impris-

onment was limited by the Virginia Code to apparently one year.*

In 1863 certain western counties of Virginia, including Monroe County, aforesaid, having formed themselves into a new State were duly received as such into the Union, and in 1865 and 1866 the new State passed two statutes, thus:

"*An Act in relation to the Statutes of Limitation, passed March 1st*, 1865.

"*Be it enacted by the legislature of West Virginia:* In computing the time in which any civil suit, proceeding or appeal shall be barred by any statute of limitations, the period from the 17th day of April, 1861, to the date of the passage of this act, shall be excluded from such computation."

"*An Act in relation to the Statutes of Limitation, passed February 27th*, 1866.

"*Be it enacted by the legislature of West Virginia:* In computing the time within which any civil suit or proceeding in trespass or case shall be debarred by any statute of limitation in the counties of Monroe (&c., other counties named), the period from the first day of March, 1865, to the date of the passage of this act, shall be excluded from such computation."

Prior to the dates of either of these acts, that is to say on the 11th of June, 1864, the Congress of the United States passed "An act in relation to the limitation of actions in certain cases," thus:

"That whenever, during the existence of the present rebellion, any action, civil or criminal, shall accrue against any person, who by reason of resistance to the execution of the laws of the United States, or the interruption of the ordinary course of judicial proceedings, cannot be served with process for the commencement of such action or arrest of such person;

"Or whenever, after such action, civil or criminal, shall have accrued, such person cannot, by reason of such resistance of the laws, or such interruption of judicial proceedings, be served with process for the commencement of the action;

"The time during which such person shall be beyond the

* Code of Virginia, 1860, p. 638, § 11.

reach of judicial process, shall not be deemed or taken as any part of the time limited by law for the commencement of such action."

And in December Term, 1867, this court, in *Hanger* v. *Abbott*,* decided that the time during which the courts in the then lately rebellious States were closed to citizens of the loyal States, was, in suits brought by them afterwards, to be excluded from the computation of the time fixed by statutes of limitation within which such suits may be brought; a principle subsequently affirmed, and perhaps extended, A.D. 1870, in *The Protector*,† and in *Levy* v. *Stewart*.‡

The rebellion being declared, by the President's proclamation of April 2d, 1866, suppressed in Virginia, and the courts of West Virginia open to all persons, Bowyer, on the 11th May, 1866, sued Caperton in the State Circuit Court of Monroe County, in trespass for the false imprisonment which as Confederate provost marshal he had made in 1862, during the rebellion.

Caperton having demurred to the declaration and pleaded the general issue, put in six special pleas:

1st. That the action was barred, because not brought within *one* year next after the cause of it accrued.

2d. That it was not so brought within *two* years.

3d. That more than two years had elapsed after the right of action accrued, and before March 1st, 1865, when the first of the above-quoted statutes of West Virginia was passed.

4th. That at the time of the supposed grievance both the plaintiff and defendant were citizens and residents of Virginia, and that the whole time of limitation prescribed for this action by the law of that State had run while the defendant resided in it, and before the said 1st of March, 1865, when the act of that date was passed.

Then came a plea, thus:

5th. "That before the time of the supposed grievances, the defendant had, on oath made in conformity with the law

* 6 Wallace, 532. † 9 Id. 687. ‡ 11 Id. 244.

long existing in the Commonwealth of Virginia, declared himself a citizen of the said Commonwealth, and solemnly swore that he would be faithful and true to the said Commonwealth, and would support the constitution thereof so long as he continued to be a citizen of the same, and until and at and after the time of the said supposed grievances he continued to be a citizen of the same, and before and at the time of the said supposed grievances the said Commonwealth was engaged in actual war, and an army consisting of a large number, to wit, —— thousand soldiers, was raised within the then territory of the said Commonwealth, for the safeguard and defence of the same against those who then, by those then acting at the city of Richmond, in said Commonwealth, as the authorities of said Commonwealth, were deemed the enemies thereof; and during the time that the said army was in actual service within said territory for such safeguard and defence, and while the then actual authorities of said Commonwealth and those in the same confederacy therewith were not only belligerents, but recognized as such by the government of the United States, General H. Heth, the general and commander of troops forming part of said army in actual service, did, under the authority of the executive power then in fact exercised over said Commonwealth and over those in the same confederacy therewith, appoint this defendant provost marshal of the county of Monroe; and while this defendant was such provost marshal under said appointment, the plaintiff was, without any special order from or instigation of this defendant, taken and imprisoned upon a charge of harboring deserters, and was, by this defendant, discharged from imprisonment upon his giving surety for his good behavior; and all the supposed grievances whereof the plaintiff has complained, so far as this defendant did or procured, caused, directed, ordered, instigated others to do the same, were acts done while this defendant was such provost marshal under said appointment, and done in what was then in fact the territory of said Commonwealth, and done in pursuance of the executive authority, which then in fact governed in said Commonwealth,

and in accordance with such laws, rules, and regulations as then in fact prevailed therein."

This was followed by another plea, the

6th. That on the 7th September, 1865, the President had granted him, the defendant, a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the said rebellion; and the defendant took the oath prescribed in the proclamation of the President, dated May 29th, 1865, and the defendant duly notified the Secretary of State, in writing, that he had received and accepted the said pardon. And further, that all the grievances complained of in the declaration were acts arising from participation, direct and implied, in the said rebellion.

The court sustained the declaration, and issue being tendered to the country on the general issue and the first three of the special pleas, and the court having, without assigning any reasons, decided the three remaining ones to be bad, on general demurrer, the case came on to be tried.

The plaintiff having shown the imprisonment, the defendant offered in evidence, "both in mitigation of damages and as justification of the acts complained of," the already-mentioned pardon of the President. This pardon had five conditions annexed to it: (1.) That Caperton should take a certain oath. (2.) That he should not acquire slaves, &c. (3.) That he should pay certain costs. (4.) That he should not claim certain property, or its proceeds. (5.) That he should notify the Secretary of State in writing that he accepted the pardon. It was shown that Caperton had given the required notice and had taken the required oath. What had been done in the other matters did not appear. The court excluded the pardon.

The defendant then requested the court to charge as follows:

"1st. If the jury believe that this action was not brought within one year next before the right to bring the same accrued, the verdict should be for the defendant.

"2d. If the jury believe that the right to bring this action accrued more than one year before the 1st day of March, 1865,

and that this action was not brought until after the 1st day of March, 1865, the verdict should be for the defendant."

The court refused so to charge, and charged thus:

"In computing the time of the statute of limitations in this cause, the jury ought to exclude from the computation all that term of time between the 17th of April, 1861, and 27th of February, 1866, and if the cause of action arose in 1862, as alleged in the declaration, then it is not barred by either of the statutes of limitations upon which issues have been joined."

Verdict and judgment having, on the 25th July, 1867, gone for the plaintiff, the judgment was taken from the Circuit Court of Monroe County, where the suit was brought, to the Supreme Court of Appeals of the State of West Virginia. All that now was shown by the record as to the action of that court or the reasons of it, appeared in a certificate from its clerk, thus:

"The court having maturely considered the transcript of the record of the judgment aforesaid, together with the arguments of counsel thereupon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in said judgment; therefore it is considered by the court that the judgment aforesaid be affirmed, and that the defendant in error recover from the plaintiff in error, damages according to law, together with his costs about his defence in this behalf expended.

"And the court doth certify that in the aforesaid judgment there was drawn in question the validity of the statute of the State of West Virginia, passed March 1st, 1865, entitled 'An act in relation to the statutes of limitation,' on the ground that it was repugnant to the Constitution of the United States; and the decision of this, the highest court of law and equity in this State in which a decision in said suit could be had, was in favor of the validity of said statute."

From the affirmance by the Supreme Court of Appeals the case was brought here, on the assumption that it came within the 25th section of the Judiciary Act, quoted *supra*, pp. 5, 6. A motion to dismiss for want of jurisdiction having been made, the question of jurisdiction was argued.

Argument in support of the jurisdiction.

Messrs. Conway Robinson, R. T. Merrick, and Simeon Nash, in support of the jurisdiction:

1. By the laws of Virginia, existing prior to the 1st of March, 1865 (when a new statute was passed), all right of Bowyer to sue Caperton had completely gone at the expiration of a year from July, 1862, the time of the alleged trespass—gone, therefore, long before this act of 1865 was passed, or this suit of 1866 was brought. Caperton thus had an ascertained and fixed privilege, immunity, and right, such as subsequent legislation could not deprive him of without his consent.* Yet the court below decided that the State of West Virginia could by a retrospective statute divest the right to the defence, which was thus complete under the previous statute, and could give a new right of action. We set up below and maintain here that such a decision is in the face of the fifth amendment to the Constitution, which says that "no person shall be deprived of liberty or property without due process of law." The judgment of the Court of Appeals having been in favor of the validity of the statute thus drawn in question by us, our right to come here under the 25th section is clear.

2. Our right is equally clear, because that court affirmed the ruling of the court below declaring our fifth special plea bad.

1. "Use," says Vattel,† "appropriates the term of *civil war* to every war between members of one and the same political society: . . . The sovereign indeed never fails to term *rebels* all subjects openly resisting him; but when these become of strength sufficient to oppose him, so that he finds himself compelled to make war regularly on them, he must be contented with the term of *civil war*." The terms *rebels* and *pirates* were freely applied by George III and the British Parliament to the Americans who were engaged in defending themselves and their families and property against Great

* Battles *v.* Fobes, 18 Pickering, 532; 19 Id. 578; Wright *v.* Oakley, 5 Metcalf, 405; Davis *v.* Minor, 1 Howard's Mississippi, 189; Couch *v.* McKee, 6 Arkansas, 495.

† § 292.

Britain between 1775 and 1783. Yet when it was argued before this court as to that war, that till the Declaration of Independence, it was only a civil war, there was uttered from its bench this language:

"But why is not a defensive war against Great Britain (call it, if you will, a civil war) to be conducted on the same principles as any other? If it was a civil war, still we do not allow it to have been a rebellion. America resisted and became thereby engaged in what she deemed a just war. It was not the war of a lawless banditti, but of freemen fighting for their dearest rights, and of men lovers of order and government. Was it not as necessary in such a war as in any between contending nations that the law of nations should be observed."*

Such language is no less applicable to the war waged by men of the Southern States from the spring of 1861 to the spring of 1865, a war "which all the world acknowledges to be the greatest civil war known in the history of the human race."† "That civil war," said this court,‡ "was carried on upon a vast scale against the government of the United States for more than four years. . . . The power which carried it on was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection." The two cases last cited and others occurring in the interval between them,§ may be regarded as consistent with the law of nations, as declared by Vattel,‖ that "whenever a numerous party thinks it has a right to resist the sovereign, and finds itself able to declare that opinion, sword in hand, the war is to be carried on between them in the same manner as between two different nations." The government of such party, whether called as by publicists a government *de facto* or denominated as by this court a government of paramount force, must, this court has said,¶ "necessarily be obeyed in civil matters by private citizens who, by acts of

* Penhallow et al. *v.* Doane's Administrators, 3 Dallas, 110.

† Prize Cases, 2 Black, 669. ‡ Thorington *v.* Smith, 8 Wallace, 7.

§ The Circassian, 2 Wallace, 148; The Venice, Id. 258; Mrs. Alexander's Cotton, Id. 419; Mauran *v.* Insurance Co., 6 Id. 13, 14.

‖ § 294. ¶ Thorington *v.* Smith, 8 Wallace, 9.

obedience, rendered in submission to such force, do not become responsible as wrongdoers for those acts, though not warranted by the laws of the rightful government."

Now here Caperton set up below in his fifth plea a claim to be exempt from liability under the *laws* of war, which exempts one engaged in war for certain acts done in the prosecution thereof. The court below denied this right absolutely by sustaining the demurrer to the pleas setting up that defence. Is this a right or claim set up under an authority exercised under the United States? It certainly is if international law is a law of the United States, of the *nation*, and not of the several States. Whether this is so was the question in the McLeod case, A.D. 1841, in New York, growing out of the burning of the Caroline. The Supreme Court of that State decided that the State had jurisdiction to try and hang McLeod, notwithstanding Great Britain had recognized the act as done under her orders, and asserted that the British government, not McLeod, was responsible for what was done.* Under the ruling of that court McLeod was put on trial, but the Attorney-General of the United States was sent by our government and was present at the trial with the necessary documents to put the question on record so it could be taken up, and the nation saved from a war with Great Britain, by this strange decision of a State court.

That the understanding of the administration and of well-informed persons at the time was, that this, the Supreme Court of the United States, had jurisdiction of the judgment of the Supreme Court of New York, is clear from a notice of the trial of McLeod in the National Intelligencer of May 22d, 1841. The editors alluding to this trial there say:

"Whatever the decision, whether for releasing or remanding the prisoner, an appeal will probably be taken to the Court of Errors, from which a further appeal lies, in cases of this nature, to the Supreme Court of the United States."

* People *v.* McLeod, 1 Hill, 377.

Mr. Choate, in a speech delivered on the 11th of June, 1841, in the United States Senate, maintains the same position.* He says:

"The clear course of the government, therefore, was to do what it did, to have McLeod's case fairly tried, and if needful, to have his case brought into the National tribunals."

The well-known relations between Mr. Choate and Mr. Webster, then Secretary of State, make it plain that the views of this great constitutional lawyer upon the jurisdiction of this court, on a right set up as Colonel Caperton's here was in this fifth plea, under international law, under the laws of war, agreed with ours.†

This indeed must be the law, or the General Government is at the mercy, on a question of foreign relations, of the action of a State, or of its courts. So in the case of the late civil war, parties for acts done in prosecution of that war are liable or not liable for acts so done, just according to the whim or prejudice of any State court. Is it possible that this court has no jurisdiction over these questions to secure that conformity which is essential to the administration of justice?

The validity of this right under the law of nations, part of the law of the United States, the court below decided against.

3. This court has jurisdiction on yet a third ground. The Constitution of the United States gives power to the President "to grant reprieves and pardons for offences against the United States." The pardon was a valid exercise of authority under the United States. And the decision of the Circuit Court is against its validity or against the exemption set up under it. If the pardon could be pleaded in bar, there was error in the court's declaring plea eighth bad. If it could not be so pleaded, then the court erred in not

* See National Intelligencer of June 17th, 1841.

† As to this see also Webster's Private Correspondence, vol. 2, p. 104; letter of May 16th, 1841, to Fletcher Webster, and p. 112, letter of January 14th, 1842, to Mr. Berrien.

admitting the pardon in evidence under the general issue in mitigation of damages, and the error brings us within the 25th section.

Messrs. J. Hubley Ashton and B. Stanton, contra, and in support of the motion to dismiss:

1. It is no matter whether the act of the legislature of West Virginia of March 1st, 1865, is constitutional or not. The decision as to the effect of the war on the old statute of limitation was right independent of that statute, and of any statute. That this is so was declared by this court at December Term, 1867, in *Hanger* v. *Abbott*, and in other cases since.

Besides, on the 11th of June, 1864, Congress passed its "act in relation to the limitation of actions in certain cases," in substantially the same form as the West Virginia law of March 1st, 1865. That act applied to all cases, and all places, when no suit could be brought by reason of resistance to the laws or the interruption of judicial proceedings. It did not in terms apply to the time that had elapsed prior to its passage. The legislature of West Virginia, acting upon its own knowledge as to the time that the courts there had been suspended, did but fix the precise time that the old statute should be suspended, and in terms made it applicable to the time that had elapsed, prior to its passage. This court, in *Stewart* v. *Kahn*,* held that Congress had power to pass such a suspending act to operate retrospectively, and also that the act was a remedial statute, entitled to a liberal construction, and such as should be held to operate retrospectively, although it did not do so in terms. It also held that the act was applicable to suits pending in the State courts.

It would be extraordinary to hold a declaratory act of a State legislature, which in reality but defined and limited the suspension of the statute of limitation, created by the action of the courts and legislature of the General Govern-

* 11 Wallace, 493.

ment, and existing independent of the State statute, unconstitutional and void.

2. Then does the case come here under the 25th section, because the Circuit Court of Monroe County declared the fifth special plea bad? We say the Circuit Court of Monroe County, because there is no evidence that the Court of Appeals ever passed on that part of the case. Contrariwise, it rather seems that they did not. Judging by the certificate (*supra*, p. 222), no Federal question was raised but that relating to the new statute of limitations. If it was shown that the Court of Appeals did decide against its validity, *haud constat* that a Federal question was thus passed on. They may have decided the plea bad for other reasons, as *ex. gr.*, for being argumentative, &c.

But what is the plea at best? It is simply that Caperton acted under the authority of the rebel government, and that therefore he is justified. But this involves no question upon the validity or construction of the Constitution of the United States, or of any treaty, law, authority, or commission derived from the United States, nor upon the validity of any State law on account of its being in conflict with any provision of the Constitution of the United States, or any treaty, law, authority, or commission, derived from the United States.

It is said that it involves a question of international law. If it does, this can give this court no jurisdiction. The law of nations is not embodied in any provision of the Constitution, nor in any treaty, act of Congress, or any authority, or commission derived from the United States. It is true that the courts of the United States, like the courts of the States, and of all other civilized countries, recognize the law of nations as binding upon them; and it is argued that as the government of the United States is charged with the management and control of our foreign relations, the courts of the United States *ought* to have the power of deciding in the last resort, all questions of international law, otherwise difficulties may arise with foreign nations on account of erroneous decisions by the State courts which the gov-

ernment of the United States could not provide against. But whatever force the argument of convenience might have in a case arising between the United States and a foreign nation, it has very little in a case arising out of a defunct rebellion. It is no great hardship for parties who have plunged the country into a bloody and protracted war, and who have been pardoned for crimes the greatest known to the law—treason, murder, arson, and robbery among them—to be required to make redress for the injuries which their neighbors have sustained at their hands.

The case of McLeod, in the Supreme Court of New York, is referred to. The decision of that court was the subject of much criticism at the time. It was disapproved by Mr. Webster, who was then Secretary of State, and by Mr. Crittenden, Attorney-General of the United States, and many other distinguished jurists. Whether it was right or wrong is not important for our present purpose. But no attempt was made to bring the case before this court for revision. And it seems probable, that if the administration had supposed that this court had appellate jurisdiction from the New York courts in that case, that the case would have been brought before this court. The administration was seriously embarrassed by the decision. There was great danger of the country being plunged into a war with Great Britain, on account of its failure to surrender McLeod. Still, the courts of New York were permitted to maintain their jurisdiction and try McLeod for murder. The country was relieved from further controversy by the jury finding him not guilty.

What is still more conclusive as to the opinion of the jurists of the country, as to the appellate jurisdiction of this court on questions of international law is, that immediately after the McLeod case was disposed of, an act of Congress passed, to give the courts of the United States jurisdiction in similar cases that might thereafter arise. That act was passed August 29th, 1842. It provided that a writ of *habeas corpus* might be issued by any judge of this court, or any District judge of the United States, where any "*subject or*

citizen" of a foreign state, and "domiciled therein," was imprisoned for any act done or committed under the authority of any foreign state or sovereign, the validity or effect whereof depended on the laws of nations. But this law can have no application to the case at bar.

It is assumed by the other side that whenever the established government in a civil war exercises the powers and rights of a belligerent, and applies to the contest the rules and usages of war, that it thereby grants to the parties in rebellion all the rights and immunities of a party to a public international war; that if it sends or receives a flag of truce, exchanges prisoners, or blockades the ports of the insurgent government, it thereby makes the insurgents a belligerent power, which has a right to demand all the rights and immunities of an independent nation in a public international war. This is an error. It is one of the essential attributes of sovereignty which belongs to every independent nation, to determine for itself, how it will deal with rebels and insurgents against its authority and government. It may treat one of its insurgent citizens as an enemy and hold or exchange him as a prisoner of war, and another as a rebel and traitor and hang him for treason. Writers on international law say indeed that the rules and usages of civilized modern warfare, which are applicable to international wars, are equally applicable to civil wars. But they also say, that when an insurrection or rebellion is suppressed, the government may prosecute the parties that are engaged in it, and punish them for treason and rebellion.

The case now before the court cannot, in short, be distinguished from *Jones* v. *Hickman*,* where it was held that "the proportions and size of the struggle did not affect its character," that there was no "rebel government *de facto* in any such sense as to give any legal efficacy to its acts," and that the judgment of a rebel court was illegal and void, and could not protect the judges and marshal from an action for false imprisonment.

* 9 Wallace, 197.

Restatement of the case in the opinion.

3. As respects the pardon, the certificate from the Court of Appeals shows that it was not spoken of there at all. If it was so spoken of, the court perhaps thought that it had rightly been deemed insufficient either as evidence or plea, because it did not appear that more than two conditions had been observed.

Mr. Justice CLIFFORD delivered the opinion of the court.

Special jurisdiction only is given to this court by virtue of a writ of error to a State court, and unless the record shows that the case falls within the conditions annexed to the right of a party to invoke the exercise of the jurisdiction, the writ of error must be dismissed. Primarily those conditions are two: (1.) That it shall appear that some one of the questions specified in the twenty-fifth section of the Judiciary Act, or the second section of the amendatory act, did arise in the case. (2.) That the question which did so arise in the case was decided by the court in the way therein required to give this court jurisdiction to re-examine the question, and the rule is settled that unless both those things appear the jurisdiction does not attach.*

On the sixth day of August, 1866, the plaintiff brought an action of trespass for false imprisonment against the defendant in the State court, in which he alleged that the defendant, on the twenty-ninth of June, 1862, with force and arms, seized the plaintiff and incarcerated him in a dungeon, and imprisoned him there for twenty-four days, separated from his home and family, and that he subjected him to great danger and many hardships, and seriously impaired his health and put him to great pain and distress, both of body and mind.

Service having been made the defendant appeared and demurred to the declaration, and filed seven other pleas, as follows: (1.) That he was not guilty in manner and form as alleged. (2.) That the action was not brought within one year next after the right to bring the same accrued. (3.)

* 1 Stat. at Large, 85; 14 Id. 386.

Restatement of the case in the opinion.

That the action was not brought within two years next after the right to bring the same accrued. (4.) That more than two years had elapsed after the right to bring the action accrued, and before the present limitation act of the State was passed. (5.) That the plaintiff and defendant were citizens of the same State, and that the whole time prescribed as a limitation had elapsed before the present act modifying the pre-existing law was passed. (6.) That the supposed grievances were acts done by the defendant as provost marshal under the military orders of the State, in time of actual war, as more fully set forth in the plea. (7.) That the President, on the seventh of September, 1865, granted the defendant a full pardon and amnesty for all offences by him committed, arising from participation, direct or indirect, in the rebellion.

Subsequently the plaintiff filed a joinder to the demurrer, joined the issue tendered under the plea of not guilty, and filed a replication to the six special pleas as follows: (1.) That the action is not barred as alleged, and tendered an issue to the country. (2.) That the action is not barred as alleged in the second special plea, and also tendered an issue to the country. (3.) That the action is not barred as alleged in the third special plea, and tendered an issue to the country. (4.) Plaintiff filed a demurrer to the fourth, fifth, and sixth special pleas, and the defendant demurred to the replication of the plaintiff to the defendant's first special plea.

All the issues of law were determined by the court in favor of the plaintiff, that is, the court overruled the demurrer to the declaration, sustained the demurrers of the plaintiff to the fourth, fifth, and sixth special pleas of the defendant, and also overruled the demurrer of the defendant to the plaintiff's replication to the defendant's first special plea, which left nothing for trial but the issues of fact, which were submitted to a jury, and the jury found all the issues of fact in favor of the plaintiff, and that the defendant was guilty as alleged in the declaration, and assessed damages for the plaintiff in the sum of eight hundred and thirty-three dollars. Judgment was rendered for the plaintiff, and

the defendant excepted and removed the case into the Court of Appeals of the State, where the judgment was in all things affirmed. Whereupon the defendant sued out the present writ of error and removed the cause into this court for re-examination under the twenty-fifth section of the Judiciary Act.

Jurisdiction, it is claimed by the defendant, may be sustained in this case upon three grounds, which will be separately considered: (1.) Because the judge told the jury that, in computing the time of the statute of limitations, they ought to exclude from the computation all that period of time between the seventeenth of April, 1861, and the twenty-seventh of February, 1866, as that ruling, as he contends, was equivalent to a ruling that the recent acts passed by the State upon that subject are valid laws, which he denies. (2.) Because the court sustained the demurrer of the plaintiff to the fifth special plea of the defendant, setting up belligerent rights as a defence to the action. (3.) Because the court excluded the pardon granted to him by the President when offered in evidence under the plea of not guilty.

1. Two acts of limitation have recently been passed by the State legislature. By the first, which was passed on the first day of March, 1865, it was enacted that, in computing the time within which any civil suit, proceeding, or appeal, shall be barred by any statute of limitations, the period from the seventeenth day of April, 1861, to the date of the passage of the act, shall be excluded from such computation.* By a subsequent act passed on the twenty-seventh of February, 1866, it is provided that, in computing the time within which any civil suit, or proceeding in trespass or case, shall be barred by any statute of limitations in certain counties, including the county in which this suit was brought, the period from the first day of March, 1865, to the date of the passage of the act shall be excluded from such computation.†

Two prayers for instruction upon that subject were also presented by the defendant which were refused by the court,

* Sess. Acts of West Virginia, 1865, p. 72. † Ib. 1866, p. 92.

but it is not necessary to reproduce them, as the question involved is as fully raised by the instruction given to the jury as by the refusal to give those instructions.

Exception was taken by the defendant to the refusal to instruct and to the instruction given, but the grounds of the exception are not stated, nor are the reasons for the ruling given by the court. Such an exception is not sufficient to show that any one of the questions mentioned in the twenty-fifth section of the Judiciary Act was either raised or decided in the manner therein required to give this court jurisdiction under a writ of error to a State court. Unless both those things appear; that is, unless it appears that the question was raised and that it was decided in the way required, the jurisdiction does not attach, and it is clear that the exception is not sufficient to show that either occurred at the trial. Nothing further was done upon the subject in the court of original jurisdiction, but the cause was removed into the Court of Appeals of the State, where the judgment was affirmed. Appended to the judgment in that court is a certificate signed by the clerk and certified by the presiding justice of the court, that there was drawn in question the validity of the act of the State passed March, 1865, in relation to the statute of limitations, on the ground that it was repugnant to the Constitution of the United States, and that the decision of the highest court of law and equity in the State was in favor of its validity. Evidently that court had before it nothing but the exception taken and signed in the subordinate court, which is clearly insufficient to raise such a question or to show that it was decided in a way to give this court jurisdiction in such a case. Undoubtedly such a certificate is entitled to much weight, as showing that the question was decided by the court which gives it, and in the manner required to give jurisdiction, but it is not conclusive to show that the question was raised in the case, as the latter question may depend upon the construction of the pleadings, or, as in this case, upon the proper construction of the language of the bill of exceptions.

Necessary implication, it is said, will suffice, which may

be granted, but it can hardly be said in this case that it must necessarily be implied that the judge instructed the jury that the State statute was consistent with the Federal Constitution. What he did tell the jury was that a certain period of time should be excluded from the computation in determining the issues of fact presented by the pleadings, whether the action was barred by the one or two years' limitations. Three years before that this court had decided that the period during which the courts of the State where the defendant resided were closed, by reason of the insurrection and rebellion, should not be deemed and taken as a part of such a limitation.*

Congress allowed one year from the date of the act to the time allowed for suing out writs of error and taking appeals in districts where the sessions of the courts had been suspended or interrupted by insurrection or rebellion, and this court decided that the act of Congress was a remedial, and not a restraining one, and applied the rule laid down in the prior case, that in computing the five years allowed for the purpose, the period for which the courts were closed by insurrection or rebellion, must be excluded from the computation.† Provision was also made by Congress that the time during which any person was beyond the reach of legal process, by reason of resistance to the execution of the laws, or the interruption of the ordinary course of judicial proceedings, shall not be deemed or taken as any part of the time limited by law for the commencement of any action, civil or criminal. Objection was taken to the validity of that provision, but this court unanimously held it to be constitutional.‡

Prior to these decisions, founded upon acts of Congress, this court had decided, as before remarked, that the period during which the courts were closed by the insurrection must be excluded from every such computation, and this

* Hanger *v.* Abbott, 6 Wallace, 534.

† 14 Stat. at Large, 545; The Protector, 9 Wallace, 687.

‡ 13 Stat. at Large, 123; Stewart *v.* Kahn, 11 Wallace, 500.

court has twice since that decided in the same way, every justice of the court concurring in the opinion.* Enemy creditors cannot prosecute their claims subsequent to the commencement of hostilities, as the rule is universal and peremptory that they are totally incapable of sustaining any action in the tribunals of the other belligerent. Absolute suspension of the right to sue and prohibition to exercise it exist during war, by the law of nations, but the restoration of peace removes the disability and opens the doors of the courts.

Tested by these considerations, this court is of the opinion that the judge of the State court may well have followed the decisions of this court in the instruction he gave to the jury without having intended to express any opinion as to the constitutionality of the State law, and that it does not appear with sufficient certainty that the supposed Federal question did arise in the case, or that it was decided in the manner required to give this court jurisdiction under a writ of error to a State court.

2. Next ground assumed is that the court erred in sustaining the demurrer of the plaintiff to the fifth special plea of the defendant, setting up belligerent rights as a defence to the action.

Unquestionably it does appear that the plaintiff demurred to that plea and that the court sustained the demurrer to the plea, but it nowhere appears that the court held the plea bad for the reason supposed by the defendant. On the contrary, the plea is very defectively drawn, and it may be that it was held bad for many other sufficient reasons, and the fact that the certificate filed by the chief justice makes no mention of this point justifies the conclusion that it was not decided by the court of last resort. Questions presented in a subordinate court are frequently waived in the appellate court, and it is plain law that questions not presented in the court of last resort do not give jurisdiction in a case like the one before the court. Such a question may be raised in a

* Levy *v.* Stewart, 11 Wallace, 249; Steinbach *v.* Stewart, Ib. 572.

bill of exceptions, but sufficient of the proceedings must be stated to show not only that it was raised, but that it was decided in the manner required to give the jurisdiction.

3. All that remains to be considered is the question respecting the pardon. By the bill of exceptions it appears that the defendant offered the pardon, both in mitigation of damages, and as a justification of the alleged wrongful acts, and it appears that the plaintiff objected to the introduction of the instrument and that the court sustained the objection, and that the pardon was excluded. Enough appears to show for what purpose the pardon was offered, but nothing appears to show upon what grounds it was rejected at the trial or that the question was ever examined or decided by the Court of Appeals. Five conditions are embodied in the pardon, but the record shows that the defendant complied with the first and fifth, and it does not show that he has ever violated any one of the others. No mention is made of that ruling in the certificate of the chief justice, nor is there anything in the record to show that the exception was presented to the Court of Appeals, unless that may be inferred from the fact that the Court of Appeals found that there was no error in the record and affirmed the judgment. Questions not decided in the State court, because not raised or presented by the complaining party, will not be re-examined in this court on a writ of error sued out under the twenty-fifth section of the Judiciary Act.* Such is the settled practice, and the act of Congress provides that it must appear that the question presented for decision in this court was raised in the State court, and that the decision of the State court was given as required by that section.† Repeated decisions have established that rule, and inasmuch as the point has been several times ruled at the present session, we forbear to extend the discussion.

DISMISSED FOR WANT OF JURISDICTION.

* Hamilton Co. *v.* Massachusetts, 6 Wallace, 636.

† Steines *v.* Franklin Co., *supra*, p. 15.

CAPERTON v. BALLARD.

To bring a case here under the 25th section of the Judiciary Act, on the ground that the provision of the Constitution which ordains that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," has been violated by a refusal of the highest State court to give proper effect to a judicial record of another State, it is necessary that it appear that the record have been authenticated in the mode prescribed by the act of May 26th, 1790, "to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated, so as to take effect in every other State."

ERROR to the Supreme Court of Appeals of Western Virginia; the case being thus:

The Constitution of the United States ordains "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," and also ordains that "the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

Congress in execution of this power thus given to it, by act of May 26th, 1790,* passed a statute prescribing the mode in which "the records and judicial proceedings of the courts of any State shall be authenticated, so as to take effect in every other State." This statute enacts:

"That the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form."

The act then proceeds:

"And the said records and judicial proceedings, *authenticated as aforesaid*, shall have such faith and credit given to them in every court within the United States, as they have by law or

* 1 Stat. at Large, 122.

usage in the courts of the State from whence the said records are or shall be taken."

In this state of the law one *William A.* Ballard, as administrator of William Ballard, deceased, brought suit against a certain Caperton, in the State Circuit Court of Monroe County, West Virginia—a county prior to about the 20th of June, 1863, of Virginia, but after that date a county of West Virginia—for a tortious seizure, sale, and destruction of the property of the intestate.* The letters of administration were issued to the plaintiff by the Circuit Court of Monroe County, on the 25th of April, 1866, after the suppression of the rebellion. In bar of the suit the defendant pleaded that on the 16th of February, 1863, letters had been duly granted by the County Court of the same county, on the same estate, to one *John C.* Ballard, who properly qualified as administrator. To this it was replied that the letters were granted by a court in rebellion, and void.

On the trial the plaintiff produced evidence to show that he was regularly appointed administrator by the Monroe County Circuit Court, on the 25th of April, 1866. The defendant, on the other hand, in order to sustain his plea, offered in evidence an order from the County Court of the same county, dated February 16th, 1863, reciting that administration of the estate of William Ballard, deceased, is granted to *John C.* Ballard, who had made oath, &c., and "that letters in due form are granted to him." This order, so far as the record shows, was certified in no other manner than by the teste of the clerk, one Lewis Callaway. There was not even a seal attached to the certificate. The defendant then offered evidence that he had paid to *this* administrator the net proceeds of the alleged tortious seizure and sale of the decedent's property, and he requested the court

* The defendant, in this case, was the same one as in the preceding case; and his acts were done, here as there, as provost marshal of the Confederate government. This case, accordingly, had certain points in common with the preceding case, but as those points had been already decided when the opinion in this one was given, the court only noticed now one point not presented by that case.

to charge that if the administration of the plaintiff's intestate had been granted to *John C.* Ballard by the County Court, composed of justices who held their commission under the authority of the Commonwealth of Virginia issued to them in 1860, such appointment was sufficient to authorize *him* to act as such administrator, and that there could be no other appointment subsequent thereto until the original appointment was set aside by a court of competent jurisdiction. The court refused so to charge, but on the contrary charged that if on the 16th of February, 1863, when the appointment of *John C.* Ballard was made by the Monroe County Court, that court was in rebellion against the government of the United States, and was composed of justices who were then engaged in giving aid and comfort to the rebellion by levying supplies, &c., its proceedings were void, and that their appointment to John C. Ballard gave no authority, and that it was not necessary to set aside an invalid order of such a court in order to give effect to the plaintiff's appointment, which was made by a competent tribunal.

Judgment having been given against the defendant, he took the case to the Supreme Court of Appeals of West Virginia, where the instruction was declared to have been proper and the judgment was affirmed.

The judgment was now brought here by the defendant, Caperton, on an assumption that he could properly bring it, on the case stated, under the 25th section of the Judiciary Act, quoted *supra*, pp. 5, 6.

Mr. J. Hubley Ashton (*with whom was Mr. B. Stanton*), having asked to have the writ of error dismissed for want of jurisdiction; *Messrs. Conway Robinson, R. T. Merrick, and Simeon Nash, argued contra, and in support of the jurisdiction*, that it existed under that clause of the Constitution which provides for giving effect in one State to the judicial proceedings of every other State, and that this constitutional provision had been disregarded, because the courts in West Virginia did not give proper effect to the letters granted in 1863 by the court of a county which at that time formed a

part of Virginia, but which, when the subsequent letters were granted, and this suit was tried, had become incorporated into West Virginia.*

Mr. Justice DAVIS delivered the opinion of the court.

This court has repeatedly declared that it is only under the 25th section of the Judiciary Act that it takes cognizance of error committed in the highest courts of a State. There must be a Federal question, within the terms of that section, to enable us to review the decision of a State tribunal. Is there such a question here?

It is argued that a constitutional provision has been disregarded, because the courts in West Virginia did not give proper effect to the letters granted in 1863 by the court of a county which at that time formed a part of Virginia, but which, when the subsequent letters were granted, and this suit was tried, had become incorporated into West Virginia.

It may be conceded that the decision on this subject could be reviewed, if the record showed a state of case in which this provision of the Constitution was applicable, but in the absence of this we cannot consider the point, whatever may be the hardship of this particular suit. The same constitutional provision which ordains "that full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," also ordains that "the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof." Congress acted on this subject, and on the 26th of May, 1790, prescribed the manner in which judicial records, and the proceedings of the courts of any State shall be authenticated, so as to be considered proved and admitted in any other court in the United States. This act declares further that the said records and judicial proceedings, *authenticated as aforesaid*, shall have such faith and credit given to them in every other court within the United

* See Virginia *v.* West Virginia, 11 Wallace, 39, for the dates connected with the formation of the new State of West Virginia.

States as they have by law, or usage, in the courts of the State from whence the said records are or shall be taken. The mode of authentication prescribed by the law requires the attestation of the clerk with his seal attached, and the certificate of the judge that the attestation was in due form. If a judicial proceeding has the effect of record evidence in the courts of the State from which it is taken, it has the same effect in the courts of every other State. To receive this conclusive effect, however, it must not only be pleaded but proved in conformity with the act of Congress on the subject. Unless this is done there is nothing for this court to act upon.

It is only through the instrumentality of the statute that the clause of the Constitution, which the plaintiff in error relies on, can be invoked for his protection. Legislation was required to make the constitutional provision effective, and this having been done by a general law, it requires no argument to show that a party cannot claim that a right under the Constitution and law has been denied him by a State court, unless he has used the means for his protection which the statute directs.

This the plaintiff in error failed to do. He relied for his justification upon letters of administration granted in 1863 by the County Court of Monroe County, while it was a part of Virginia, but did not furnish the legal evidence required to establish the existence of the record. It would seem that in Virginia, the tribunals intrusted with probate business were designated by the name of County Courts, while in West Virginia the Circuit Courts of each county were empowered to grant letters of administration. Doubtless the County Court records of Monroe County were transferred to the custody of the clerk of the Circuit Court, after West Virginia was admitted into the Union. This is fairly inferable from the fact that the only evidence offered of the grant of letters in 1863 was the transcript of the records of the County Court, under the hand of Lewis Callaway, styling himself clerk of the Monroe County Circuit Court.

This proof, if received by the State court as sufficient to

establish the record of a judicial proceeding in Monroe County, while a part of Virginia, lacked the formalities required by the act of Congress. The seal of the County Court was wanting, as well as the certificate of the presiding magistrates. It will not do to say that they could not be procured on account of the anomalous condition in which the records of the county were placed by the change of jurisdiction. There is nothing to show that any effort was made to supply the omission. In fact the case does not seem to have been tried in reference to the conclusive effect of the judgments of one State in the courts of another. It rather seems to have been tried on the theory that the judgment was void because the court granting the letters was disloyal. Indeed, neither in the pleading nor proof is the particular provision of the Constitution on this subject relied on. It is certainly not set up in words, nor from the pleading itself could an inference even be drawn that Monroe County in 1866 was not in the same State as in 1863. It is only through the history of the country that we ascertain this fact.

It may be that the attention of the court below was called to the conclusive effect of judicial proceedings under the Constitution and laws of Congress, but if so, there is nothing in the record to show it. It is, doubtless, unfortunate that the plaintiff in error did not in proper terms set up the right he now claims, and conform his proof to the requirements of the law. If he had done so, and the decision had been adverse to him, he could have had it reviewed here, although the question would still arise whether the constitutional provision concerning the effect of judgments of different States would be applicable on account of the transfer of Monroe County to the jurisdiction of West Virginia. As the case is, the Federal question is not presented at all, and the writ of error must be

DISMISSED FOR WANT OF JURISDICTION.

GIBSON *v.* WARDEN.

1. Under the statutes of Ohio authorizing chattel mortgages, a seal is not necessary to their validity.
2. Where one partner, R. M., affixed his name and seal to an instrument whose *testatum* set forth that "R. M. & Sons, by R. M., one of the firm, had thereto set their hands and seals," the instrument may be regarded as the deed of all the partners on proof that prior to the execution the others had authorized R. M. to execute the instrument, and after execution, with full knowledge acquiesced in what he had done.
3. The two clauses of the 35th section of the Bankrupt Act, differ mainly in their application to two different classes of recipients of the bankrupt's property or means, that is to say, the first clause is limited to a creditor, a person having a claim against the bankrupt, or who is under any liability for him, and who receives money or property by way of preference; and the second clause applies to the purchase of property of the bankrupt by any person who has no claim against him, and is under no liability for him.

APPEAL from a decree of the Circuit Court for the Southern District of Ohio, in a bill in equity filed by Warden & Ludlow, assignees of Moore & Co., against David Gibson, and against Gaylord, Son & Co., and other defendants. The matter in issue was the validity, in view of the bankrupt law, of two chattel mortgages, given by the bankrupt, one to the said Gibson, and the other to the said Gaylord, Son & Co. The mortgages were asserted to be frauds on the bankrupt law, as coming within either the first clause or the second of the 35th section of the Bankrupt Act. The first clause reads thus:

"If any person being insolvent, or in contemplation of insolvency, within four months before the filing of the petition by or against him, with a view to give a preference to any creditor or person having a claim against him, or who is under any liability for him, procures any part of his property to be attached, sequestered, or seized on execution, or makes any payment, pledge, assignment, transfer, or conveyance of any part of his property, either directly or indirectly, absolutely or conditionally, the person receiving such payment, assignment, transfer, or conveyance, or to be benefited thereby or by such attach-

Statement of the case in the opinion.

ment, having reasonable cause to believe such person is insolvent, and that such attachment, payment, pledge, 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."

The second clause read thus:

"And if any person being insolvent, or in contemplation of insolvency or bankruptcy, within six months before the filing of the petition by or against him, makes any payment, sale, assignment, transfer, conveyance, or other disposition of any part of his property to any person who then has reasonable cause to believe him to be insolvent, or to be acting in contemplation of insolvency, and that such payment, sale, assignment, transfer, or other conveyance is made with a view to prevent his property from coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or defeat the object of, or in any way impair, hinder, impede, or delay the operation and effect of, or to evade any of the provisions of the act, the sale, assignment, transfer, or conveyance shall be void, and the assignee may recover the property, or the value thereof, as assets of the bankrupt. And if such sale, assignment, transfer, or conveyance is not made in the usual and ordinary course of business of the debtor, the fact shall be *primâ facie* evidence of fraud."

The court below decreed that the mortgages were invalid, and secured no priority, and that the defendants stood on the footing of general creditors. Gibson appealed, as did Gaylord & Sons; the other defendants did not appeal.

Mr. Aaron F. Perry, for the appellant, Gibson; Mr. E. M. Johnson, for the appellants, Gaylord & Son; no counsel for the appellees.

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

This is an appeal from the decree of the Circuit Court for the Southern District of Ohio.

The appellees are the assignees in bankruptcy of Robert

Moore & Sons, and filed this bill to compel such of the defendants as claimed to have liens upon certain effects of the bankrupt firm to have their respective rights touching the property in question ascertained and adjusted by the decree of the court. The decree rendered, disposed of the several cases litigated under the bill. All the defendants acquiesced in the decisions made, except David Gibson and Gaylord, Son & Co. They have brought the decree of the Circuit Court, so far as it affects them, here for review by this appeal. Our examination of the case will be confined to their respective claims.

On the 8th of March, 1868, Moore & Sons executed to Gibson a chattel mortgage. It was conditioned that if the mortgagors should pay to Gibson their promissory note to him of the same date with the mortgage, for $6000, payable sixty days from date at the Central National Bank of Cincinnati, the instrument should be void. The testatum clause set forth that Robert Moore & Sons, by Robert Moore, one of the firm, had thereto set their hands and seals. Robert Moore alone affixed his name and seal to the document. The amount claimed by Gibson under the mortgage was indorsed and sworn to by him, and the instrument was filed with the proper officer on the 18th of the same month. On the 21st of that month Moore & Co. failed in business, and made a general assignment of all their effects for the benefit of their creditors. On the 15th of September, 1868, a petition in bankruptcy was filed against them, under which they were subsequently adjudged bankrupts, and the appellees were appointed their assignees in that proceeding.

The note mentioned in the mortgage was indorsed by Gibson for the accommodation of the makers. They procured it to be discounted, and the proceeds went to their benefit. Gibson was compelled to pay it. The amount thus paid, with interest, constitutes his claim under the mortgage.

No statute of Ohio directs how a chattel mortgage shall be executed. The statutes regulating such instruments are silent upon the subject. Our attention has been called to

no local adjudication touching the point. In an elementary work prepared by an eminent jurist of that State the form given purports a sealed instrument, and has a seal affixed to it.*

Such instruments in Ohio are usually under seal. But the term *mortgage* used in the statutes does not import or imply that a seal is necessary. In regard to chattels, it is a *mortgage*, and not a *deed of mortgage*, that is required. The distinction between real and personal property and between the means which are necessary to affect them is well settled. Personal property, according to the common law, could always be transferred or incumbered without the use of a deed for that purpose. A seal has never been held necessary to the validity of a bill of sale. A chattel mortgage is only a bill of sale with a defeasance incorporated in it. The presence or absence of that formality is wholly immaterial. In the case before us it may be regarded as surplusage.†

There is another view of the subject that must not be overlooked. There is proof in the record that the partners, other than Robert Moore, authorized him in advance to execute the mortgage, and after its execution, with full knowledge, acquiesced in what he had done. If the law had required a seal these circumstances would have made the instrument the deed of the firm—as much so as if all the members had been personally present and assented to its execution in that form.‡ This is not inconsistent with the principle, which seems to be too deeprooted in the law to be wholly eradicated by judicial authority, that a sealed instrument executed in the name of a firm by one of its members, without the proper authority, where a seal is necessary, is the deed of such member only, and that he alone is bound by it.

* Swan's Treatise, 692.

† Milton et al. *v.* Mosher, 7 Metcalf, 244; Tapley *v.* Butterfield, 1 Id. 515; Despatch Line *v.* Bellamy Manufacturing Co., 12 New Hampshire, 234.

‡ Story on Partnership, p. 212, § 122; Purviance et al. *v.* Sutherland, 2 Ohio State, 478; Cady *v.* Shepherd, 11 Pickering, 405; Gram *v.* Seaton, 1 Hall, 262.

Opinion of the court.

The statute provides that every mortgage of goods and chattels, where there is no change in the possession of the things mortgaged, "shall be absolutely void," as against subsequent purchasers and mortgagees in good faith, "unless the mortgage, or a true copy thereof, shall be forthwith deposited" with the proper officer. The Supreme Court of the State has held that the omission to deposit *forthwith*, as directed, does not avoid the mortgage *in toto*, but that, whenever deposited, it becomes effective from that time.* That court has also held that actual notice to a subsequent mortgagee, before his mortgage is taken, is conclusive evidence of *mala fides* on his part.†

In cases like this the assignees stand in the place of the bankrupt; his rights are their rights; and theirs, like the liens of judgments at law, are subordinate to all the prior liens, legal and equitable, upon the property in question.‡

This mortgage was deposited three days less than six months before the filing of the petition in bankruptcy.

This raises a question under the bankrupt statute which it is necessary to consider.

The first clause of the 35th section avoids certain acts of the bankrupt touching his effects, if done within four months before the filing of the petition in bankruptcy. The second clause imposes the like result, if the transaction be within six months of that time.

To bring a case within the first clause the act must have been done by a person insolvent, or in contemplation of insolvency, with a view to give a preference to a creditor or person having a claim against, or who is under a liability for, the bankrupt, and such person must have reason to believe that the transaction is in fraud of the statute.

The category of the second clause contains the same re-

* Wilson *v.* Leslie, 20 Ohio, 161.

† Kendall & Co. *v.* Mason, 7 Ohio State, 199.

‡ Lempriere *v.* Pasley, 2 Term, 485; Belcher *v.* Oldfield, 6 Bingham's New Cases, 102; Doremus *v.* Walker, 8 Alabama, 194; Peck *v.* Jenness, 7 Howard, 612; Fletcher *v.* Morey, 2 Story, 555; Archbold on Bankruptcy, 314.

quirement of insolvency, or contemplation of insolvency, on the part of the person doing the act. The recipient may be any one who has reason to believe him insolvent or acting in contemplation of insolvency, and that the act was done by him to prevent the property from coming into the hands of his assignee in bankruptcy, and from being distributed under the bankrupt law.

Upon comparing the two clauses carefully together we are satisfied that the first clause was intended to refer to the past and the second to the present. The language employed in the first clause imports clearly that the consideration must be one growing out of a former transaction, and that the recipient must stand in the relation thus created to the other party. It is equally clear that the second clause, enlightened by this construction of the first one, must be limited to cases where the transaction in question was original and complete in itself at the time it occurred, and had no reference for its consideration to anything between the parties which had gone before it. It is only by this construction that the two clauses can be made to harmonize and full and distinct effect be given to each. Any other construction would make them cover the same ground and obliterate everything by which one is differenced from the other, except the limitation of time which they respectively prescribe. It is not to be supposed that such was the intention of the law-making power. This view of the subject was taken by the Circuit Court for the District of Missouri, and subsequently there by one of the justices of this court. We can see no answer to the conclusion at which they arrived.* According to this construction the mortgage to Gibson falls within the second category, as to the time within which its validity could be challenged. Is it therefore void? To this there is a conclusive answer in the negative.

The statute of Ohio deprived the mortgage of effect until "deposited"—as to *creditors*, *subsequent purchasers*, *and mortgagees in good faith*. These assignees are neither. As be-

* Bean *v.* Brookmire, 10 American Law Register, N. S. 181.

tween the mortgagor and the mortgagee and subsequent mortgagees and purchasers with notice, the mortgage was valid and took effect from the time of its delivery to Gibson, which was the 8th of March, more than six months before the filing of the petition in bankruptcy.

The mortgaged premises have been converted into money. But this does not affect the rights of the parties. The lien of the mortgage followed the fund into the hands of the assignees, and binds it there in all respects as it bound, before conversion, the property which the fund represents.*

Gaylord, Son & Co. indorsed for Moore & Sons to the extent of $10,000, as early as May, 1867, which was repeated from time to time. In May, 1868, Moore & Sons applied to them for a definite arrangement for indorsements to the extent of $20,000, to be secured by a chattel mortgage. After inquiry, they agreed to indorse for $15,000, and possibly $20,000, their liability to be secured as proposed. In pursuance of this arrangement, on the 23d of January, 1868, they indorsed for $5000, and afterwards made other indorsements, amounting in all to $17,000. The first mortgage was made on the 27th of January, 1868. It was held by Gaylord, Son & Co., and not filed. Later—probably in March—Moore & Sons pressed for further indorsements, which were refused. Shortly afterwards Moore & Sons advised Gaylord that judgments were about to be taken against them, but insisted they were solvent. The mortgage was shown to counsel, who objected to it, but upon what ground does not appear. He advised that another should be taken. This was done on the 18th of March, and the mortgage was deposited on the same day with the proper officer, but some hours later than the deposit of the mortgage to Gibson. It appears by the face of the instrument that the signature and seal of the firm were affixed by one of the firm in the absence of the others. There was the same prior authority and subsequent acquiescence as in the case of the Gibson mortgage. It recited that Gaylord, Son & Co. were liable

* Astor *v.* Miller, 2 Paige, §§ 68-78; Sweet *v.* Jacocks, 6 Id. 355.

as indorsers and otherwise for certain debts of Moore & Sons; that Moore & Sons were indebted to Gaylord, Son & Co.; and that Moore & Sons were desirous to renew their paper with the indorsement of Gaylord, Son & Co., and was conditioned that if Moore & Sons should save Gaylord, Son & Co. from loss by reason of said indorsements and debt—Gaylord, Son & Co. agreeing to renew for eighteen months—then the mortgage was to be void.

After the failure of Moore & Sons, Gaylord, Son & Co. took up notes which they had indorsed for the mortgagors, amounting to $17,000. The mortgagees also held a note of the mortgagors for iron sold by the former to the latter, amounting to $400, making the aggregate of the indebtedness of Moore & Sons to Gaylord, Son & Co., exclusive of interest, $17,400.

We hold this mortgage also to be valid under the laws of Ohio. The views we have expressed as to the Gibson mortgage, considered with reference to the statutes of Ohio, apply equally to the one here under consideration, and render it needless to say anything further upon the subject.

Being founded upon a past consideration, it falls within the first clause of the 35th section of the bankrupt law, which limits the right of attack upon such instruments to those executed within four months prior to the filing of the petition in bankruptcy. In respect to this statute also it must, therefore, be held valid. It was upon the same property as the mortgage to Gibson. Like that mortgage, its force and effect reach and bind the fund into which the property has been converted.

It was contended with great ability by the counsel of Gaylord, Son & Co. that as regards the limitations of time under the 35th section of the bankrupt law this mortgage must be regarded as if it had been executed at the date of the prior one for which it was substituted, and numerous authorities were cited to sustain the proposition. The view we have taken of the case has rendered it unnecessary to consider this point.

The counsel representing both mortgages, in the argument in this court, advised us that we need not decide the question of priority as between the two instruments, they having made an agreement which fixes their respective rights. We have not, therefore, considered the question. If there be any surplus after satisfying these claims it must be distributed to the general creditors.

So much of the decree of the Circuit Court, as is brought before us by this appeal, is REVERSED, and the cause will be remanded to that court, with directions to enter a decree

IN CONFORMITY TO THIS OPINION.

HOOK *v.* PAYNE.

1. In a suit in the Circuit Court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor.
2. If such persons do not appear before the master no decree can be made for or against them, because they would not be bound thereby.
3. If they should appear and claim an interest, if there are controverted matters between them and the administrator outside of the mere accounting to be made by him, this can only be decided on proper pleadings and regular hearing by the court.
4. A bill which seeks to set aside a fraudulent receipt obtained by an administrator from one distributee, and to recover the amount coming to that distributee, is not a suit in which all other persons interested in the estate can be heard unless they are made parties, or make themselves parties to the suit in some appropriate mode.
5. In a State where the law allows ten per cent. per annum interest, a decree will not be reversed, because it allows against a fraudulent administrator eight per cent. interest with annual rests.

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

Ann Payne, a citizen of Virginia, filed a bill in chancery in the Circuit Court of the United States for Missouri, against

Statement of the case.

Zadok Hook and others, citizens of the State of Missouri. Hook had acted as administrator of the estate of one Curtis, and the other defendants were sureties on his official bond, and the object of the bill was to assert the right of the complainant, as one of the heirs of Curtis, to an account and a distribution of the assets in Hook's hands. But she had received of Hook a certain sum of money, in consideration of which she had signed a paper which might be called either a release or assignment to Hook of all her interest in the estate of which he was administrator, and she charged in her bill that this instrument had been procured by fraud, and prayed to have it set aside and held for naught. She also charged that certain settlements made by Hook with the County Court, which had probate jurisdiction of such matters, were fraudulent, and she prayed that they be restated, and she alleged that she was entitled to one-eighth part of the estate of the said Curtis on final distribution, and prayed that on a fair statement of the administrator's account a decree be rendered in her favor for the one-eighth of the sum found in his hands subject to distribution.

Susan Curtis and Mary Gwinn, each of whom held a like interest with Ann Payne in the estate, had signed the same paper, and each of them brought a similar suit to that brought by Ann Payne, in the same court, and though the bills in these cases were not in the record, it was conceded that except in the name of the complainants they were identical with that of Ann Payne. These suits were consolidated before answer, by order of the court, and were treated in the subsequent proceedings as one case.

The defendants answered, and the court made an interlocutory decree setting aside the release given by the complainants and the settlements made by Hook with the County Court, and appointed a master to state an account with Hook as administrator, and he was directed to inquire what other persons were interested in the estate besides the complainants, and to report what payments, if any, had been made to them, and what was due to them, respectively, at the date of the report.

Statement of the case.

The report of the master seemed, as this court considered, to have been based upon diligent inquiry and accurate information, and if the principles on which it is founded were sound, there seemed to be no reason to question the facts on which it proceeded.

It charged the administrator with interest on all that came to his hands at the rate of 10 per cent. per annum, with annual rests. It reported the names of all who were entitled to distribution, which the master believed he had correctly ascertained. He said that some of these appeared before him, either in person or by attorney, and claimed their rights in the estate, while others did not, and he gave the names of those who did and of those who did not. He reported that, as to some who appeared, they had given releases similar to those given by the complainants, and that, though this was shown, he disregarded them, and allowed their interest as though the releases were void, and ascertained and reported what was due to each distributee, whether appearing or not. The final decree modified the report by substituting 8 per cent. per annum as the rate of interest, and confirmed it in all other respects, and made a final decree distributing the estate according to the report, and ordering Hook to pay to each person the specific sum found due, with interest from the date of the report. On the subject of the annual rests, and as a ground therefor, it appeared that nearly all the bonds and notes belonging to the estate bore 10 per cent. interest, which was collected by Hook, who failed to charge himself with the interest received; that he had used the money of the estate in trade and speculation; buying and selling gold, discounting paper, and lending it at full interest. In answering the bill, too, and in giving testimony, he dealt mostly in generalities, when positive information was called for. He could not tell when he made collections, nor in what amounts; "paid no particular attention;" lent the money "from time to time;" but to whom he lent it, in what amounts, when the money was collected, and how long he kept it on hand, or when he re-lent it, he did not state, but said he had kept no accounts by which he could answer

these questions. He admitted that he had deposited the trust money with certain bankers named, but he did not produce his deposit books, because, as he said, his private funds were mixed up in the accounts; to what amount he could not remember. His loans and deposits of the estate's money were in his own name, excepting one loan. On the other hand he attempted to prove by sundry witnesses that in their opinion money could not have been lent at certain times during the war at all.

The case coming here many objections were taken to the decree, among them two, much insisted on:

1st. That the court had disposed of the rights of parties who were in no kind of way actually or in contemplation of law before it.

2d. That the rate of interest was too high, and that the case was not one for rests.

Mr. J. B. Henderson, for the appellants; Messrs. Glover and Shepley, contra.

Mr. Justice MILLER delivered the opinion of the court.

1. We are of opinion that all that part of the decree which attempts to settle the rights of the parties, who were neither plaintiffs nor defendants in the original suit, must be reversed.

We do not propose, in this case, to lay down any precise rule on the subject of adjusting administrators' accounts in the Federal courts, or how far certain persons, not made parties in the original suit, or incapable of being made parties by reason of their citizenship, may or may not come in before the master, on a general accounting, and protect their rights; nor do we intend to go into that question.

In the case before us persons representing a considerable interest in value have not appeared at all. As to them we hold it to be clear that they cannot be bound by the decree rendered in this case, and they have an undoubted right to bring such a suit or institute such other proceeding as the law authorizes for the assertion of their rights, notwithstanding this decree.

It follows from this also, that as they are not bound by it, so Hook, the administrator, cannot be bound by a decree which does not bind them as to any rights to be controverted between them and him.

It is also equally clear that if Hook had paid money to any other parties who did appear before the master, and had made a purchase of the interest of these parties in the estate, that purchase could not be set aside and held for nought without such adversary proceedings between them and Hook as would give him a fair hearing on that subject. They should have filed such a bill as the present plaintiffs did, and the question of the fraud should have been heard and decided by the court. It by no means follows that because the court, on full hearing, set aside his purchase of Ann Payne, that the master could without pleading or trial assume that all other purchases were equally fraudulent.

Another reason for this may be found in the nature of the original bills. Although there are three of them there is no attempt to make the other distributees parties, nor do they make each other parties to their separate bills. They are each framed on the basis of setting aside the release executed by them, in which no other distributee had any interest, and each claims for herself the one-eighth to which she is entitled, without any prayer for general accounting or general distribution. The consolidation then of these cases does not change this feature of the relief sought, and the ground of that relief, namely, the fraud in obtaining the release.

These bills are obviously not framed on any theory of a final settlement of the estate and distribution among all entitled. They are merely brought to obtain for each plaintiff the special relief from the fraudulent release and the specific sum of money due to each from Hook, and on this theory it is that counsel brought three separate suits instead of one.

For these reasons we are of opinion that the only relief to be administered in this case is that in favor of the three complainants.

2. It is strongly urged upon us that the account stated against the administrator is too hard to be justified, in refer-

ence to the interests, both as regards the rates charged and the annual rests.

The laws of Missouri allow a conventional rate of interest not exceeding ten per cent. The master stated the account on that basis, but the court below, on mature consideration, reduced the rate to eight per cent., and we are not disposed to disturb that decision. The *annual* rest is one which can hardly be sustained in a case of honest administration unless it be shown that the amount so ascertained was actually received. But there are circumstances in this case which seem to justify the decree of the court so far as to disincline us to interfere with it on that point. The administrator is shown to have mixed the funds with his own, and to have used them for puposes of speculation for his own profit. The assets for which he was held accountable were almost exclusively notes due the intestate, bearing ten per cent. interest and collected by the administrator. In his settlement with the County Court he rendered no account of the interest received on these notes, nor any interest account for the use of the money after it came to his hands. Nor of the profits made by him by its use in his own business transactions. He is shown to have made private arrangements to settle separately with the distributees or to buy out their interests, and these have been shown to be accompanied with fraud and without any fair statement of the condition of the estate, and he kept no separate account of the trust funds in his hands. Under such circumstances we are of opinion that he should be held to account for all that he might have made by the use of the money, and as the master and the Circuit judges have held that he might have invested and reinvested annually, at eight per cent., we will not disturb their finding.

The decree in favor of Ann Payne, and Susan Curtis, and Mary Gwinn, is AFFIRMED, and the decrees in favor of the other parties are REVERSED, and the case remanded to the Circuit Court with directions to dismiss the case as to them without prejudice. And that each party pay their own costs of appeal.

THE VAUGHAN AND TELEGRAPH.

1. Where exceptions of form are taken on a libel in admiralty in the District Court, but are not found in the record of the appeals from the District to the Circuit Court, or from the Circuit Court to this one, and do not appear to have been brought to the attention of the Circuit Court, or acted on in any manner by it, they must be held in this court to have been waived.
2. A bill of lading indorsed and sent to the consignees, who make, on the receipt of it, advances on the cargo, gives the consignees sufficient title to maintain a libel in admiralty against a vessel by whose tortious collision with the vessel in which the cargo consigned to them was coming, the cargo has been wrecked and lost.
3. A cargo was shipped from Canada to New York, October 7th, 1864, when gold was 101 per cent. above legal tender notes of the United States. The cargo was wrecked soon after, on the Hudson. On libel in the admiralty at New York, and on appeal from the District Court, the Circuit Court, on the 26th March, 1870, when $100 gold was only 12 per cent. above notes, gave the libellants a decree for the value in gold of the cargo on the day and at the place of shipment, converting that value, at the same time, into legal tender notes, at the rate at which such notes stood as compared with gold on the day of shipment; that is to say, when gold was 101 per cent. above legal tender notes, or, in other words, when it required $201 legal tender notes to buy $100 of gold. On appeal to this court (the difference between gold and notes having now sunk to about 9 per cent.), *held* that this decree was right.

ON the 7th of October, 1864, O. & J. Lynch, of St. Timothy, a place (near Montreal) in Canada East, shipped a cargo of barley on board a canal-boat which was about to sail through different canals and waters into the upper part of the Hudson and go thence to New York. The Lynches were correspondents of Gordon, Bruce & McAuliffe, commission merchants of New York, and this barley was in fact consigned to them.

The cargo was worth on that day, at St. Timothy's, $2436 *in gold*, or at the then rate of depreciation, about $4896.30 in legal tender notes of the United States; at that time so much below the value of gold as that it required $2.01 of them to buy $1 of gold. The Lynches received a bill of lading

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making the barley deliverable "on the order of O. & J. Lynch, or to their assigns," which bills they thus indorsed:

"Deliver to the order of Gordon, Bruce & McAuliffe.

"O. & J. LYNCH."

Thus indorsed, the bills were forwarded to Gordon, Bruce & McAuliffe, at New York, who on receipt of them advanced the premium for insurance, the consignors being then indebted to G., B. & McA. for some advances previously made.

The canal-boat arrived safely at Troy, on the Hudson, where she was taken in tow with other boats—she on the port side—by the steamer Mary Vaughan. The steamer went down the river with her tow, and on the night of the 26th October, a clear, starlight night, in calm weather, the tide near its change, and therefore feeble—when in that broad, straight, deep reach of the Hudson, where Butter Hill announces the presence of the Highlands—she saw another steamer, the Telegraph, coming up the river, she also with a tow, and the lights of the two steamers being visible to each other for more than a mile. No intervening objects interfering with the safe and easy transit, nothing but the grossest negligence, or, what would seem more probable, a determination by each boat that the other should give way to her, could have brought them together; nevertheless they did come together, and with such force that the canal-boat was wrecked, her cargo sunk mid-river; the crew just escaping with their lives.

Hereupon Gordon, Bruce & McAuliffe, alleging themselves to be the consignees of the barley, libelled in one libel *both* the steamers in the District Court at New York. The libel alleged that the Mary Vaughan moving down the river Hudson with her tow (describing it), the canal-boat being securely fastened on the port side of the steamer, and propelled, governed, and controlled in all respects by her movements, on the morning of the 26th October, 1864, encountered in the Highlands the Telegraph, moving up with her tow (also described); that a barge on the port side of the Telegraph, in all respects propelled, governed, and con-

trolled by the Telegraph, "came in collision with and struck the canal-boat near her bow with great violence, parting the fasts that held her to the Vaughan, staving in her bow, and causing so much damage and injury to her that in about fifteen minutes she went down in water from 100 to 200 feet deep, . . . and that the loss was caused by the negligence, want of skill, and improper conduct of the persons navigating the Mary Vaughan, or by the negligence, want of skill, and improper conduct of the persons navigating the Telegraph, or by their joint negligence, fault, and improper conduct, and not by the fault, negligence, or improper conduct of the persons on board the canal-boat."

The case coming on to be heard in the District Court exception was taken there by the Vaughan—

1st. That the statement of facts upon which the libellants relied was not sufficiently full, by reason of the omission of essential particulars, such as the courses of the respective steamers one to that of the other, their speed, the direction of the wind, the flow of the tide; and again, by the omission to state in what manner the Vaughan was in fault or improperly managed; that it did not state any fault or negligence on the part of the steamer, nor the acts of commission or omission, upon which the imputation of fault might be founded; all which were required by the practice in admiralty to be stated in plain allegations, to apprise the claimant of the ground of fact upon which relief was sought, that he might admit or take issue thereon, or allege matters in avoidance thereof.

2d. That the libellants could not join in the same libel both steamers, nor maintain a joint libel against them; this exception being taken by both steamers.

Both these exceptions of form were overruled and a decree entered against both steamers, charging each with the whole loss of the cargo; fixed at $2924, this value in gold, as already stated, on the day and at the place of shipment. But though the value in gold of the cargo was thus plainly made the basis of the decree in the District Court at New York, yet the decree was not by its terms made payable in

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gold, thus apparently leaving it payable in legal tender notes, if they were constitutional. Appeals were taken to the Circuit Court, nothing being contained in the appeals about the exceptions of form taken in the District Court, nor anything said in the arguments there on those points. The cases were considered on their merits, and on an objection that Gordon, Bruce & McAuliffe showed no sufficient interest in the cargo to sue; and especially on an objection to the entry of the judgment payable in legal tender notes instead of gold or its value in legal tenders.

The Circuit Court, equally with the District Court, held both steamers liable; but reversed the decree because, as *it* held, the same ought, in order to give full indemnity to the libellants, to have been for the value in legal tender notes ($4896.30), of the $2436 *gold*, which in gold the cargo was worth. The decree of the Circuit Court was accordingly entered March 26th, 1870, for the $4896.30, with interest added to the date of its entry, in all $6515.51, with costs. One dollar of gold was, at the date of this decree, worth $1.12 in legal tenders.*

An appeal was now taken to this court.

The case coming here, *Mr. C. Van Santvoord, for the owners of the Vaughan, and Mr. F. J. Fithian, for the Telegraph*, pressed, the one or the other, the objections of form which had been urged in the District Court, though not put before the Circuit Court. They contended then, in opposition to each other, on the merits; the former that the fault had been with the Telegraph, the latter that it had been with the Vaughan. The point was raised and argued in the interest of both steamers, that Gordon, Bruce & McAuliffe had no sufficient interest to sue; that in legal effect the advance of the premium of insurance at the time of the delivery of the bill of lading with the direction indorsed, to be forwarded, and not

* At the time this case was argued in this court, January 24th, 1872, the difference between gold and legal tender notes had sunk to about 9 p. c., and on the day when the judgment was given, March 4th, 1872, the difference was about 10 p. c.

as security for the advance, was an advance on advice of the shipment, as in *Sargent* v. *Morris*,* for which, as was held in that case, the libellants would have had a lien if the goods had been received by them, but which could have no effect to transfer the property; that the libellants not having the legal title or any property or right of possession at time of loss, and the suit being without the scope of their authority as consignees or agents, for the purpose of sale on arrival in New York, the case did not fall within the rule which allows a consignee or agent for an absent owner to institute a suit for a purpose within the scope of his authority.

But the point most pressed perhaps was the mode in which the Circuit Court had fixed the damages, in regard to which it was said by these counsel, that the Circuit Court should have affirmed the decree of the District Court in its award of damages based upon the value of the barley lost, at the time and place of shipment, St. Timothy, Canada East, in specie or Canadian currency, on a specie basis, in dollars and cents, equivalent to money of that denomination in gold or in the coinage of the United States, with interest from the date of the shipment; or at the most, that the Circuit Court should have decreed the payment in gold, or in the coinage of the United States, of the value at the time and place of shipment, in the currency prevalent there, specie or paper, on a specie basis, with interest. The damages decreed by the District Court, it was said, if short of full indemnity, were so only for the reason that the claimants, under the Legal Tender Act, might pay the decree in legal tender notes. But that a decree for the payment in gold, or coin of the United States equivalent to the specie value at the time of shipment in Canada, with interest from the time of shipment, would be a full indemnity to the Canadian shipper, whose consignees the libellants claim to be. The cases in this court recognizing the existence of two currencies, one specie or gold, and the other paper, and adjudging payment in gold or not, as the justice of the case demands,

* 3 Barnewall and Alderson, 277.

were, it was said, authorities to the competency of the court to make such assessment and decree;* the Legal Tender Acts not having been intended to change the legal standard or measure of value, or rule of damages in judicial proceedings.

Mr. Samuel E. Lyons, contra:

The exceptions to form having been abandoned in the appeal to the Circuit Court cannot be renewed.

The case on the merits is clear.

The libellants were consignees, and as such had a right to maintain the action for the injury to the cargo. In *Fitzhugh* v. *Wiman*,† Selden, J., says:

"The consignee of property is in law presumed to be the owner, and if lost *in transitu* or diverted from its destination, suit may be brought, either in his name or that of the real owner."

The decision of the Circuit Court in giving the libellants *indemnity* for their loss was correct. The rule under which damages in such a case are to be ascertained is stated with exactness in *Smith* v. *Griffith*,‡ as follows:

"The damages to which the plaintiff is entitled, if any, should afford an adequate *indemnity* for the loss sustained at the time the injury happened. The fair test of its value, assuming there is no defect in the quality of the article, and consequently of the loss to the owner, if it has been destroyed, is the price at that time in the market."

In this case the property destroyed had a market price, fixed by daily transactions, and it is this price at its exact value on the day of the destruction, in the forum where the judgment is rendered, that is allowed by the decree of the Circuit Court. This gives the libellants indemnity and no more, while the rule contended for by the appellants would give them a fraction less than one-half the sum of the actual cost of the barley.

* Bronson *v.* Rodes, 7 Wallace, 229; Butler *v.* Horwitz, Ib. 258.

† 5 Selden, 562.

‡ 3 Hill, New York, 366, 337.

Recapitulation of the case in the opinion.

If the legal tender notes have approximated more in value to gold than they were when the decree in the Circuit Court was entered, that is only because the owners have chosen to appeal.

Mr. Justice SWAYNE delivered the opinion of the court.

On the 25th of October, 1864, the steam propeller Mary Vaughan left the city of Troy for a voyage on the Hudson River to the city of New York. She had in tow two canal-boats laden with cargoes of barley under the deck and hoop-poles upon the deck. The boats were lashed, one on each side of the propeller. The canal-boat R. M. Adams was fastened to the starboard side, and the canal-boat Sherman Lewis upon the port side. They were attached to the propeller by towing lines. The propeller was about sixty tons burden, and ninety feet in length by seventeen wide.

The steamboat Telegraph left her dock at the city of New York about five o'clock in the afternoon of the same day on a voyage up the river to Newburg, having in tow three large heavy freight barges, to wit, the Minnesink lashed to her port side, the Dutchess to her starboard side, and the Insurance lashed to the stern of the starboard barge, Dutchess.

On the morning of the next day, between two and four o'clock A.M., just below Butter Hill, the barge Minnesink, on the larboard side of the Telegraph, and the canal-boat Sherman Lewis, on the port side of the Vaughan, came in collision, whereby the Sherman Lewis was torn from her fastenings to the propeller, swung round crosswise of the river, and across the bow of the Telegraph and her barges, and was so much injured that shortly afterwards she filled and sunk in water from one to two hundred feet deep, carrying down her under-deck cargo with her.

The barley belonged to J. & O. Lynch, of Buharnois, Canada, and was shipped by them from St. Timothy, Canada, in the boat in which it was lost. The boat was bound to Albany or New York. The bill of lading was given to the owners, and by them indorsed as follows: "Deliver to the order of Gordon, Bruce & McAuliffe. O. &. J. Lynch."

Gordon, Bruce & McAuliffe were a firm of the city of New York. The bill of lading was then placed in the hands of Gordon & Co., and by them, at the request of the shippers, forwarded to the consignees. Upon receiving it Gordon & Co., as the agents of the consignees, advanced upon it $29.50 for the premium of insurance upon the barley; the entire arrangement with the shippers was made by Gordon & Co. as such agents. They had special authority to advance upon this particular barley by drafts at thirty days upon the consignees, and so advised the shippers before the bill of lading was forwarded.

This libel was filed by the consignees. It alleged that the disaster was caused "by the negligence, want of proper skill, and improper conduct of the persons navigating the said propeller, or by the negligence, want of proper skill, and improper conduct of the persons navigating said steamboat, or by their joint negligence, fault, and improper conduct."

In the District Court both the claimants excepted to the libel; the claimant of the Vaughan upon the grounds that the particular facts upon which the imputation of fault was founded were not set forth, and that the allegations were not sufficient to entitle the libellants to a decree; the claimant of the Telegraph upon the same grounds, and the further ground that a libel against both vessels jointly could not be maintained. The exceptions were overruled. The court decreed against both vessels, and the claimants of both appealed to the Circuit Court.

The appeals found in the record are wholly silent as to these exceptions. It does not appear that they were brought to the attention of the Circuit Court, or that it took any action whatever upon the subject. The appeals from the Circuit Court to this court are confined to the merits of the case. Neither of them contains any reference expressly, or by implication, to the exceptions. Under these circumstances they must be held to have been conclusively waived by the respondents. To consider them here would be to exercise the appellate power of this tribunal in reviewing the

action, not of the Circuit, but of the District Court. This we have no power to do. The exceptions must, therefore, be laid out of view.

It was insisted in the argument here by the counsel for the Vaughan that the consignees had no title to the barley, and hence cannot maintain this libel for its loss. The converse of this proposition is too clear to require discussion. The transfer of the bill of lading carried the legal title with it. The authority of Gordon & Co. to draw on the consignees for advances upon receiving the bill of lading, and the actual payment by them as such agents of the premium for insurance, show such to have been the intention of the parties.

The presumption of title in the transferee of a bill of lading which the law raises upon the transfer is, in this case, fully sustained by the facts developed in the proofs.* But aside from the special circumstances referred to, we have no doubt of the right of the consignees as such to maintain this proceeding. The question is not an open one in this court. In *Houseman* v. *The Schooner North Carolina*,† Chief Justice Taney, delivering the opinion of the court, said: "We consider it well settled in admiralty proceedings that the agent of absent owners may libel either in his own name as an agent, or in the name of his principals, as he thinks best. . . . And that the consignees had such an interest in the whole cargo that they may lawfully proceed in this case, not only for what belonged to them, and was shipped on their account, but for that portion also which was shipped by Porter as his own and consigned to them." In *McKinlay* v. *Morrish*,‡ it was said, "Whatever may be the uncertainty concerning the consignee's right to sue in a court of law, from the conflicting decisions to be found on that right, there is none that he may sue in a court of admiralty in the United States."

This brings us to the consideration of the merits of the case.

* Grove *v.* Brien, 8 Howard, 439; Lawrence *v.* Minturn, 17 Id. 107.

† 15 Peters, 49.

‡ 21 Howard, 355.

Opinion of the court.

The District Court held that both vessels were in fault. The Circuit Court came to the same conclusion, and affirmed this part of the decree of the District Court. These concurring judgments are *primâ facie* to be deemed correct. Our examination of the evidence apart from this consideration has led our minds to the same results. Where the collision occurred the channel was straight, wide, and deep. The night was calm and clear. It was near the end of the ebb tide. No disturbing element was present. The circumstances were as favorable as possible for each vessel to pass the other with its tows in safety. Without the grossest negligence or mismanagement there could be neither peril nor disaster. Yet there was a disaster; and the colliding vessels came together with such violence that the canal-boat was wrecked and sunk. Neither vessel had a lookout. The pilot and engineer of the Vaughan were inexperienced and incompetent. There was at the time no one on the deck of the Telegraph but the captain. The pilot had gone below. The engine was in charge of a fireman. Other special faults in the conduct of each vessel are imputed, and we think the evidence establishes them. The vessels are antagonists, and one remarkable feature of the case is the zeal and ability with which the counsel of each has attacked the other and labored to defend his own. In the former both have been successful; in the latter neither. The evidence is to a large extent confused and contradictory. It could serve no useful purpose to analyze and discuss it. It is sufficient to remark that we could add nothing to the clear and able opinion of the judge of the District Court, by whom this part of the case was there disposed of. We concur in the views which he expressed.

In the District Court it was held that the proper rule of damages where a cargo is lost *in transitu* by a collision, or other tort, is the value of the goods at the time and place of shipment. It was conceded that upon the breach of a contract for the delivery of goods at a particular place the measure of damages is the full value of the goods at such place. Both propositions are correct and are well settled in

our jurisprudence. The place of shipment was a port in Canada, and the value of the barley there when shipped was found to have been 70 cents per bushel, amounting in the aggregate, with interest, to $2436. The estimate was made in the currency of Canada, which was equivalent in value to the gold coin of the United States. It was admitted that the decree was solvable in legal tender notes, which were then largely depreciated, but it was held that this was an incident of the suit in the forum where it was brought, and that the result was unavoidable. In the Circuit Court the same rule of damages was applied, but the decree gave the value of the Canada currency in legal tender notes. These notes have since largely appreciated, so that while the libellants would, under the decree of the District Court, if it had been paid when rendered, have received much less than the estimated value of the barley, they will now, if the decree of the Circuit Court be affirmed, receive much more.

It is clear that if the decree of the Circuit Court had been paid when it was rendered the result to the respondents would have been the same as if the decree of the District Court had been then affirmed and paid in specie. Upon the rule of damages applied by both courts as respects the kind of currency in which the value of the barley was estimated the libellants were entitled, upon the plainest principles of justice, to be paid in specie or its equivalent. The hardship arising from the decree before us is due entirely to the delay in its payment which has since occurred, and the change which time and circumstances have wrought in the value of the legal tender currency. The decree was right when rendered, and, being so, cannot now be disturbed. It is unnecessary to pursue the subject further. The decree, in the particular under consideration, presents the same question which was decided by this court in the case of *Knox* v. *Lee*.* There the court instructed the jury that in assessing the plaintiff's damages they might take into account the fact that the judgment could be paid in legal tender notes. This

* 12 Wallace, 457.

court upon error affirmed the correctness of that instruction. The authority of that case is conclusive of the question here under consideration.

DECREE AFFIRMED.

The CHIEF JUSTICE, dissenting.

I dissent, and am authorized to say that my brothers CLIFFORD and FIELD also dissent, from so much of the opinion just read as relates to the measure of indemnity for the loss of the barley.

We agree that the loss was through the fault of both boats, and that the libellants were entitled to indemnity; and we agree further that the measure of this indemnity was the value of the barley at the time and place of shipment; and that this value was $2436 in gold. The decree of the District Court, rendered on the 21st day of February, 1868, was for this sum, with interest, making the whole amount of the decree $2924.20.

On appeal, the Circuit Court held that in order to give full indemnity to the libellants, the value in gold must be converted into its equivalent in legal tender notes on the day of shipment. At that time this currency was so much depreciated that $100 in gold were worth $201 in notes. The $2436 in gold, were, therefore, converted into their equivalent in note dollars, making the sum of $4896.36. The decree of the District Court was accordingly reversed, and a decree was entered, on the 26th of March, 1870, for the last-named sum and interest, in all $6515, with costs.

This was much more than indemnity at the date of the decree, and the injustice is still more apparent at this time, when the value of the notes has so much appreciated that the affirmance of the decree of the Circuit Court gives the libellants almost double indemnity.

This case strikingly illustrates the evil consequences of rendering judgments payable in legal tender currency. Hardly anything fluctuates in value more than such judgments. Every day witnesses a change. The judgment debtor gains by depreciation and loses by appreciation.

Doubtless, if the legal tender clauses of the Currency Acts

are constitutional, such judgments may be rendered; but there is nothing in those acts which *requires* that judgments for damages estimated in coin shall be entered otherwise than for coin. On the contrary, we have decided in several cases* that judgments for coin debts may be rendered payable in coin. In the present case the amount of indemnity was ascertained in gold, and, in our judgment, the decree should have been for that amount payable in coin. This would have done exact justice between the parties and would have been in harmony with the principles of the cases referred to. It would have given indemnity, and not double indemnity.

THE CAYUGA.

1. Although where two steamships are running in the same direction—the ship astern sailing faster than the ship ahead—the ship astern is in general bound to adopt the necessary precautions to avoid a collision, the rule does not in general apply in a case where the ships are running on intersecting lines, and the faster sailer is *thus* coming up. In such a case the fourteenth article governs, and the ship which has the other on her own starboard side must keep out of the way.
2. *Restitutio in integram* being the rule in suits for damages occasioned by collision, demurrage was held to have been rightly given to the owners of a New York ferry-boat, injured by a tortious collision, during the number of days that she had necessarily to lay by for repairs, the rate being fixed at what the superintendents of three principal ferries of New York gave it as their opinion, assigning their reasons and showing estimates, that the service of the boat was worth; and this right to demurrage was held not to be affected by the fact that no *charter rate* per day existed for ferry-boats, or the other fact that the owners of the boat (a ferry company) had another ferry-boat which they kept for emergencies, and which they put on the line during the time that the injured one was repairing.

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

Congress, by an act of April 29th, 1864, "fixing certain

* Cheang-kee *v.* United States, 3 Wallace, 320; Bronson *v.* Rodes, 7 Id. 245; Butler *v.* Horwitz, Ib. 259; Trebilcock *v.* Wilson, 12 Id. 687.

rules and regulations for preventing collisions on the water," made among them the following:

TWO SHIPS UNDER STEAM MEETING.

Article 14. If two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way.

CONSTRUCTION OF ARTICLES 14, &c.

Article 18. Where by the above rule one of two ships is to keep out of the way, the other shall keep her course subject to the qualifications contained in the following article:

PROVISO TO SAVE SPECIAL CASES.

Article 19. In obeying and construing these rules due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger.

With these rules in force the James Watt, a North River ferry steamboat, and a fast sailer, set out from her slip at Hoboken, New Jersey, opposite the upper part of New York, to make her regular ferry trip to her slip at the foot of Barclay Street, a point about a mile lower down on the opposite side of the river. This made her course across the river southeast. A few minutes previously the steam-tug Cayuga, a less fast sailer than the ferry-boat, was setting out from her slip at Desbrosses Street, a point on the New York side about half a mile lower down than Hoboken, and of course about half a mile above Barclay Street. Her purpose was to go over to certain wharves on the Jersey shore, not very far from opposite Barclay Street; meaning, however, first to go in to Hubert Street—a street about seven hundred feet below Desbrosses—and there to take a boat in tow. Setting off, she did round in as if to go in to Hubert Street, but perceiving that she could not get the boat out from the place (the dock being then crowded), rounded out again, and pursuing a course about south-southwest went out toward the middle of the river, about one-third into the stream. Pur-

suing their respective courses the two boats were on intersecting lines; *the tug having, of necessity, the steamer on her starboard side until the point of intersection should be passed.* The ferry-boat having been the faster sailer, and her point of departure at Hoboken having been farther north than that of the tug on the opposite or New York side of the river, she was continually coming nearer to the tug, but coming up on an intersecting line and not directly astern. The possibility of a collision was, of course, obvious to any intelligence, from the time the two boats left their respective wharves. As they got near the middle of the stream it became more plain; and by degrees, as they approached, the possibility passed into a probability.

Coming quite near to each other, *the ferry-boat being still on the tug's starboard side*, and just before reaching the point where their courses if adhered to would intersect, the tug stopped her engine for a short time, and then put it ahead. The ferry-boat having supposed, when she saw that the tug's engine was stopped, that it was meant that *she*, the ferry-boat, should go ahead, now dashed on, but the tug after a short stoppage put her engine into motion again, and a collision followed. The ferry-boat was struck on the port bow, and so much injured that she had to go into dock and remain there seventeen days for repairs; the company which owned her putting on the line a spare boat which they owned and kept to supply emergencies. Hereupon the owners of the ferry-boat libelled the tug in the District Court at New York. That court condemned the tug, and awarded to the owners of the ferry-boat $75 a day for the time she was necessarily laid up for repairs; the superintendents of three leading ferries in New York harbor having expressed the opinion, and the reasons of it with an exhibition of estimates, that the boat was worth that much per day; though it was admitted by her owners that there was no fixed charter rate for ferry-boats.

The Circuit Court affirmed the decree, and from this the present appeal came.

Assuming the case as above given to be the case made out

Restatement of the case in the opinion.

by the evidence (which was what the court did assume), the points, of course, were:

1st. Which boat had violated the rules of navigation?

2d. Whether the decree for demurrage was rightly made on the testimony, and with the admitted want of evidence of a *charter rate* per day for ferry-boats; and when the company supplied the place of the injured boat with another boat of their own, kept for emergencies of a sort such as that which had happened.

Mr. C. Van Santvoord, for the appellants; Mr. W. J. A. Fuller, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Collision cases usually present difficult questions of fact, arising from conflicting testimony, and the case before the court is one of that class, but both of the subordinate courts decided in favor of the libellants, and our decision, with brief explanations, must be in the same way.

The libellants are the owners of the steam ferry-boat James Watt, employed in transporting passengers and freight between the port of New York and the city of Hoboken, in the State of New Jersey, and they filed the libel in the District Court against the steamtug Cayuga, usually employed in towing vessels and other water-craft, charging that the steamtug was so improperly and unskilfully managed and navigated that she ran into and upon the James Watt, causing to the latter steamboat great injury and damage, as more fully set forth in the libel. By the pleadings and evidence it appears that the collision occurred at four o'clock in the afternoon of the thirteenth of June, 1866, in clear weather and under circumstances which show beyond all doubt that one or both vessels were in fault. Daily trips were made by the James Watt, and at the time she was making her regular trip down the river to her place of destination at the foot of Barclay Street, on the New York side of the river. She started from her regular slip at Hoboken, and as she proceeded on her route she was heading obliquely across the

river towards the wharf to which she was bound. Shortly after the James Watt left her wharf at Hoboken the Cayuga came out from the slip at the foot of Desbrosses Street, and having rounded to, nearly opposite Hubert Street, she then took a course down the river, heading for the Jersey side of the river, though less obliquely than the ferry-boat of the libellants, and they collided when the former had advanced about one-third of the way across the river towards the Jersey shore. Enough appears to show that the James Watt was heading in a south by east course, and that she was running in the track she usually followed in making her daily trips, and that the Cayuga was heading nearly in a south-southwest course for the place of her ultimate destination on the opposite side of the river. Both steamers were well manned, and each was seasonably seen from the other and at about the same time, and as it was daylight and good weather, and as it was obvious that their courses intersected, it must have been known to those intrusted with their navigation that a collision might ensue unless some proper precaution was seasonably adopted to prevent such a disaster. They had plenty of sea-room, and if either had changed her helm the collision would have been prevented, but as the Cayuga had the James Watt on her own starboard side throughout, from the time she took her course down the river to the time of the disaster, the sailing rules made it her duty to keep out of the way. Article fourteen prescribes that "if two ships under steam are crossing so as to involve risk of collision, the ship which has the other on her own starboard side shall keep out of the way of the other," and the court is of the opinion that the Circuit judge was correct in deciding that that rule is applicable in this case.

Suggestion is made, and perhaps it is correct, that the Cayuga was slightly ahead when she first took her course and started down the river, but the speed of the James Watt being somewhat the greater it appears that she soon made such an advance that it became evident that unless one or the other gave way the danger of collision would become imminent. Apply that rule and it is clear that it was the

duty of the Cayuga to keep out of the way, inasmuch as she had the James Watt on her own starboard side. Every vessel overtaking another vessel, it is said, shall keep out of the way of the vessel ahead, but that rule cannot properly be applied in this case, as the two steamers were crossing or running on intersecting lines, in which case the question is not in general affected by the comparative speed of the two vessels, nor by the fact that the one or the other was slightly ahead when the necessity for precaution commenced.

Undoubtedly where two ships are running in the same direction, the ship astern, if she is sailing faster than the ship ahead, is in general bound to adopt the necessary precautions to avoid a collision, but it is clear that the rule does not in general apply in a case where the ships are crossing or are distant from each other on a right line and are running on intersecting lines, as it is expressly enacted where two steamships are crossing that the ship which has the other on her own starboard side shall keep out of the way of the other.* Such is the express regulation enacted by Congress, and the correlative duty of the other vessel is described in the eighteenth article, which is, that where one of two ships is required to keep out of the way the other shall keep her course, subject to the qualifications contained in the succeeding article, which is entitled a "proviso to save special cases." By that proviso it is prescribed that in obeying and construing those rules due regard must be had to all dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from those rules necessary in order to avoid immediate danger.† Persons engaged in navigating vessels upon the seas are bound to observe the nautical rules enacted by Congress, whenever they apply, and in other cases to be governed by the rules recognized and approved by the courts. Nautical rules, however, were framed and are administered to prevent such disasters and to afford security to life and property, but

* Whitridge *v.* Dill, 23 Howard, 453.

† 13 Stat. at Large, 60, 61.

it is a mistake to suppose that either the act of Congress, or the decisions of the courts, require the observance of any given rule in a case where it clearly appears that the rule cannot be followed without defeating the end for which it was prescribed or without producing the mischief which it was intended to avert. Qualifications of that character were sanctioned by this court years before the existing rules were enacted by Congress, and no doubt is entertained that the proviso to save special cases contained in those rules was intended to affirm in substance and effect the views upon that subject which this court had previously expressed.* Responsive to the charge that the Cayuga did not observe the fourteenth article of the sailing rules, the respondents attempt to show that the James Watt did not keep her course, as required by the eighteenth article—that she was running faster than the steamtug, and that having passed her on the starboard side she suddenly sheered across her bows, and that the two steamboats in a few seconds came together, the stern of the Cayuga striking against the port stern-quarter of the James Watt and caused the injuries alleged in the libel. Instead of that the District Court found, as matter of fact, that the Cayuga, just before she reached the point of intersection, stopped her engine, giving those in charge of the ferry-boat to understand that the latter steamer could pass in safety, which had the effect to mislead those in charge of the James Watt, as the Cayuga in a brief period put her engine in motion and started ahead, and that the collision immediately ensued.

Additional testimony was taken, subsequent to the appeal from the decree of the District Court, but the Circuit Court, in view of the whole case, was still inclined to the opinion that the finding of the District judge was correct. Considerable conflict exists in the testimony on that point, but it is not necessary to decide it, as the same conclusion must be adopted even if it be admitted that the steamtug did not stop her engine and mislead the ferry-boat, as is supposed

* Steamship Co. *v.* Rumball, 21 Howard, 385.

by the libellants, as it is clear that the charge made against the James Watt that she changed her course is not sustained.

Even if the Cayuga did not do anything to mislead the James Watt it is clear that she did not keep out of the way, as required by the fourteenth sailing rule, nor did she adopt any proper precaution to prevent a collision. Bound as she was to keep out of the way, the fact that she did not comply with that requirement is as complete an answer to the defence set up by the claimants as the proof would be that she misled the other vessel, as charged by the libellants. Having done nothing to prevent the collision she must abide the consequences, unless she can show some good reason for her failure to perform her duty in that regard. All the excuse, or the principal one, offered is the one before mentioned, that she was ahead and that it was the duty of the James Watt to have adopted the necessary precautions.

Where a steamer astern, in an open sea and in good weather, is pursuing the same general course as the one ahead, and at greater speed, the steamer astern, as a general rule, is required to give way or to adopt the necessary precautions to prevent a collision, as the steamer ahead is entitled to the road, but the court here concurs with the Circuit Court that that rule did not apply in this case, even if it be conceded that the Cayuga, after she rounded to, and when she first took her course down the river, was slightly ahead, as the relative situation of the two steamers even at that time, was that described in the fourteenth article of the sailing rules, and not that described in the seventeenth article, as is supposed by the respondents. Precautions at that time were not necessary, as the distance between the two steamers, measuring east and west, was very considerable, but they were running on converging lines, and as they advanced that distance was fast reduced, which soon created the necessity for precautions to prevent a collision, and the testimony entirely satisfies the court that at the time the necessity for precaution commenced, the two steamers were nearly abreast, and that the Circuit Court was right in holding that the fourteenth sailing rule is applicable to the case,

and that it was the duty of the Cayuga to keep out of the way.

Reference was made to a commissioner in the District Court to ascertain the amount of the damages, and he reported the whole amount to be two thousand six hundred and seventy-two dollars and thirty cents, as more fully shown in the record. Exceptions were duly taken by the respondents to various items of the report, but the court overruled the exceptions and confirmed the report. Included in the report of the commissioner was an allowance of seventy-five dollars per day for the seventeen days the steamer was detained while the repairs were being made, and to that allowance the respondents still object. Other exceptions to the commissioner's report were taken at the time, but they have not been much pressed in argument and are overruled as not well founded. Reasonable demurrage is certainly a proper charge, as the leading maxim is *restitutio in integram* in all suits for damages occasioned to vessels by collision.* Subject to the provision that owners of ships and vessels are not now liable for any such loss, damage, or injury, beyond the amount of their interest in the ship and her freight then pending, it is settled law that the damages which the owner of the injured vessel is entitled to recover in cases of collision are to be estimated in the same manner as in other suits of like nature for injuries to personal property, and the owner, as the suffering party, is not limited to compensation for the immediate effects of the injury inflicted, but the claim for compensation may extend to loss of freight, necessary expenses incurred in making repairs, and unavoidable detention.† Tested by that rule it is quite clear that the explanations given by the respective judges in the subordinate courts are sufficient to show that the report of the commissioner was correct. Many other authorities might be referred to in support of the rule here laid down,

* The Baltimore, 8 Wallace, 385.

† The Cayuga, 2 Benedict, 125; S. C., 7 Blatchford, 389; S. C., 1 Benedict, 171.

Statement of the case.

but inasmuch as the subject was fully considered in the case of *The Baltimore*, the court does not deem it necessary to give it much additional consideration.

DECREE AFFIRMED.

EASLEY *v.* KELLOM ET AL.

1. Where the Land Department of the government, denying an unfounded pre-emption claim in the government lands set up by a person indebted to several persons, proceeds to sell the lands at public auction, as part of the public lands, and the debtor and several of his creditors enter into an agreement that the land shall not be bid up, but on the contrary shall be struck off at as low a price as possible to one of the creditors, who shall divide it among such creditors as will come into an agreement to receive it in satisfaction of their debts, and the land is thus sold at an under price, creditors who have not come into the arrangement cannot set the arrangement aside. The government alone can interpose.
2. A bill of review held to have been properly entertained on the after-discovery of a lost paper; and a former decree held, on the new evidence, to have been rightly reversed.

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

On the 25th of June, 1857, Harrison Johnson having, as he supposed, the west half of a pre-emption right of 160 acres within the limits of the city of Omaha, gave a mortgage or deed of trust on it to secure the payment of his note to Easley and Willingham. Some time afterwards, the city of Omaha filed a caveat against Johnson's claim, and on the 29th of December, 1859, the commissioner of the land office gave notice to the local register and receiver that Johnson's certificate of location had been cancelled. Thereupon the property was advertised for sale as a part of the public lands. Johnson being in debt to several other persons, including one Kellom, it was proposed between him and some of these creditors that the property should be bid off at as low a price as possible, so that the creditors might receive satisfaction for their claims, and that something might be left for him.

An agreement was drawn up and signed by Johnson and several of his creditors; but Easley and Willingham and one or two others refused to come into it. They insisted on their priority of lien. The sale took place in August, 1860. In pursuance of the agreement Johnson bid off the southern half of the 160 acres at the minimum government price in the name of his mother, and Kellom, on behalf of the creditors, bid off the northern half; each part containing forty acres of the land mortgaged. Kellom executed conveyances to the other creditors who, with himself, had signed the agreement, so as to divide between them the eighty acres purchased by him, in proportion to their claims against Johnson; and these creditors gave Johnson acquittances in full. Johnson's mother was in possession of her portion ever since the sale, he living on a part of it.

In 1866 Easley and Willingham filed their bill against Kellom, Johnson, his mother, and several creditors, to foreclose their mortgage. They charged, first, that the cancellation of Johnson's pre-emption right was procured by his complicity and acquiescence, for the purpose of defrauding them out of their mortgage debt, and paying the other creditors; and, secondly, that when the public sale took place, it was agreed between Johnson and the other creditors who participated in the purchase, that Johnson was to have an interest in the purchase proportionate to the claims of those creditors who did not sign the agreement, so that he might afterwards make settlements with them. All the answers denied these charges; that of the mother alleged further that she was a *bonâ fide* purchaser of the eighty acres purchased by her; and those of the other defendants alleged that Kellom was a similar purchaser of the eighty acres purchased by him. They further insisted that the complainants' mortgage, or trust deed, being made by Johnson before he obtained a patent for the land, was void by the 12th and 13th sections of the pre-emption act of September 4th, 1841.*

* The case of Myers *v.* Croft, 13 Wallace, 291, had not been decided when this last point of the defence was made.—REP.

Statement of the case.

Upon these pleadings the parties went into proofs. No evidence, however, was adduced to show that the cancellation of Johnson's pre-emption certificate was improperly obtained, and the case was therefore to be considered upon the hypothesis that he had no valid claim, and that the land belonged to the government, and was properly sold as such in 1860.

But on the question with regard to the agreement made between Johnson and his creditors, the preponderance of the evidence seemed to establish the allegations of the bill. Neither the original agreement between Johnson and the creditors, though it had confessedly been in writing, nor any copy of it, could be found; and the parol evidence, taken after the lapse of seven years (notwithstanding the stout assertions of Kellom and the creditors associated with him to the contrary), went to show that Johnson had reserved an interest in such portion of the land as would have belonged to the creditors that failed to come into the agreement. Johnson himself testified this. The consequence was, that a decree was entered for the complainants, against Kellom and those who received portions of his purchase, for one undivided half of the property in their possession covered by the mortgage. The decree did not touch the mother's half.

After the decree was entered a copy of the agreement was accidentally discovered, and by it, it appeared that no provision had been made for the benefit of any creditors but those who signed it. The position which the defendants had taken in the case, and which, on the hearing, had appeared to be a false one, was thus shown to have been well founded. A bill of review was thereupon filed by the defendants, and the Circuit Court pronounced a decree in their favor, reversing the former decree. From this decree an appeal was taken to this court.

Mr. J. Hughes (*a brief of Mr. Woolworth being filed*), *for the plaintiff in error; Mr. Lyman Trumbull, contra.*

Mr. Justice BRADLEY (having stated the case) delivered the opinion of the court.

It seems difficult to find any ground for sustaining this appeal. Conceding that the deed of trust held by the complainants would have been valid as against Johnson and his assigns, had his pre-emption right been sustained; still, this right was not sustained. He had nothing that he could mortgage or convey. The subsequent sale by the government agents conveyed a good title to the purchasers, clear of the mortgage. The other ground on which the appellants relied, namely, that at the public sale Johnson had made some reservations in his own favor, in his agreement with the other creditors, for the purpose of enabling him to settle with the appellants, is taken away by the discovery of a copy of that agreement. It contains no such provision whatever. On the contrary it is a mutual agreement made for the sole benefit of those who executed it.

No question arises here, in reference to the eighty acres purchased by Johnson's mother. The original decree did not embrace any portion of that, and no appeal from that decree was taken by the complainants.

Some observations were made in reference to the provision of the agreement, looking to a combination to prevent competition in bidding at the government sale; but that objection, if valid, could only be taken by the government itself.

To conclude, the copy of the agreement which was discovered, and which laid the foundation for the bill of review, is sufficiently proved; and its absence at the former trial is satisfactorily accounted for.

DECREE AFFIRMED.

CITY OF LEXINGTON *v.* BUTLER.

1. The restriction of the 11th section of the Judiciary Act giving original jurisdiction to the Circuit Courts, but providing that they shall not "have cognizance of any suit to recover the contents of any promissory note or *other chose in action*, in favor of an assignee, unless a suit might

have been prosecuted in such court to recover the said contents if no assignment had been made," does not apply to cases transferred from State courts under the act of March 2d, 1867, giving to either party in certain cases a right to transfer a suit brought in a State court where either makes affidavit, &c., "that he has reason to believe, and does believe, that from prejudice or local influence he will not be able to obtain justice in such court."

2. Independently of this, negotiable paper (within which class coupons to municipal bonds, if having proper words of negotiability, fall) is not regarded as falling within the exception.
3. When a corporation has power under any circumstances to issue negotiable securities the *bonâ fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.
4. A municipal corporation on a suit against it for bonds issued to a railroad, set up that the plaintiff had notice of certain proceedings, which (as the plea alleged) destroyed the plaintiff's right to sue. The plaintiff replied, denying the notice. The city demurred to the replication. *Held*, that the city thus admitted that he had no notice.
5. A suit upon a coupon or interest warrant to a bond is not barred by the statute of limitations, unless the lapse of time is sufficient to bar also a suit upon the bond.

THE 11th section of the Judiciary Act enacts:

"The Circuit Court shall have original cognizance of all suits . . . between a citizen of the State where the suit is brought and a citizen of another State."

It is enacted by the same section:

"That no Circuit Court shall have cognizance of any suit to recover the contents of any promissory note or other *chose in action*, in favor of an assignee, unless such suit may have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

The 12th section, however, of the same act enacts:

"That if a suit be commenced in any State court against an alien or by a citizen of the State in which the suit is brought against a citizen of another State, ... and the defendant shall at the time of entering his appearance in such State court file a petition for the removal of the cause for trial into the next Circuit Court, ... and offer good and sufficient surety for his

entering in such court on the first day of its session copies of said process against him, and also for his there appearing .... it shall then be the duty of the State court to accept the surety and proceed no further in the cause; . . . and the said copies being entered as aforesaid in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process."

By a statute of March 2d, 1867, this right of removal was extended to controversies in any State court, between a citizen of the State where the suit is brought and a citizen of another State, in cases where either party—plaintiff or defendant—shall, any time before final hearing,

"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."

With these statutes in force the city of Lexington, Kentucky, acting under the authority of an act of the legislature of Kentucky, issued in 1853 to the Lexington and Big Sandy Railroad Company, one hundred and fifty bonds, each for $1000, having thirty years to run, and bearing an interest of 6 per cent. per annum, payable semi-annually, for which coupons were annexed to the bonds. The coupons were payable "to bearer."

The bonds bore the corporate seal of the city and were signed by the mayor, and countersigned by the city clerk. They were payable to the Lexington and Big Sandy Railroad Company or order at the Bank of America, New York, and were indorsed and assigned by the railroad company to bearer. They recited upon their face that—

"This certificate is used in part payment of a subscription of $150,000 by the city of Lexington to the capital stock of said Lexington and Big Sandy Railroad Company, *by order of the mayor and council of said city, as authorized by a vote of the people taken in pursuance of an act of the General Assembly of the Commonwealth of Kentucky incorporating said railroad company, approved the 9th of January*, 1852."

They were sold in market overt by the railroad company, and being by the indorsement made payable to bearer, circulated by delivery from hand to hand. J. C. Butler, a citizen of Ohio, became the owner of four of them. The coupons for a number of years being unpaid, he brought suit in a court of the State of Kentucky for the recovery of the amount of them. Before the trial came on, he removed the cause into the Circuit Court of the United States for the District of Kentucky, for trial, under the already-quoted act of Congress of March 2d, 1867, and on bringing the transcript of the cause into the Circuit Court, he filed a declaration in debt in that court, in conformity with the rules of proceeding in causes removed from the State court. To this declaration the city of Lexington filed two pleas in bar.

First plea. That the city was authorized to make the subscription of the $150,000, on condition that a majority of the qualified voters of the city should cast their votes in favor of the subscription, and that without such a vote the city had no authority to make the subscription; that the vote was cast in favor of the subscription, but only on the condition that it should not be obligatory until $1,000,000 should be first subscribed by others; that the $1,000,000 not having been subscribed, the city refused to make the subscription or to issue the bonds; that the company thereupon obtained a judgment of mandamus to compel the city to make the subscription and execute the bonds; and that the city was compelled by that judgment, and did so make the subscription and issue the bonds; that the Court of Appeals of Kentucky, however, reversed this judgment; that a rule was then made upon the company to redeliver the bonds in order to be cancelled; but that the company refused to redeliver them; that before the company had negotiated the bonds sued upon, the city obtained an injunction against the issue, and an order that the bonds be deposited with a receiver; that these orders, although process was duly served on the company, were not obeyed; and that both actions were still pending.

The plea then alleged that *it was after all these proceedings and with these actions pending*, that the company transferred and delivered the bonds to Butler; and *that Butler had notice of the proceedings aforesaid before said bonds were transferred to him.*

Second plea. As to the coupons the city pleaded a statute of limitations, applicable to debts not under seal; a statute of five years;—fifteen years being the statutory bar in regard to sealed instruments.

To the first plea the plaintiff replied, traversing the notice and denying all knowledge of any facts set out in the plea when he took the bonds.

To the second plea he demurred.

To the plaintiff's replication to the first plea (the replication denying notice of the proceedings about the bonds) the city demurred.

The court below on the whole case gave judgment for the plaintiff; and the city now brought the case here.

The questions, of course, were:

1st. Whether under the restriction of the 11th section of the Judiciary Act and under the act of March 2d, 1867, the court below had jurisdiction.

2d. Whether the fact that Butler had no notice of the proceedings about the bonds, set up to rebut his *bona fides* and destroy his right to sue (which fact of want of notice was of course admitted by the city's demurrer to his replication), made him, presumably, a *bonâ fide* holder for value, and entitled to sue.

3d. Whether the statutory bar of five years was applicable to coupons to bonds under seal, and where to the bonds themselves nothing less than fifteen would by statute be a bar, or whether the coupons partook of the qualities of the bond in such a way as to be subject to the law which governed them?

Mr. J. F. Fisk, for the plaintiff in error:

1. The court below had no jurisdiction. The bonds sued on were made by a corporation or citizen of Kentucky, and

were payable to the order of the railroad company, another citizen or corporation. If no assignment had been made then certainly under the 11th section the Circuit Court would have had no jurisdiction, the suit being between citizens of the same State. It is only in virtue of the assignment which was made by the indorsement that Butler, a citizen of Ohio, has any rights. But the same 11th section says that the Circuit Court shall not have cognizance of any suit to recover any *chose in action* in favor of an assignee, unless the suit could have been prosecuted in the same court if no assignment had been made.

2. The facts alleged in the plea other than that of notice—which is the only part of the plea traversed—are sufficient to bar the action. The allegation of notice was not necessary. Butler was bound to take notice of the proceedings. The rule of *lis pendens* applies; a rule than which none has been established on higher authority or with more uniform sanction, one also peculiarly applicable to negotiable paper.

3. The court held the bonds negotiable and yet held that the statute of limitations governing promissory notes did not apply. This was plain error. Even if the bonds which were sealed did not come within the statute of five years, the coupons, which were not sealed—mere ordinary promises, did.

Mr. J. W. Stevenson, contra:

1. *As to the jurisdiction.* The whole argument of the other side on this point has no foundation. Since the case of *Bushnell* v. *Kennedy*,* in which it was decided that the restriction of the 11th section as to the right to sue on *choses in action* assigned, not being found in the language of the 12th, and the reasons for its being in the 11th not existing for its being in the 12th, "it is not to be considered as applying to cases transferred from State courts to the Circuit Courts under this latter section." The decision applies equally to cases transferred under the act of March 2d, 1867.

* 9 Wallace, 387.

Argument in favor of the bondholder.

2. *As to the demurrer of the city to the replication.* The plea, to which this replication was filed, went on to set forth a state of facts from which it was to be inferred the bonds were issued without authority of law. In the face of bonds which recite that they *were* issued by authority of law, such a plea would be bad, unless it also showed that Butler was not an innocent holder for value. The law presumes in favor of the holder: (1) that he took the bonds before they were due; (2) that he paid a valuable consideration for them; and (3) that he took them without notice of any latent defect which would render them invalid.* The plea did not dispute the first two points, to wit: That Butler took the bonds before they were due and paid a valuable consideration for them. Hence these two presumptions stood in his favor, notwithstanding the plea. It did, however, aver that at the time he took the bonds he had notice of the facts set forth in the plea and relied on as rendering the bonds invalid. It was this averment of notice alone that rendered the plea good.

The replication traversed the averment of notice, and denied all knowledge or notice of any of the facts set out in the plea at the time the plaintiff took the bonds.

By demurring to the replication the city confessed Butler's denial of notice to be true, and thereby confessed away an allegation in its plea which was absolutely necessary to render it good.

3. *As to Butler's demurrer to the second plea.* This plea is an attempt to rely upon the statute of limitation of five years, in force in Kentucky, to actions on simple contracts. But the obligation to pay this interest is embodied in the bond itself, which is a specialty, under seal, and of a higher nature than simple contracts. Therefore no lapse of time, short of fifteen years, would bar an action on the bond, that being the period of limitation to actions upon specialties by the statute of Kentucky. That bonds of this character are special-

* Bronson *v.* La Crosse, 2 Wallace, 283; Woods *v.* Lawrence, 1 Black, 386; Alexander *v.* Springfield Bank, 2 Metcalfe, 534; Nelson *v.* Cowing, 6 Hill, New York, 339.

ties, and that the coupons attached to them partake of their character and are governed by the same term of limitation as governs the bond itself, was ruled by this court in *The City* v. *Lamson*.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Subscription to the stock of the Lexington and Big Sandy Railroad Company was made by the corporation defendants to the amount of one hundred and fifty thousand dollars, and on the fifteenth of October, 1853, they, as the municipal corporation of Lexington, issued one hundred and fifty bonds, each for one thousand dollars, sealed with the corporate seal and signed by the mayor and clerk of the corporation. By the terms of the bonds they are payable to the railroad company or order, at the Bank of America, in thirty years from date, with interest semi-annually at the rate of six per centum per annum, also payable at the same bank in the city of New York. Interest warrants were annexed to each bond, whereby the municipal corporation undertook and promised to pay to bearer the several instalments of interest provided in the bonds, as the same matured and became payable.

Pursuant to that arrangement the railroad company became the lawful owners and holders of the whole of those bonds, and they, as such holders and owners, indorsed the bonds in blank and transferred the same to divers persons or corporations as the means of borrowing money to construct their railroad, and the plaintiff in that way, as he alleges, became the purchaser and owner of four of those bonds with the unpaid interest warrants annexed. Payment of the interest being refused the plaintiff instituted the present suit in the State court to recover the amount of the interest overdue, as more fully appears in the petition or declaration filed in the State court where the suit was commenced. Service was made and the defendants appeared, and on their motion the cause was continued. Subsequently

* 9 Wallace, 477.

Restatement of the case in the opinion.

the plaintiff filed a petition and affidavit for the removal of the cause into the Circuit Court of the United States, for trial, alleging as the ground of the application that he had reason to believe and did believe that from prejudice and local influence he would not be able to obtain justice in the State court, and the applicant having given bond as required by law the cause was removed into the Circuit Court of the United States for that district.*

Two special pleas were filed by the defendants in bar of the action:

I. That they were not liable to pay either the bonds or the interest on the same because the conditions precedent to the right of the corporation to subscribe for the stock of the railroad company and to issue the bonds were never fulfilled; that the conditions annexed to the right, as enacted by the legislature, were that the proposition to subscribe should be submitted to the qualified voters of the corporation, and that it should be approved by a majority of the persons voting on the question; that three conditions were embodied in the proposition as submitted to the voters, as specifically set forth in the plea; that the proposition as submitted did not authorize a subscription unless a million of dollars were previously subscribed by other parties; that other parties not having subscribed that amount the authorities of the corporation refused to make the subscription, and that the State court on the application of the railroad company issued a mandamus and compelled the authorities of the corporation to make the subscription and issue the bonds; that the defendants appealed to the Court of Appeals, where the judgment of the subordinate court was reversed, the Court of Appeals holding that the corporation had no authority to subscribe for the stock or to issue the bonds until one million of dollars had been subscribed by other parties; that the action was thereupon redocketed and a rule laid upon the railroad company to redeliver the bonds to the defendants to be cancelled; that the railroad company in the mean-

* 14 Stat. at Large, 559.

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time deposited forty-eight of the bonds with an agent with directions to sell the same for their benefit; that before the bonds were negotiated or transferred they, the defendants, obtained an injunction and an order of court that the same should be deposited with a receiver of the court to be sold, and that the proceeds should be applied under the order of the court, and the defendants allege that the action is still pending and that the order of the court was never obeyed; that the bonds described in the declaration are a portion of those bonds, and that the plaintiff, when the bonds in suit were transferred to him, well knew of the pendency of said actions and of the judgments and orders therein, and that the bonds had been issued under and by virtue of said writ of mandamus.

II. That the cause of action did not accrue to the plaintiff within five years next before the action was commenced.

To the first special plea of the defendant the plaintiff filed a replication, in which he denied that he had any knowledge, notice, or information whatever, before or at the time the bonds were transferred to him, of the pendency of said supposed actions, or any or either of them, or of the supposed judgments or orders in those actions, or that said bonds had been issued under or by virtue of the said writ of mandamus, in manner and form as the defendants have alleged and tendered an issue, and the defendants demurred to the replication and the plaintiffs joined in demurrer.

On the other hand the plaintiffs demurred to the second plea of the defendants and the defendants joined in demurrer, so that both pleas terminated in an issue of law for the decision of the court; and the court overruled the demurrer of the defendants to the replication of the plaintiff and sustained the demurrer of the plaintiff to the second plea of the defendants, and gave judgment for the plaintiff in the sum of three thousand six hundred and thirty dollars and six cents, being the amount of the debt demanded in the declaration. Dissatisfied with the judgment of the court the defendants sued out a writ of error and removed the cause into this court.

Three errors are assigned by the original defendants: (1.) That the court erred in rendering judgment for the plaintiff, as the court had no jurisdiction of the case. (2.) That the court erred in overruling the demurrer of the defendants to the replication of the plaintiff filed to their first special plea. (3.) That the court erred in sustaining the demurrer of the plaintiff to the second plea of the defendants.

Jurisdiction of the case is denied by the defendants because, as they insist, the suit is founded on a cause of action which could not properly be removed from the State court into the Circuit Court, where the judgment was rendered, but the objection is not well founded, as will be seen by reference to the twelfth section of the Judiciary Act and the amendatory act under which the removal in this case was made. Where a suit is commenced in any State court, in which there is a controversy between a citizen of the State in which the suit is brought, and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, 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 for the removal of the suit into the next Circuit Court of the United States, to be held in the district where the suit is pending. Authority to remove such a suit is given by that act to the plaintiff as well as to the defendant, but the further provision is that the party desiring to exercise the privilege, must offer good and sufficient surety that he will enter in such court, on the first day of its session, copies of all process, pleadings, depositions, testimony, and other proceedings in said suit, and that he will do such other appropriate acts as are required by law to be done for the removal of a suit from a State court into a Federal court.*

* 14 Stat. at Large, 559.

Evidence that the plaintiff complied with those conditions, it is conceded, is exhibited in the record, but the precise objection is that the cause of action is not one cognizable in the Circuit Court under any circumstances, and reference is made to the eleventh section of the Judiciary Act to support that proposition. By that section it is provided that no District or Circuit Court shall have cognizance of any suit to recover the contents of any promissory note, or other *chose in action* in favor of an assignee, unless such suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange.

All of the bonds were made payable to the order of the railroad company, and each was assigned by a writing on the back of the instrument to bearer by the company, and the payment of principal and interest was guaranteed by the obligees in the bond. Neither bonds of the kind nor the coupons annexed, where they are made payable to bearer or are indorsed to bearer by the original obligees or payees, are regarded as falling within the prohibition of the eleventh section of the Judiciary Act, as they pass from one holder to another by delivery without any formal assignment, as has been held by this court in several cases, to which reference is made for the reasons upon which the rule is founded.*

Suppose, however, the rule is otherwise, still the objection must be overruled, as the suit was not originally commenced in the Circuit Court. Suits may properly be removed from a State court into the Circuit Court in cases where the jurisdiction of the Circuit Court, if the suit had been originally commenced there, could not have been sustained, as the twelfth section of the Judiciary Act does not contain any such restriction as that contained in the eleventh section of the act defining the original jurisdiction of the Circuit Courts. Since the decision in the case of *Bushnell* v. *Kennedy*,† all

* White *v.* Railroad, 21 Howard, 576; Thomson *v.* Lee County, 3 Wallace, 331.

† 9 Wallace, 387.

doubt upon the subject is removed, as it is there expressly determined that the restriction incorporated in the eleventh section of the Judiciary Act, has no application to cases removed into the Circuit Court from a State court, and it is quite clear that the same rule must be applied in the construction of the subsequent acts of Congress extending that privilege to other suitors not embraced in the twelfth section of the Judiciary Act.* Such a privilege was extended by the twelfth section of the Judiciary Act only to an alien defendant, and to a defendant, citizen of another State, when sued by a citizen of the State in which the suit is brought, but the privilege was much enlarged by subsequent acts, and the act in question extends it to a plaintiff as well as to a defendant, where the controversy is between a citizen of the State where the suit is brought and a citizen of another State, if the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, which shows that the jurisdiction of the Circuit Court in this case was beyond controversy.

III. Express authority to subscribe for the stock of the railroad company, and to issue the bonds in payment for the same, was conferred upon the corporation defendants by the twenty-eighth section of the act incorporating the railroad company, subject to the conditions therein prescribed, that the proposition to subscribe for the stock should be submitted to the qualified voters of the corporation, and the same section points out the steps to be pursued by the proper authorities to take the sense of the voters upon the subject. Authority was conferred by the legislative act upon the corporation defendants to issue bonds to the amount of one hundred and fifty thousand dollars, and the plea alleges that, by virtue thereof, they issued one hundred and fifty bonds, each of one thousand dollars, payable in thirty years from date, with coupons or interest warrants annexed providing for the payment of the interest semi-annually at the rate of six per centum per annum. They bear the corporate seal

* 1 Stat. at Large, 79.

of the city and are signed by the mayor, and are countersigned by the clerk, each bond containing on its face a certificate that it was issued in part payment of the subscription of one hundred and fifty thousand dollars, by the city of Lexington, to the capital stock of the railroad company, by order of the mayor and council of said city, as authorized by a vote of the people taken in pursuance of the beforementioned act of the General Assembly of the State.* Issued by authority of law, as the bonds purport to have been, and being, by the regular indorsement thereof, made payable to bearer, they lawfully circulated from holder to holder by delivery, and the plaintiff having purchased four of the number in market overt, became the lawful indorsee and holder of the same, together with the coupons annexed, and the interest secured by the coupons being unpaid he instituted the present suit to recover the amount. Evidently, the *primâ facie* presumption in such a case is that the holder acquired the bonds before they were due, that he paid a valuable consideration for the same, and that he took them without notice of any defect which would render the instruments invalid. Impliedly the plea admits that the bonds were purchased before they were due, and that the plaintiff paid a valuable consideration for the same, but the defendants allege that he took the same with notice of the irregularities in issuing the same, as set forth in the plea, and they rely on those allegations as a complete defence to the action, but the replication traversed the averment of the notice and tendered an issue to the country, and the defendants, by demurring to the replication, confessed that the allegations of the plea in that behalf were untrue, and that the plaintiff was the *bonâ fide* holder of the bonds without notice of the alleged defects in the inception of the instruments.

Coupons attached as interest warrants to bonds for the payment of money, lawfully issued by municipal corporations, as well as the bonds to which they are attached, when they are payable to order and are indorsed in blank, or are

* Session Acts of Kentucky, 1852, p. 786.

made payable to bearer, are transferable by delivery and are subject to the same rules and regulations, so far as respects the title and rights of the holder, as negotiable bills of exchange and promissory notes. Holders of such instruments, if the same are indorsed in blank or are payable to bearer, are as effectually shielded from the defence of prior equities between the original parties, if unknown to them at the time of the transfer, as the holders of any other class of negotiable instruments.*

Admitted, as it is, that the corporation defendants possessed the power to subscribe for the stock and to issue the bonds, it is clear that the plaintiff is entitled to recover upon the merits, as the repeated decisions of this court have established the rule that when a corporation has power under any circumstances to issue negotiable securities the *bonâ fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and that they are no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper.†

IV. Actions on simple contracts are barred by the limitation law of that State unless commenced within five years next after the cause of action accrued, and the second plea was filed as a bar to the action under that section of the statute of limitations, but the bonds described in the declaration are specialties not falling within that section of the statute. On the contrary, suits upon bonds may be maintained if commenced at any time within fifteen years next after the cause of action accrued, and it is well settled law that a suit upon a coupon is not barred by the statute of limitations unless the lapse of time is sufficient to bar also a suit upon the bond, as the coupon, if in the usual form, is but a repetition of the contract in respect to the interest, for

* Moran *v.* Miami Co., 2 Black, 722; Mercer County *v.* Hacket, 1 Wallace, 83.

† Gelpcke *v.* Dubuque, 1 Wallace, 203; Knox Co. *v.* Aspinwall, 21 Howard, 539; Supervisors *v.* Schenck, 5 Wallace, 784; Bissell *v.* Jeffersonville, 24 Howard, 299.

Syllabus.

the period of time therein mentioned, which the bond makes upon the same subject, being given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature and is not barred by lapse of time except for the same period as would bar a suit on the bond to which it was attached.* Coupons are substantially but copies of the stipulation in the body of the bond in respect to the interest, and are so attached to the bond that they may be cut off by the holder as matter of convenience in collecting the interest, or to enable him to realize the interest due or to become due by negotiating the same to bearer in business transactions without the trouble of presenting the bond every time an instalment of interest falls due.

For these reasons we are of the opinion that the ruling of the Circuit Court was correct.

JUDGMENT AFFIRMED.

BIGLER v. WALLER.

1. Where the terms of a mortgage or deed of trust require that before any foreclosure or sale under it is made, sixty days' notice shall be given in certain newspapers, a sale without the notice conveys no title.
2. Although a mortgagee who takes possession of the mortgaged premises, under what purported to be a sale of the property, may be liable for rents and profits of the estate notwithstanding that the sale was wholly void, yet to be so liable he must have had such a possession as gives an actual enjoyment and pernancy of profits. A false claim of title is of itself insufficient.
3. A mortgagor, who on a bill attempting to charge his mortgagee with reception of profits of the estate because of a foreclosure which, though void for requisite notice of the intended sale in foreclosure, was gone through with in form, has had his bill dismissed, with a decree that *he* is himself still owner and liable for a balance of unpaid mortgage-money, cannot object, on error, that the decree did not order the heirs of the formal purchaser (the purchaser himself being dead) to convey, if the bill have not made such heirs parties, or if they have not been called in.

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* 2 Revised Statutes of Kentucky, 126 and 127; The City *v.* Lamson, 9 Wallace, 483.

Statement of the case.

4. However, the execution of the decree for the payment of the mortgage-money may be stayed in such case till an outstanding title made by the proceedings purporting to have been in foreclosure shall have been brought back to the mortgagor.
5. A decree ordering the payment in coin of a debt contracted before the passage of the Legal Tender Acts reversed on the authority of the *Legal Tender Cases* (12 Wallace, 457).

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

On the 2d April, 1853, Waller, of Virginia, made an agreement in writing with one Bigler, of New York, to sell to him for $30,000 an estate on the York River, Virginia, consisting of about 2400 acres, to be paid for in successive annual payments through a term of ten years. The agreement contained this covenant:

"Said Waller will allow said Bigler to sell such portion of the land as he may see fit, from time to time; the said Bigler paying over to said Waller such proceeds of sales as will afford ample security for the liquidation of the residue of the debt."

On the 10th of May, 1853, Bigler paid $5000 of the purchase-money, gave his bond for the balance, $25,000, took a deed of the property, and at the same time took possession of the estate. On the 22d day of June following, he made a deed of trust or mortgage to one Saunders (like Waller, of Virginia) to secure the payment of the bond. This deed provided for the sale of the estate in default of payment according to the terms of the bond; but it provided also that in case of sale *the trustee shall give sixty days' notice in newspapers in Richmond and in the city of New York.* There was nothing said in either the deed of May 10th to Bigler, nor in the deed of trust to Saunders to secure the purchase-money, of the covenant contained in the agreement of April 2d about Waller's allowing Bigler to sell any portions of the estate.

Bigler having taken possession, as already said, made improvements; wharves, mills, a hotel, store, church, school-house, &c., and laid out a village. In the autumn of 1853 and spring of 1854 he had offers for portions of the estate

(village lots), its most central and valuable part, and applied to Waller to release the mortgage lien; a matter which, in consequence of the opinion expressed by some persons whom he consulted, that the security might be impaired, Waller refused to do. Releases, however, of other and more considerable parts, situated less centrally, were given on the price of them being paid over.

Bigler fulfilled his agreement about annual payments until May 10th, 1861, at which date there remained $13,000 unpaid on the bond, of the original purchase-money. Subsequently to this, the war having now broke out, and Bigler having remained in the North, the rebel army, then in that part of Virginia, took possession of this estate; and about the 1st of March, 1862, Waller caused a sale of the estate to be made at public auction on the premises; the sale being in professed execution of the deed of trust and for nonpayment of the debt due on the purchase; *but no notice of any kind having been in newspapers of either Richmond or New York.* Waller bought it in himself for $17,000, and took a deed thereof from the trustee, Saunders, cancelled the bond ($13,000), and gave his notes for the balance of the $17,000 purchase-money. While the rebel army was in possession of the estate a certain Drake, one of its officers, burned two mills and a valuable wharf, and greatly injured the houses and orchards. This destruction occurred a month after Waller's purchase; but Waller was not attached in any way to the rebel Army of the Peninsula, was away at this particular time, and was not shown to have counselled or approved, or even known of what was done. Whether Waller went into actual possession, or whether he had ever been on the estate after the sale, or whether he ever received any of its rents or issues or profits, did not appear, and he denied that he ever was in such possession or ever had received any profits. But it appeared that he had settled with the Confederate government for the waste committed by them while they were in possession thereof, which damage amounted to more than thirty thousand dollars.

Though he sometimes spoke of himself as owner, he fre-

quently declared that he held only to protect the property from seizure and confiscation, as Bigler's, a Northern man's, by the Confederate government; and that when the war closed he should offer the property again to Bigler; he paying the purchase-money.

On the suppression of the rebellion Bigler went to Virginia and resumed possession of his property. He saw its devastated condition and learned of the sale that had been made in professed execution of the trust. On the other hand Waller came North and sued Bigler in one of the New York courts for the balance, $13,000, which was due to him on the outbreak of the rebellion.

Hereupon Bigler filed a bill in equity in the court below. It set out the admitted history of the case as already given; that is to say, the agreement of April 2, 1853, for the sale of the land, the subsequent sale on the 10th of May, the execution of the deed of trust, the possession taken by the complainant, the improvements made, the abandonment of possession in 1861, and its resumption in 1865. It charged that the complainant made contracts for the sale of portions of the land, and tendered to Waller the proceeds of such sales sufficient to afford ample security for the liquidation of the part of the residue of the debt for the purchase-money then due, but that Waller declined to ratify the sales, in disregard of his contract, and greatly to the damage of the complainant; that about September 1, 1861, Waller authorized Saunders, the trustee, to sell the lands, and that a sale was then made to Waller himself, but without such publication as was required by the deed of trust; that out of the proceeds of sale the trustee satisfied the complainant's obligation, and failed to pay over the balance; that Waller then took possession, both of the land and of the personal property thereon, and applied the proceeds of the personalty to the payment of the complainant's debt; that he received large sums for rents of the real estate, and also received compensation from the Confederate authorities for the destruction of the property. The bill further charged the pendency of the suit in New York, and that Saunders, the trustee, was

proceeding again to sell the property without advertising the sale sixty days in newspapers of the city of New York, as required by the deed of trust. It averred also that Waller was insolvent, that he and Saunders would confederate to cheat the complainant in the sale, and that if the sale should be made, the complainant would be unable to recover from Waller what was due to him, or to avail himself in the courts of Virginia of his just rights. The relief prayed was that Saunders, the trustee, might be enjoined against selling the land, and Waller against assigning his interest in the complainant's obligation, until the determination of the action in the State court of New York, or until the matter was referred to a master to take an account of the rents and sales made by him, and an inquiry of the damage done by Waller to the complainant's property; that whatever should be found due the complainant might be decreed to be paid him, and all his proper offsets be allowed. The bill also contained a prayer that all deeds and papers in the defendant's possession concerning the sales be decreed to be delivered up, and concluded with a prayer for general relief.

The answer of Waller denied that he was ever in possession after the deed of trust was made, denied that he sold or appropriated any of the personal property thereon, that he received any of the rents, issues, and profits, or that he committed waste, or induced the Confederate forces to do so.

The suit in New York having been discontinued, and the bill coming on to be heard in the court below on the pleadings and proofs, that court directed a master to state an account between the parties of what was due to Waller on the bond and of the offsets in the nature of waste, rent, and damages due from Waller to Bigler, and to make any recommendations. The master found $13,000 with interest, to be unpaid on the bond; $43,000 with interest, to be due from Waller to Bigler on account of damage, waste, and rent, and concluded with showing a balance of $26,186 due from Waller to Bigler, for which judgment should be entered in favor of Bigler. The report recommended that the bond

be cancelled, and that Waller and Saunders execute a release deed to Bigler of all claims to the land.

During the pendency of the suit (it should be added) Waller died and the bill was revived against his administrator. Saunders also died, and a new trustee, Henry Coalter Cabell, was appointed, with his powers, in his place.

On a final hearing the Circuit Court, overruling the master's report, decided that Waller was not liable for the waste done to the premises, nor entitled to interest on the bond during the war; nor bound to pay damages for not releasing; that Bigler was liable for the amount of the bond, *payable in coin*, and entitled to recover $151.88 (this sum being $2000 Confederate money reduced to the specie equivalent), damages received by Waller of the rebel authorities, for the injury done the estate.

From this decree (which of course assumed that the foreclosure in 1862 was a nullity) Bigler appealed.

Messrs. E. L. Fancher and J. K. Hayward, for the appellants:

The court below proceeded on the assumption that Waller's foreclosure in 1862 was a nullity and that the property is now Bigler's. But this is an error. The estate does not belong to Bigler, but belongs to Waller under the foreclosure. Hence the bond has been satisfied by the sale under the trust, and there is even a considerable sum of the purchase-money under the foreclosure still due Bigler, for which Waller is liable.

But if the court will compel Bigler to retake title to the property, then what was Waller's relation to the estate during the interregnum, and what are his responsibilities, if any, growing out of that relation? It cannot be said that Waller's actual relation to the property was not sufficiently intimate to warrant his being said to be in actual possession. He regularly bought it, paid for it, and took a deed thereof. Possession follows the title. In fact he exercised all the acts of dominion over the property possible under the then condition of that portion of the country. Waller could have maintained ouster, eviction, adverse possession, and dis-

seisin, as against Bigler, from April, 1862. The doctrine of the Federal courts as to what will constitute actual adverse possession is thus stated in Smith's Leading Cases,* and cases there cited; especially in *Robertson* v. *Norris*:†

"It may with safety be said that where acts of ownership have been done upon land which, from their nature, indicate a notorious claim of property in it, &c., such acts are evidence of an ouster of a former owner, and an actual adverse possession against him, if the jury shall think that the property was not susceptible of a more strict or definite possession than had been so taken and held; and the continued claim of property has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property he did not claim."

If the plaintiff is compelled to retake the estate he should have releases from Waller's heirs; for if Bigler pays the bond he is entitled to have a clean record from Waller. Only Waller's heirs-at-law can make this reconveyance, and they were not made parties at the time the administrator was let in to defend.

Finally, in any view, since the reversal in the legal tender cases of *Hepburn* v. *Griswold*, the decree directing the payment in coin must be reversed.

Mr. Conway Robinson, contra.

Mr. Justice STRONG delivered the opinion of the court.

The complainant insists that the Circuit Court erred in assuming that the sale which was made by Saunders in 1862 was a nullity, and that the property remained the complainant's notwithstanding. This position is taken in order that it may be inferred the residue of complainant's bond for the purchase-money was satisfied by a sale under the trust, and that Waller has not only been thus paid, but that he is accountable for the excess of his bid at that sale above the amount then due him by virtue of the bond. The position

* Vol. 2, p. 641, 643, m. 566, sixth Am. ed. † 5 Jurist, N. S. 1238.

is certainly a strange one. It is directly in conflict with the law of the case and with the complainant's bill. By the deed of trust it was stipulated that in case of a sale the trustee should give sixty days' notice in newspapers in Richmond and in the city of New York. To a valid execution of the power of sale such notice was indispensable, and a sale without it of course conveyed no title. It is not pretended that such notice was given. On the contrary, the bill charges that it was not, and to this the answer of Waller makes no denial, while the answer of Saunders expressly admits that there was no advertisement in a New York paper, giving as a reason for the failure thus to advertise that communication with the Northern States was then prohibited. The fact that the sale was made without the requisite notice is then an established fact, and the inevitable inference is that the sale was inoperative to divest the ownership of the complainant. Without confirmation by him it was a mere nullity, disturbing no right and conferring none. But if this were not so, the theory of the complainant's bill is that his title was not divested. It charges that the necessary notice was not given. It complains that possession was taken by Waller after the sale, that he received the rents, issues, and profits, down to 1865, received compensation for injuries done to the improvements by the Confederate military forces, and it asserts that Waller is accountable to the complainant for such possession, rents, and profits, as well as for the compensation he obtained. All this is utterly inconsistent with the assertion that the sale was effectual to change the title. But this is not all. There is much more in the bill that asserts continued ownership of the complainant, and the invalidity of the sale made in 1862. The averment that the trustee is about to sell the lands again under the trust-deed, and the charge that the sale will be conducted in such a partial and unjust manner as to cheat and defraud the complainant are full of meaning. So is the prayer for an injunction against another sale, and the prayer for the delivery over of the deeds. In view of all this it is impossible for the complainant to maintain now that the attempted

foreclosure in 1862 was not a nullity, ineffective to transfer his right to Waller. Even if he could have affirmed the sale, he has precluded himself from doing so, and has left nothing for the court but to adjudicate upon the case as he has made it. There has then been no actual payment of the bond.

The next inquiry is whether Waller is chargeable with the rents, issues, and profits of the property from the 1st of April, 1862, when the sale was made, until the spring of 1865, when the complainant returned to the land and resumed actual possession. This, of course, assumes that the sale had no validity, for if it worked a foreclosure of the complainant's equity, if it vested the title in Waller, there can be no pretence that he is liable for subsequently-accruing rents and profits. It is only while he can be considered as holding the possession in trust for the mortgagor that he can be called to account. Had he entered in pursuance of his purchase, claiming title in himself by virtue thereof, he would doubtless be chargeable as a trustee, though the purchase was wholly void; and it may be conceded, if he had taken actual possession without claim of right, that he might be treated as such. But actual occupation of the mortgaged premises is indispensable to the existence of such a liability. It is the enjoyment of the property, or the pernancy of its profits, that raises the trust. A false claim of title is, of itself, insufficient.

The difficulty of the complainant's case is, there is no proof that Waller was in actual possession, or even that he was on the land at all, from the time of the sale until this bill was filed, or that he ever received any of its rents, issues, or profits. There is a total failure of any such evidence. The most that can be alleged is, that he claimed sometimes to be the owner without ever enjoying any of the rights of ownership. It is proved that he had possession neither of the personalty nor of the realty.

Equally unsustained is the claim, that Waller is responsible for the waste committed upon the land, and the destruction of improvements. The property was greatly injured be-

tween 1861 and 1865, during the existence of the civil war, but the evidence wholly fails to show that the injury was caused by any act of the defendant's. It was done by the Confederate military forces in Waller's absence, and, so far as it appears, without his knowledge.

It is further insisted, on behalf of the complainant, that the Circuit Court erred in refusing to allow him a credit for damages which, it is alleged, he sustained in consequence of a refusal by Waller to release portions of the land from the operation of the deed of trust in order to enable him to sell them. This claim is founded upon the clause in an executory agreement between the parties, dated April 2d, 1853, by which it was stipulated that Waller would allow Bigler to sell such portions of the land as, from time to time, he might see fit, Bigler paying over such proceeds of the sales as would afford ample security for the residue of the debt due for the purchase-money of the land. The deed for the land from Waller to Bigler was, however, not made until the 10th of May, 1853, and probably not delivered until the 22d of June next following, when the deed of trust was executed. Neither the deed nor the deed of trust contains any such stipulation for releases as is contained in the agreement of April 2d, and it might perhaps be maintained that the agreement was subsequently changed, or merged in the after-executed contracts. But, assuming that it was not, what is the evidence of the breach of the agreement? It does appear that, in 1853 or 1854, the complainant had offers to purchase some parts of the land situated in the heart of it; that he applied to Waller for releases, and that they were refused. But it does not clearly appear that those lots thus located could have been sold without so impairing the value of the remainder as to leave it less than ample security for the payment of the residue of the debt. Applications were afterwards made for releases of other and larger portions differently situated, and the releases were given. That those first asked were not given, when only one-sixth of the purchase-money of the whole property had been paid, ought not to be regarded as a violation of the agreement without

very clear evidence that Waller knew they could have been given with entire safety. Besides, it does not distinctly appear that the complainant was injured by the refusal, or that he ever claimed compensation for it until this bill was filed. From year to year, down to 1860, and including that year, he paid the annual instalments of the purchase-money called for by his contract without claiming any deduction—a course of conduct inconsistent with the existence of any just claim to compensation for a prior breach of his creditor's engagement. There is, then, no sufficient reason for the allowance of a credit on his bond in consequence of Waller's refusal to execute releases.

It is further objected to the decree of the Circuit Court that it does not direct a conveyance by the heirs of Waller to the complainant. His heirs were not called in, and they are no parties. No decree could, therefore, have been made against them; nor was any necessary. If, by the conveyance of Saunders to Waller in 1862, and his subsequent death, the legal title was cast upon Waller's heirs, it was only a naked legal right, which they may be compelled to surrender whenever the purposes of the trust shall be accomplished—when the debt secured by the deed of trust shall be paid. Besides, Saunders, the trustee, has also died, and a new trustee has been appointed clothed with all the rights, duties, and responsibilities of the trustee named in the deed.

It is, however, easy to protect the complainant against any outstanding title in the heirs of Waller by staying the execution of any decree until those heirs shall have conveyed to Henry Coalter Cabell, the new trustee, all the interest, if any, conveyed to their father by the deed of Saunders to him, to be held by Cabell under and subject to the trust declared in the deed of trust to Saunders. Such an order the Circuit Court may properly make.

There remains to be considered but one other objection made to the decree. It is that the sum found by the account due to the administrator of Waller was decreed to be paid in United States coin. In view of the ruling of this court

in *Knox* v. *Lee* and *Parker* v. *Davis*,* this was erroneous, and for this cause alone the decree must be reversed.

DECREE REVERSED, and the cause remanded with directions to proceed to an amended decree

IN ACCORDANCE WITH THE FOREGOING OPINION.

DENT v. EMMEGER.

1. Inchoate rights in the Territory of Louisiana, such as those made A.D. 1789, by a concession of the then Lieutenant Governor of Upper Louisiana to Gabriel Cerre, were of imperfect obligation on the United States when succeeding to the ownership of that Territory by the cession made of it by France to us in A.D. 1803; nor until the Congress of the United States gave them a vitality and effect which they did not before possess, were they of such a nature that a court of law or equity could recognize or enforce them. When confirmed by Congress they took their effect wholly from the act of confirmation, and not from any French or Spanish element which entered into their previous existence; so that the elder confirmee has always a better title than the younger, without reference to the date of the origin of their respective claims or the circumstances attending it.
2. *Held*, accordingly, on an application of these principles, that the title of the village of Carondelet, in Missouri, to lots 90 and 91 of the commons tract of the town, as subdivided by the survey made by Jasper Myer A.D. 1837, which lots the village claimed under a confirmation by act of Congress of 13th June, 1812, vesting the title of the United States in the inhabitants of Carondelet for all the lands lying within the outboundary line of said commons not previously granted by act of Congress—this followed by a survey in 1816 and a re-survey on the old lines in 1817, with a relinquishment of right by Congress in 1831—was a better title than that derived by Gabriel Cerre from a concession to him A.D. 1789, by the Lieutenant Governor of Upper Louisiana, a confirmation by act of Congress 1836, in which the right of all adverse claimants was saved, a survey of 1838, another act of Congress in 1869, confirming the claim of Cerre, "subject to any valid adverse rights, if any such there be," and a patent in 1869.

ERROR to the Circuit Court for the District of Missouri.

Messrs. Glover and Shepley, for the plaintiff in error; Mr. B. A. Hill, contra.

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* Legal Tender Cases, 12 Wallace, 457.

Statement of the case in the opinion.

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

The plaintiff in error brought an action of ejectment to recover the premises described in his declaration. They consist of thirty acres of land, and are lots 90 and 91 of the commons tract of the town or village of Carondelet, as subdivided by the survey made by Jasper Myer, in 1837. The parties waived the intervention of a jury and submitted the case to the court. The court found the facts specially and adjudged that the plaintiff could not recover and that the Carondelet title, which was held to be the better one, was in the defendants. In the progress of the cause, the plaintiff offered certain evidence which was excluded by the court, and he thereupon excepted.

Two questions are presented for our consideration:

Whether the facts found are sufficient to support the judgment given; and,

Whether the court erred in excluding the evidence to which the bill of exception relates.

The examination of these questions renders it necessary to consider the title of the respective parties as disclosed in the record, as well as the testimony excluded.

The premises in controversy are within the Territory of Louisiana which belonged originally to France, was transferred by that country to Spain, and by Spain subsequently back to France, and by France to the United States by the treaty of the 30th of April, 1803. Carondelet was a village of that part of the Territory which subsequently became the State of Missouri, and contained four descriptions of real property. They were known as in-lots, out-lots, common-field lots, and commons. It is with the last only that we have to do in this case. At the period of the transfer to the United States, the claim of the village to the premises in controversy was supported by no clear and definite evidence, and the out-boundaries of the tract had not been run. On the 25th of December, 1797, Soulard, then the surveyor-general of the Territory of Louisiana, certified that at the request of the inhabitants of the village of Carondelet, Ber-

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thelemy had been appointed to survey the tract granted to them as commons by Lieutenant Governor Trudeau, and that he had failed to perform the work by reason of his compass being found out of order, and that want of time had prevented the surveyor-general subsequently from having the survey made.

This condition of things subsisted when the Territory came into the possession of the United States under the treaty with France of 1803, and it continued until Congress acted upon the subject. By the act of June 13th, 1812,* it was declared "that the rights, titles, and claims to town or village lots, out-lots, common-field lots, and commons, in, adjoining, and belonging to the several towns and villages," of which Carondelet is one, "which have been inhabited, cultivated, or possessed prior to the 20th of December, 1803, are hereby confirmed to the inhabitants of the respective towns or villages aforesaid according to their several rights in common thereto." It was provided that nothing in the act should affect the rights of persons whose titles had been confirmed by the board of commissioners appointed to adjust and settle such claims. It was made the duty of the principal deputy surveyor of the Territory to survey, where it had not been done, the out-boundary lines of the villages named, so as to include the out-lots, common-field lots, and commons belonging to them respectively. Plats of the surveys were to be forwarded to the surveyor-general, who was required to forward copies to the Commissioner of the General Land Office and the Recorder of Land Titles.

The act of April 29th, 1816,† provided for the appointment of a surveyor of the public lands in the Territories of Illinois and Missouri, and after requiring him to appoint a sufficient number of skilful surveyors as his deputies, made it his duty, among other things, to cause to be surveyed the lands in those Territories, claims to which had been or might thereafter be confirmed by Congress, which had not already been surveyed according to law.

* 2 Stat. at Large, 748, § 1. † 3 Id. 325.

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Under the act of 1812, a survey of the out-boundary lines of Carondelet was made by Rector, a deputy surveyor, under instructions from the office of his principal, and the survey and field-notes were deposited in that office in the year 1817.

The act of January 27th, 1831,* declared that the United States did thereby relinquish to the inhabitants of the villages named in the act of 1812 all the title of the United States to the lots and commons "in, adjoining, and belonging to said towns and villages, to be held according to their respective rights, to be regulated and disposed of according to the laws of Missouri."

Pursuant to orders from the surveyor-general, his deputy, Brown, retraced the lines of the commons of Carondelet, as run by Rector, and re-established the corners. This resurvey was returned to the surveyor-general, and was approved by him on the 29th of July, 1834.

This statement exhibits the several links in the defendants' chain of title, so far as regards the action of the government.

That of the plaintiff in error had its inception also at a period preceding the treaty of cession of 1803. In 1789 the then Lieutenant Governor of Upper Louisiana, on the petition of Gabriel Cerre, conceded to him a tract of land of ten by forty arpents. In 1812 Cerre presented the claim for confirmation under the acts of Congress of 1805 and 1807, and it was rejected by the commissioners. It was presented by Cerre's legal representatives before the commissioners appointed under the act of Congress of July 9th, 1832, and was by them recommended for confirmation, and was confirmed accordingly by an act of Congress of the 4th of July, 1836.† The right of all adverse claimants, to assert their claims in a court of justice was saved, and it was provided that if any of the land confirmed had been located by any other person under any law of the United States, or had been surveyed and sold by the United States, the confirmation should not avail against the title thus acquired; but that

* 4 Stat. at Large, 435.

† 5 Id. 127.

the confirmee might, to the extent of the interference, locate his claim elsewhere in the State of Missouri or the Territory of Arkansas, as the claim might have originated on one or the other, upon any lands of the United States, subject to entry at private sale. Under this act the claim of Cerre was surveyed for the first time, and the survey was made within the limits of the commons of Carondelet as previously run by Rector in 1817, and by Brown in 1834. Before this survey the Cerre claim was totally undefined and uncertain as regards its out-boundaries.

The act of March 3d, 1869, declared that the claim of the legal representatives of Cerre was thereby confirmed "in place, subject to any valid adverse rights, if such there be," and that a patent should be issued accordingly. A patent bearing date the 3d of July, 1869, was accordingly issued. It was admitted in the court below that the plaintiff in error held whatever title was conveyed by this patent. The premises in controversy are within the limits of the Carondelet commons as surveyed by Rector and Brown, and embrace the premises in controversy in this suit.

The labors of our predecessors have left us little to do, and a few remarks will be sufficient to dispose of the case.

Titles which were perfect before the cession of the Territory to the United States, continued so afterwards, and were in nowise affected by the change of sovereignty.* The treaty so provided, and such would have been the effect of the principles of the law of nations if the treaty had contained no provision upon the subject. According to that code, a change of government is never permitted to affect pre-existing rights of private property. Perfect titles are as valid under the new government as they were under its predecessor.† But inchoate rights such as those of Cerre were of imperfect obligation and affected only the conscience of the new sovereign. They were not of such a nature (until that sovereign gave them a vitality and efficacy

* United States *v.* Roselius et al., 15 Howard, 36.

† Strother *v.* Lucas, 12 Peters, 412.

which they did not before possess) that a court of law or equity could recognize or enforce them. When confirmed by Congress they became American titles, and took their legal validity wholly from the act of confirmation and not from any French or Spanish element which entered into their previous existence. The doctrine of senior and junior equities and of relation back has no application in the jurisprudence of such cases. The elder confirmee has always a better right than the junior, without reference to the date of the origin of their respective claims or the circumstances attending it. Such is the settled course of adjudication both by this court and the Supreme Court of Missouri.*

After the passage of the act of 1812 the claim of the city was still indefinite and unenforceable until made definite and located by the survey prescribed and provided for. A survey made under the direction of the officer designated to have it made and approved by him was final and conclusive unless an appeal were taken to the Commissioner of the General Land Office.† The survey made by Rector in 1817, retraced by Brown, and approved by the surveyor-general in 1834, is binding upon the village and estops her from claiming any land beyond the lines thus established.‡ And those lines must necessarily be of equal validity as regards those claiming against her. The confirmation by the act of 1812 was exclusive except as to adverse claims which had then been confirmed. The Cerre claim was not within this category. It was confirmed subsequently, and after the lines of the commons had been defined and established by the surveys of 1817 and 1834. The action of Congress in confirming it was in every instance made subject to all prior valid conflicting rights. The title of the village asserted in this litigation was of that character.

* Menard's Heirs *v.* Massey, 8 Howard, 307; Chouteau *v.* Eckhart, 2 Id. 345; Les Bois *v.* Bramell, 4 Id. 449; Mackay *v.* Dillon, Ib. 430; Bird *v.* Montgomery, 6 Missouri, 514; Widow and Heirs of Mackay *v.* Dillon, 7 Id. 7; Vasquez et al. *v.* Ewing, 42 Id. 248.

† Menard's Heirs *v.* Massey, 8 Howard, 313.

‡ Carondelet *v.* St. Louis, 1 Black, 179.

Upon principle, authority, and the express legislation of Congress, we are constrained to hold that the adverse claim of the plaintiff in error cannot prevail against the title of the village.

The evidence excluded by the court is set out in full in the bill of exceptions, and consists of copies of documents relating to the surveys of Rector and Brown. The first of these documents bears date on the 24th of September, 1839, and the last on the 8th of October, 1855. They are communications from solicitors of the Land Office, setting forth objections to the surveys, from Commissioners of the General Land Office, the Surveyor-General of Illinois and Missouri, the Secretary of War, and the Secretary of the Interior upon the same subject; and finally a plat of the survey as retraced by Brown—with a certificate appended by the Surveyor-General—which states that the survey so traced was sanctioned by the Secretary of the Interior on the 23d of February, 1855, with a large reservation in favor of the United States at Jefferson Barracks, and subject to all other adverse claims.

As the right of the village, according to the judgment of this court in *Carondelet* v. *St. Louis*,* had been fixed by the resurvey of Brown, in 1834, which was conclusive, as regards all adverse individual claims, the testimony was clearly irrelevant and incompetent and was properly rejected. The acts of 1812 and 1836 were inapplicable to the United States and did not affect their rights.

JUDGMENT AFFIRMED.

FRENCH *v.* SHOEMAKER.

1. A., B., C., and D., having a dispute about their rights in a railroad company, entered into a contract of settlement, by which they divided the stock in certain proportions among them. A. refused to carry out the contract. B. filed a bill to compel him to stand to his agreement. A.,

* 1 Black, 179.

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after answering, filed a cross-bill, insisting that B. ought to have made C. and D. parties to his original proceeding. *Held*, that the bill, not seeking any relief against B. and C., it was not necessary that they should be parties.

2. Equity will not set aside a contract whose purpose is a settlement of disputes, simply because one party to it was in want of money when he made it, and because such want may have been an inducing cause for his making it; the party having been an intelligent person, who acted deliberately and with knowledge of what he was doing. Equity favors amicable compromise of controversies where pecuniary interests are complicated and conflicting.

APPEAL from a decree of the Circuit Court for the District of Virginia; the case was thus:

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

The civil war broke out when the road was in this condition. French and Lenox went South, and the government took military possession of the road.

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

Under the sale thus made, a new company was organized, which assumed the name of the Washington, Alexandria, *and Georgetown* Railroad Company; and the government having relinquished the road in 1865, this company took

possession of it at once; and not long afterwards entered into a contract with the Adams Express Company, represented by one Shoemaker, in relation to the conveyance of express freight, and the furnishing by the company of means to work the road. This contract did not prove satisfactory, and by consent of both parties, a lease for ten years was made to two persons, named Stevens and Phelps, in May, 1866; and in the following June, another contract for means of operation and for the conveyance of express freight was made for ten years with the Adams Express Company.

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

The Washington and Alexandria Railroad Company, describing itself as *that company, by J. S. French, its president*, had already in March, 1866 (the government having, with the suppression of the rebellion, given up, as already said, its possession, and French and Lenox having returned from the South), filed its bill in the Alexandria County Court asserting its title to the road, charging fraud in the whole proceeding for the organization of the Washington, Alexandria, and *Georgetown* Railroad Company, and praying that it might be declared void, and that a decree might be made establishing its own original title to the road as unimpaired by that proceeding. But French, when he returned to Alexandria, was very needy, and so much in debt that he was quite without means to work this railroad if he had had it, or even to get a decree establishing the old company's

title to it. Lenox was little or no better off. And the debts of the road were very heavy.

In this condition of their pecuniary concerns, and in the general state of opposed and opposing interests, in November, 1866, French and Lenox had an interview in Washington, at the house of Mr. Merrick, who had been the counsel of Stevens and Phelps, with Shoemaker (representing the Adams Express Company), Stevens and Phelps, the lessees under the new, or as it was sometimes styled the "spurious" road, and Dean Smith, who had been counsel of Shoemaker, at which interview an inchoate agreement was made for the organization of a new company and the payment of the debts of the old one. This meeting, which was a long one, and where the whole condition of things was largely gone into, was apparently satisfactory to French. Shoemaker, Stevens and Phelps, and Smith were the active managers of the Washington, Alexandria, and *Georgetown* Railroad at this time, and perhaps its formal directors, but all seemed to be of the opinion that the sale by the trustee Stewart and the new organization could not stand in law.

This inchoate agreement remained unacted upon for some months, its details being the subject of conversations among the parties. It was subsequently reduced to writing, and at another meeting signed by all the parties except French, who was absent. It was not then dated; the date was left in blank.

The stipulations of this agreement in substance were:

1st. That French and Lenox would convey all their interest in the Washington and Alexandria Railroad Company to a corporation to be formed as specified, or to devote all of that interest to the common benefit of the parties, in the proportion specified, should the Washington and Alexandria Railroad be revived and the corporation by that name again come into existence.

2d. That when the parties should have agreed to reorganize and should actually reorganize that company, or should organize another company on the basis of the title of French and Lenox, Stevens and Phelps would assign to the company

all their interest as lessees of the Washington, Alexandria, and *Georgetown* Railroad Company, or hold the same for the exclusive use of the parties to the agreement, according to their respective interests.

3d. That Shoemaker, for himself and the Adams Express Company, would aid the corporation to be formed or reorganized by money and credits; that is, to pay, settle or compromise all liabilities of the Washington and Alexandria Railroad Company, the liabilities of the lessees of the Washington, Alexandria, and *Georgetown* Railroad Company for stock and materials for the road, and all the *bonâ fide* liabilities incurred by them in behalf of the road; Shoemaker to be substituted in all rights of creditors paid by him; all compromises to be for the benefit of all the parties or the new organization; no advances to discharge liens to be refunded until the final end of litigation; a majority in interest to have the right to substitute other securities for any thus acquired by him; and the net receipts of the company to be formed or reorganized to be devoted to reimburse the advances made by him, except 20 per cent. of the receipts, to be divided among the parties to the agreement in proportion to their interests.

4th. That the agreement should be carried into effect on the rendering of the decree of the Alexandria County Circuit Court in the case of The Washington and Alexandria Railroad Company *v.* The Washington, Alexandria, and *Georgetown* Railroad Company, and the new company to be formed or reorganized with a capital stock of 3000 shares, to be divided among the parties thus: French and Lenox, 1250; Stephens and Phelps, 850; Shoemaker, 500; Dean Smith, 200; G. W. Brent, 200.

5th. The lessees to be continued under the new corporation as general superintendent and manager, receiving $250 per month each until otherwise ordered by the board of directors, as to salary.

When the agreement thus reduced to writing was presented to French, early in the year 1867, by Mr. G. W. Brent, who was the professional adviser of French and

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Lenox, French refused to sign it, for certain reasons which were the subject of conversation between him and Brent; one of the reasons being that a certain $5000 which were to be advanced to him were not provided for in the agreement. Finally, however, on the 6th of December, 1867, French signed the contract. On the same day a separate contract was made between French and Shoemaker, by which the latter advanced the former $5000 on the transfer to the latter of French's right and interest in the road. By this separate deed from French to Shoemaker, French conveyed, on account of $5000 paid him by Shoemaker, all his right and interest in the railroad, for the purpose of securing the payment of the $5000, and for the purposes set forth in the agreement of same date, 6th December, 1867.

After the courts in Virginia had finally decided, as they did on 28th August, 1868, the case of The Washington and Alexandria Railroad Company *v.* The Washington, Alexandria, and *Georgetown* Railroad Company in favor of the plaintiff therein, reinstating the said company and annulling the charter of the new company, Lenox (September 22d, 1868) called a meeting of the parties who had signed the agreement of 6th December, 1867; the purpose of the meeting being to carry into effect the provisions of that agreement. French was present at the meeting. The meeting directed, among other things, that Mr. Brent should prepare and publish a call to form the new company in accordance with the provisions of the Virginia code. The proceedings were printed and French received a copy. Acting under the instructions given to him, Brent did prepare a form of call and caused to be called a meeting at the Mansion House Hotel, in Alexandria, Va., for the 29th October, 1868.

The meeting was duly held. Lenox was present, and voted on the stock assigned him by the agreement of 6th December, 1867. Shoemaker was elected president of the company. One day previously, that is to say, on the 28th day of October, 1868, French filed a bill of complaint in the Circuit Court of Alexandria County, Virginia, against Shoemaker, the Adams Express Company, and Lenox, setting

forth that Lenox had made a fraudulent combination with Shoemaker to injure and annoy the said Washington and Alexandria Railroad Company, and had called a meeting of stockholders at the Mansion House, in Alexandria, for the 29th October, and he prayed an injunction against them to forbid their holding the meeting under said notice, from electing a board of directors, &c.

In the meantime, that is to say, on the 30th day of September, 1868, a writ of possession had been issued from the Circuit Court of Alexandria County, Virginia, in the suit of The Washington and Alexandria Railroad Company *v.* The Washington, Alexandria, and *Georgetown* Railroad Company, commanding the sheriff to put the former, the plaintiff, into possession of the railroad and its appurtenances. This writ of possession was taken out by French, as president of the company.

Hereupon Shoemaker filed in the Circuit Court of the United States for Virginia, against French, the bill on which the decree now appealed from was made. The bill had been prepared and was sworn to by Shoemaker on the 27th of October, 1868. A subpœna, ordered against French on the same day, and a rule to show cause why an injunction should not be issued, were served on French, all on the same 27th October; the day before he, French, applied for an injunction to prevent the meeting at the Mansion House to organize the new company.

The bill set forth most of the facts above stated, that the complainant had offered to convey to French his interest in the stock and property of the Washington and Alexandria Railroad Company, on his paying the $5000 advanced, which he had refused to do. It then prayed that the said French might be restrained from doing any act whatever as president of the Washington and Alexandria Railroad Company; from interfering with the road and property of the said company, or with the complainant and the parties to the agreement, in carrying out the provisions thereof and in organizing a new company, or from taking any legal proceedings for that purpose; and prayed, further, that French's interest

might be sold by a commissioner of the court for the payment of the said sum of $5000.

The answer of French set up as its main defence needy circumstances and imposition. It was thus:

"The parties—Shoemaker, Stevens, Phelps, Smith—whom the defendant met at Mr. Merrick's, were all strangers to him. Some of them he had never seen before; others of them he had seen and knew by sight. His interview with them was solely on the recommendation of his counsel, G. W. Brent. Such was the embarrassment under which the defendant was suffering, resulting from the fraudulent deprivation of his property and the consequent want of himself and family, that he was scarcely in a condition to investigate the nature of the proposition; and such was the confidence which he had in his attorney, the said G. W. Brent, under whose counsel he acted, that it was impossible for him to suspect the propriety or the advantages of the proposition thus made to him. Before, however, these propositions were reduced to writing, the defendant was suddenly called by telegraph to his home in Southwestern Virginia, on account of the illness of a member of his family. This was in the month of November, 1866. The defendant heard nothing more of these negotiations until his return, in the month of January, 1867, when the contract referred to in complainant's bill, signed by the complainant, the said Stevens, Smith, Brent, and Lenox, was handed to the defendant by the said Brent, and the defendant was pressed by him to sign the same. The defendant declined to sign it, upon the grounds that it was not in accordance with the verbal agreement; that it contained no stipulation for the advance of the sum which was agreed to be advanced to the defendant, and the advance of which was the great inducement to his making the said agreement; and that the contract, in many particulars, was essentially different from the agreement discussed at the meeting. The defendant was then threatened by the said Stevens, and those acting in concert with him and the complainant, that they would keep the defendant out of possession of the road for years; that they would set up the contract in a court of equity, and making the impression upon the mind of the defendant that, by protracted litigation, they would render his property in said road unavailing to him. Thus assailed, importuned, and threatened, the defendant,

after having for nearly one year resisted their influences, being greatly pressed by his necessities, was at length forced to sign the said contract upon the condition that the complainants would advance to the defendant the sum of $5000, and the further condition that the contract should be immediately carried into effect.

"The defendant avers that the contract was void in law and equity, because against public policy, having been fraudulently made by the said complainant, Stevens, Smith, and Phelps, in violation of the fiduciary relations they sustained to the said Washington, Alexandria, and *Georgetown* Railroad Company; that the contract to purchase the interest of the said defendant and the said Lenox, and to furnish, supply, and advance the means to carry on the litigation of the suit then pending was illegal, and of the nature of champerty; and that for these reasons, if there were none other, the complainant is not entitled to the relief prayed for in his said bill, and especially is not entitled to the injunction prayed for therein; the contract being obnoxious to the maxim that '*ex turpi contractu non oritur actio.*'

"That upon the face of the contract there was no consideration sufficient to support said contract, and that it was drawn with the fraudulent purpose and design of deceiving and defrauding the defendant, and he avers that the assignment aforesaid, which he executed only as a mortgage to secure the $5000 advanced to him by the complainant, was fraudulently prepared by the complainant, the said Smith and the said Stevens, with the design of deceiving the defendant into an assignment of his interest and estate in the said road, for purposes other than that which he intended.

"The defendant averred that the complainant, Phelps, Stevens, Smith, and Brent, have conspired together for the purpose of oppressing and defrauding him; that to this end they have imposed upon his confidence, taken advantage of his necessities, seized upon his property, appropriated the earnings of the road, three-fourths of the stock of which is owned by him, for the purpose of preventing the company, of which he is president, from obtaining possession of the road."

A cross-bill was also filed by French to set aside the arrangement. It set up the same facts as the answer; admitting, notwithstanding, that he, French, was for a long time

willing and anxious to carry out the arrangement, and asserting that the other parties had wholly failed to perform their part of it, though he, French, had frequently urged them to do so. It further insisted that Stevens and Phelps were necessary parties to the original bill. The answer to the cross-bill denied all its important allegations of fact.

The case as made out by the proofs was much as that already stated. There was no doubt that French was needy, and it seemed probable that his want of money was the prevailing consideration with him when he finally determined to sign the contract, but it was not proved that he acted unadvisedly or otherwise than his best interests in the complicated and embarrassed condition of the road and his own embarrassed condition might reasonably seem to suggest.

The questions were: 1. Whether Stevens and Phelps were necessary parties to the original bill. 2. If not, whether the contract of December 6th, 1867, was binding on French? If it was, then of course his act in taking possession of the road with the view of excluding the other parties to the contract, and his application to the Circuit Court of Alexandria County, Virginia, for an injunction to restrain the parties to the agreement from holding a meeting to reorganize, was a breach of faith which justified the complainant in invoking the authority of the Circuit Court against him.

As to the first point the court below said:

"If the original bill sought any relief as against Stevens and Phelps, or any aid from the court in carrying into effect the settlement contract as to them, it would be necessary to make these persons parties. But such is not the case. The bill seeks no relief as against them. There does not appear to be any controversy between them and the original complainant. And we cannot see that the cross-complainant has a right to have any controversy he may have with them settled in this suit. It is very certain that at the time the settlement contract was made he had no cause of complaint against them. Nothing, so far as they were concerned, appears to have been concealed from him. The plain language of the agreement, which he had before him nearly a whole

year, stated their relation, and gave all the notice of circumstances connected with them which a court of equity will require. If their subsequent conduct affords ground of complaint, it must be in regard to the stock assigned to them; but this may be, and should be, as we think, submitted to judicial scrutiny, in a proceeding founded on the settlement contract; not hostile to it. The objection that Stevens and Phelps are not made parties to the original bill must therefore be overruled."

On the second point—the merits—the court was of opinion that the equity of the case was with the complainant, and accordingly decreed that French be enjoined from any use of the title of the president of the Washington and Alexandria Railroad Company, and from any action to interfere with any proceeding for the reorganization of the said company under the contract of the 6th of December, 1867, and from any proceeding whatever not in accordance with the said contract, without prejudice, however, to his right to the stock assigned to him by the said contract, or to assert any claim he might have against the company reorganized under the contract, or against Shoemaker, or against the Adams Express Company, not in contravention of the contract, or to pursue by proper proceedings in law or equity any claim he might have in respect to the distribution of stock made by the contract, founded upon failure of consideration or other cause.

From this decree French brought the case here by appeal.

Messrs. H. O. Claughton and B. Stanton, for the appellants; Messrs. T. J. Durant and J. H. Bradley, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Complicated as the transactions are out of which the present controversy has arisen, it will be impossible to explain the grounds of our decision in a manner which will be satisfactory to the parties, without giving in the first place a pretty full statement of the facts.

On the twenty-seventh of February, 1854, the legislature

Restatement of the case in the opinion.

of Virginia passed an act incorporating a company to construct a railroad between Alexandria and Washington, by the name of the Alexandria and Washington Railroad Company, and the record shows that three-fourths of the stock of the company was taken by James S. French, and the other fourth by Walter Lenox, and that they continued to own the whole stock of the company and the entire railroad until they conveyed the same to the complainant. They proceeded to build the road, and in procuring means for that purpose they contracted large money obligations, and to secure those obligations they executed the three deeds of trust mentioned in the bill of complaint; that on the breaking out of the rebellion they went within the lines of the insurgents, and our government took possession of the railroad and used it for military purposes; that during their absence within the insurgent lines Joseph Davison presented a petition to the County Court of the State representing that he was the agent and attorney of all the holders of the bonds in the deed of trust to Walter Lenox, and that the trustee therein named was incapacitated from acting as such, and praying that a certain other person named might be appointed in his place; that the County Court removed the trustee named in the trust deed and appointed the person mentioned in the petition as substituted trustee, and that the substituted trustee subsequently, on the 10th of April, 1862, sold the railroad and everything belonging to it to the persons named in the record, and that the purchasers and others associated organized, or pretended to organize, a new company, called the Washington, Alexandria, and Georgetown Railroad Company. When the government relinquished the road, some time in the year 1865, this new company took possession of the same, and on the first of February entered into a contract with the Adams Express Company in relation to the conveyance of express freight and the furnishing by the latter of means to operate the road. On the twenty-eighth of March, 1866, French and Lenox, having returned, caused a suit to be instituted in the County Court in the name of the Washington and Alexandria Railroad Company against

the new company organized or pretended to be organized under the sale, to recover the railroad and property belonging to it, upon the ground that the whole proceedings by which the sale was made and the new company was formed were fraudulent and null and void. Dissatisfaction arose as to the contract with Adams Express Company, and on the fifth of May, 1866, by consent of both parties a lease for ten years was made by the new or spurious company to Oscar A. Stevens and W. J. Phelps, and on the eighteenth of June following another contract for means of operation and in respect to the conveyance of express matter was made for ten years with the same express company. Litigations ensued with respect to those contracts, some of which were pending when the contracts which are the foundation of the present litigation were executed, and others were commenced at a later period. Serious embarrassments surrounded the parties who had caused the suit to be instituted to set aside the pretended sale of the road during their absence within the insurgent lines, and it was at this stage of the controversy, in November, 1866, that it was arranged that the parties interested should meet for consultation, as shown by the proofs, and as admitted by the respondents. James S. French, S. M. Shoemaker, Walter Lenox, Oscar A. Stevens, J. Dean Smith, and R. T. Merrick were present at the interview. Satisfactory proof is exhibited that they came to an amicable arrangement, subject to the condition that the pending suit in the County Court to set aside the pretended sale of the railroad should be determined in favor of the old company. They separated at the close of the consultation without reducing the agreement to writing, but it was drawn up in form, leaving the date blank, not long after, and was signed by all the parties except the complainant and respondent, who were not present. By the proofs, however, it appears that the complainant signed it shortly after and the respondent, on the sixth of December, 1867, also signed it, though he earnestly objected to signing it when it was first presented to him for that purpose not long after it was signed by the other parties. He not only signed the agreement, but at

the same time executed a conveyance of all his interest in the railroad to the complainant to secure the repayment of five thousand dollars advanced to him by the grantee, and covenanted that it should be held by the grantee for the purpose and objects declared in the contract executed at the same time.

1. By that contract French and Lenox agreed to convey all their right, title, and interest in the railroad to a corporation to be formed as specified, if such a company was formed, or to devote all their interest to the common benefit of the parties thereto, in the proportions specified, if the old company should be revived.

2. Stevens and Phelps agreed, if the parties decided to reorganize the old company or to form a new one as there suggested, to assign all their interest as lessees of the spurious company to such new company, or to hold the same for the exclusive benefit of the parties to the contracts in the proportions therein specified.

3. On behalf of himself and Adams Express Company the complainant agreed to aid the organization to be formed or revived, by money and credit, to pay, settle, or compromise all liabilities of the old company, and the liabilities of the lessees of the spurious company, for procuring stock and materials for working the road, and all other *bona fide* liabilities incurred by them on behalf of the road, the claimant being substituted to all the rights and remedies of any such creditors for the benefit of the parties to the agreement or the organization by them formed or revived, subject to certain conditions therein specified, excepting twenty per cent. of the receipts, which it was agreed should be divided among the parties to the instrument according to their respective interests.

4. They also agreed that the arrangement should be carried into effect on the rendition of the decree of the County Court in the pending case before mentioned, and that the company should then be formed and organized with a capital stock of three thousand shares, to be divided and distributed as follows: French and Lenox to have twelve hundred and

fifty shares, Stevens and Phelps to have eight hundred and fifty shares, S. M. Shoemaker to have five hundred shares, J. Dean Smith to have two hundred shares, and George W. Brent also to have two hundred shares.

5. It was also agreed that the lessees should be continued as general manager and superintendent, at two hundred and fifty dollars each as salary until otherwise ordered by the directors.

Five thousand dollars were paid by the complainant, or agreed to be paid, at the date of the agreement, and in consideration thereof the respondent executed the instrument called the assignment, in which he acknowledges the payment of that sum of money, and proceeds to say, "I do hereby assign, convey, transfer, and set over unto the said S. M. Shoemaker or his assigns, all my right, title, interest, claim, and demand in and to the property, stock, road, roadbed, franchise, and charter of the corporation known as" the old company, or "any interest I may possess in and to the same, and do further agree to make such other and further conveyances or assurance as may be hereafter required by the grantee or his assigns for the following purposes," to wit: (1.) To secure the payment of five thousand dollars due to the grantee as an advance on the same. (2.) For the purposes and objects set forth in the agreement bearing even date herewith, between the parties therein named, and which is particularly described in the pleadings.

Various defences were set up in the answer, but those chiefly to be noticed are the two following: (1.) That the signature of the respondent to the contract was obtained by fraud and oppression, that it is void as against public policy, and because it was fraudulently obtained. (2.) That the assignment, though intended only as a mortgage to secure the five thousand dollars advanced to him by the complainant, was fraudulently prepared with the design of deceiving the respondent into an assignment of his interest and estate in the road, and that he was compelled to sign it by threats, oppression, and persistent and deceptive influences and importunities.

Proofs were taken and the parties were fully heard upon the bill, answer, and replication, and upon the cross-bill, answer, and replication, and upon the proofs, and the Circuit Court being of the opinion that the equity of the case was with the complainant, granted an injunction perpetually restraining the respondent from any and every proceeding not in accordance with the contracts. Appeal was regularly taken to this court, and the principal error assigned here is that the Circuit Court erred in setting up and enforcing the contracts for the conveyance by the respondent of his right, title, and interest in the railroad to the complainant.

Complaint is also made that the decree of the Circuit Court is equivalent to a decree for specific peformance, but it is clear that it cannot be viewed in that light, as the contracts were executed and the conveyance made and delivered nearly a year before the bill of complaint was filed, nor is that the theory of the defence as set up in the answer or in the cross-bill. On the contrary, they both admit the execution of the agreement and the assignment to secure the sum advanced, but the respondent appears to rely chiefly for his defence upon the circumstances of hardship, imposition, and oppression alleged in the answer as affording a just ground to deny the prayer for relief contained in the bill filed by the complainant. He admits that the conveyance was made to secure the sum of five thousand dollars, but he alleges that he tendered the amount to the complainant on condition that the complainant would reconvey the property to him to be held as it was prior to the assignment, and that the complainant refused to receive the money on those terms.

Fraud is certainly charged in the answer, but the charge is wholly unsupported by any satisfactory proof, and the charge is virtually abandoned by the cross-bill, in which it is alleged that the respondent, notwithstanding the oppression and injustice which compelled him to execute the agreement, was willing and anxious, and for a long time continued to demand, that the same should be carried out according

to its spirit and intent. What he there alleges as matter of complaint is that it was his necessities which compelled him to make the sacrifice and to surrender his stock on the hard terms of the agreement, and yet he affirms that he would have been satisfied if the other parties to the agreement had fairly and honestly performed their part of the same, but he alleges that they have utterly failed so to do, though often reminded of the delinquency and repeatedly urged to commence their performance. Many instances of such alleged failures are specified, but it is a sufficient answer to them all to say that they are separately denied in the answer to the cross-bill, and that the party making the charges has failed to introduce any sufficient proof to warrant a finding in his favor in respect to any one of the accusations. Nearly eight months elapsed after the contracts were signed before the County Court rendered their decree annulling the charter of the spurious company and restoring the railroad to its rightful owners. They entered the final decree on the twenty-eighth of August, 1868, and on the twenty-second of September following Walter Lenox called a meeting of the parties to the agreement, and the record shows that the respondent was duly notified and that he attended the meeting. He not only attended the meeting but he knew that the persons composing the meeting intended to effect an organization under the agreements described in the pleadings, as they directed one of their number to prepare and publish a call for another meeting to carry that purpose into effect in accordance with the code of the State and as contemplated by the terms of those agreements. Acting under those instructions the person designated for the purpose prepared the form of a call for such a meeting to be held on the twenty-ninth of October then next, and caused the same to be published; and the record also shows that the meeting was regularly held pursuant to the call for the same, and that the company was duly organized at that meeting by the choice of the complainant as president of the company. Prior to that meeting, however, to wit, on the thirtieth of the preceding month, the respondent, claiming to act as

president of the road, obtained a writ of possession under the decree annulling the pretended sale of the road, and it appears that he was put in possession of the road by the sheriff, to whom he delivered the writ for that purpose. Instead of co-operating with the other parties to perfect the organization the respondent applied to the County Court for an injunction to restrain the other parties from holding the meeting called for that purpose, but the subpœna was issued in this case on the same day and the complainant obtained a rule requiring the respondent to show cause why an injunction should not issue restraining him from doing any act as president of the road, and from interfering in any way to prevent the execution of the agreement, and it appears that the subpœna and the order to show cause were served on him the day before he obtained his injunction forbidding the contemplated meeting.

Sufficient has already been remarked to show that the defence of fraud is not proved, but inasmuch as that defence is set up in several forms in the answer it may be necessary to say that the antecedent remarks upon the subject apply to that defence in every form in which it is presented. Reference has also been made to the defence that the respondent was compelled to sign the contracts by threats, oppression, and by persistent and deceptive influences and importunities, but it becomes necessary to state that defence more in detail and to give it a more careful consideration.

He alleges that he was induced to sign the two instruments by threats that if he refused he should be kept out of the possession of the road for years, and that in consequence of his pecuniary embarrassments and through fear that the parties would render his property unavailing to him in case he continued to resist their importunities, he finally executed the agreement; that being pressed for the want of pecuniary means and overcome by threats, importunities, and deceptive influences, he was ultimately forced to sign the agreement upon the condition that the complainant would advance him five thousand dollars, and that the contract should be immediately carried into effect.

Even if admitted to be true the answer does not show that the instruments were executed under duress, as the respondent admits that the sum of five thousand dollars was to be advanced as a part of the consideration for the transfer, and that he finally consented to the arrangement on the condition that the contract should be immediately executed. Much discussion to show that a contract or written obligation procured by means of duress is inoperative and void both at law and in equity is hardly required, as the proposition is not denied by either party. Actual violence, even at common law, is not necessary to establish duress, because consent is the very essence of a contract, and if there be compulsion, there is no actual consent, and moral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient in law to destroy free agency, without which there can be no contract, because in that state of the case there is no consent.* In its more extended sense duress means that degree of constraint or danger, either actually inflicted, or threatened and impending, which is sufficient in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness.† Decided cases may be found which deny that contracts procured by menace of a mere battery to the person, or of trespass to lands, or of loss of goods, can be avoided on that account, and the reason assigned for that restriction to the general rule is that such threats are held not to be of a nature to overcome the mind and will of a firm and prudent man, because it is said that if such an injury is inflicted sufficient and adequate redress may be obtained in an action at law, but the modern decisions in this country adopt a more liberal rule, and hold that contracts procured by threats of battery to the person or of destruction of property may be avoided on the ground of duress, because in such a case there is nothing but the form of a contract without the

* Brown *v.* Pierce, 7 Wallace, 214.

† Chitty on Contracts, 217; 2 Greenleaf on Evidence, 283.

substance.* Grant all this and still the concession cannot benefit the respondent, as the proofs exhibited in the record are not sufficient to support the charges as made in the answer. Substantially the same charges are made by the respondent in his cross-bill, and every one of them is denied by the complainant under oath in his answer to that bill.

Enough appears in the record to convince the court that the respondent was in straitened circumstances, that his business affairs had become complicated, that he was greatly embarrassed with litigations, and that he was in pressing want of pecuniary means, but the court is wholly unable to see that the complainant is responsible for those circumstances or that he did any unlawful act to deprive the respondent of his property, or to create those necessities or embarrassments, or to compel him to do what he acknowledges he did do, which was to yield to the pressure of the circumstances surrounding him, and as a choice of evils accepted the advance of five thousand dollars and the shares assigned him in the new organization as proposed, and voluntarily signed both the agreement and the assignment. Such an act as that of signing those instruments, under the circumstances disclosed in the record, must be regarded, both in equity and at law, as a voluntary act, as it was unattended by any act of violence, or threat of any kind, calculated in any degree to intimidate the party or to force the result, or to compel that consent which is the essence of every valid contract. Suppose he consented reluctantly, as he avers, still the fact is that he did consent when he might have refused to affix his signature to the instruments, as he had repeatedly done for the year preceding; and having consented to the arrangement and signed the instruments he is bound by their terms, and must abide the consequences of his own voluntary act, unless some of his other defences set up in the answer have a better foundation.

Want of consideration is also averred in the answer, but

* Foshay *v.* Ferguson, 5 Hill, 158; Central Bank *v.* Copeland, 18 Maryland, 317; Eadie *v.* Slimmon, 26 New York, 12; 1 Story's Equity Jurisprudence, 9th ed. 239.

the terms of the instrument disprove the allegation, and the proofs introduced by the respondent as well as those introduced by the complainant show that the defence is unfounded.

Mistake and misapprehension on the part of the respondent are alleged, but the allegation is not sustained by any satisfactory proof, and the attending circumstances, taken in connection with the lapse of time from the original meeting to the time the respondent signed the instrument, convinces the court that the defence is without merit, which is all that need be remarked upon the subject.

Delay in execution of the contract is also alleged in the cross-bill, and that the complainant has failed to perform his part of the agreement, but those allegations are expressly denied in the answer to the cross-bill, and being unsustained by any satisfactory proofs the defence must be overruled.

Inequitable and unconscionable contracts, it is said, ought not to be sustained, but it is not possible to regard the arrangement in question as falling within that category, as by the terms of the agreement the complainant was to advance five thousand dollars to the respondent and to aid the organization by money and credit, to pay, settle, and compromise all liabilities of the old company and the liabilities of the lessees of the spurious company, for procuring stock and materials for working the road, and all other *bonâ fide* liabilities incurred by them in behalf of the road. Authentic data to enable the court to compute the amount of those liabilities are not given in the record, but enough appears to satisfy the court that they must have been very large, and amply sufficient to constitute a valuable consideration for the contract.

Suggestion is also made that the contract was against public policy, as some of the parties were interested in the spurious company, but the court is of the opinion that the charge is without any foundation, as it is clearly proper that parties whose pecuniary interests are complicated and conflicting should compromise the controversy, nor is it possible to see how the respondent is injured even if some one or more of

the parties failed to perform their duty to the spurious company which was annulled.

Suffice it to say, in respect to the alleged want of proper parties, that the court is of the opinion that the objection cannot be sustained, and being entirely satisfied with reasons given for overruling the objection in the Circuit Court it is not necessary to give the point any further examination.

Want of mutuality in the contract is also suggested, but it is clear that the suggestion is not well founded, as the covenants to make the advance, pay the debts and liabilities of the company, and to allot the stock as stipulated, could be enforced by suit in any court of competent jurisdiction.

Strong doubts are entertained whether any of those defences to the merits are open to the respondent, as the general rule is that where fraud is charged in the bill or set up in the answer, the party making the charge, if it is denied in a proper pleading, will be confined to that issue, but the court being disinclined to place the decision upon that ground has determined to give each defence a separate examination.*

Parties who execute contracts must expect that they will be enforced when due application for that purpose is made to a court of justice, nor can they reasonably hope that courts of justice will reopen matters which they have voluntarily and understandingly closed. Even if the terms of adjustment were unfavorable to the respondent still he is bound by the arrangement, as he voluntarily signed both the agreement and the assignment. Had he refused his assent to the arrangement the case might have been different, but the proofs show that he signed instruments after he had ample time for inquiry, examination, and reflection, and having done so, neither a court of equity or a court of law can release him from the obligation to fulfil his contracts according to the terms of the instruments.

DECREE AFFIRMED.

* Eyre *v.* Potter, 15 Howard, 42; Fisher *v.* Boody, 1 Curtis, 206; Price *v.* Berrington, 7 English Law and Equity, 254.

THE LAURA.

1. The master, officers, and crew of a vessel, with every person on board, having gone off in extreme anxiety for their personal safety from the vessel on to another which they had brought to them by signals of distress, the mere expressed intention by the master to employ if possible a tug to go and rescue his vessel (she then lying at anchor in a violent gale), to which expression of intention, the person to whom it was made replied, that he "could not get a tug that would come and bring the boat in, as the weather was too rough," was held not sufficient to deprive the vessel of the character of a derelict, so far as timely effort to save her was contemplated.
2. A vessel undertaking in good faith to perform the office of salvor to a derelict vessel, held not responsible for the latter having been wholly lost in the effort to save her.

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

The high-pressure steamer Savory and the steamer Laura, a low-pressure steamer of a rival line, were in the habit, in the year 1866, of plying on Lake Pontchartrain; that is to say, of going up and down from the mouths of the rivers Tangipahoa and Tchefuncta (streams which empty into the north part of the lake), and from the towns of Mandeville and Madisonville (also on the north part of the lake—its northeast part—and not far from each other, or from the mouths of the rivers named), to the railroad-landing, on the southwest part of the lake, of a short railroad which goes to New Orleans. The length of the lake is about thirty-six miles. As is common between steamers of opposing lines, there was some rivalry between them.

On the night of Friday, January 19th, 1866, the Savory, with twenty-five people on board—seven of them paying as passengers—and with a raft of timber in tow, had come from the Tchefuncta, and was on her way from the Tangipahoa to the railroad-landing. She had gone well down the lake when a gale came up which, increasing in severity, compelled her to cut away her rafts and to come to anchor. The Savory had been built originally as a river-boat, "high

up," and was not specially adapted to the lake navigation. When she cast anchor, as just mentioned, she was within five or six miles of the railroad-landing where she wanted to go, and not more than a mile and a half from the western shore of the lake. On that shore, and within three or four miles of where the vessel was anchored, was what is called the "Old Basin," and rather closer to her what was called the new one. The gale increased. About 3 o'clock of Saturday morning it became very steady, and the danger of her sinking was so considerable that the utmost anxiety prevailed among her officers, crew, and the few passengers on board, to get off her. The captain ordered the flag to be raised Union down; had his life-boat made ready; had driven spikes across the edges of a bale of cotton, and attached ropes to these for persons in the water to hold to and swim or float to shore; and by what he said, and by what in various ways he did, showed extreme anxiety for the safety of all on board, including specially himself.

In this state of things, and about 10 o'clock on the morning of Saturday, the Laura, being on her usual trip, hove in sight. The captain of the Savory at once blew signals of distress from his steam-whistle. "What can I do for you?" was the inquiry of the captain of the Laura on hearing the whistle and seeing the Union down. "Save my passengers and crew," was the reply from the Savory. Thereupon the captain of the Laura came alongside; in doing which, owing to the violence of the wind and waves, he was driven against the Savory with so much force, that the wheel-house of the Savory was considerably torn by the contact. As soon as she got near enough for persons on the Savory to pass on board of her, they began to come; the clerk of the Savory first, and her captain right afterwards; the third or fourth person who did come. "There was no degree of order," said one witness, "observed by the passengers in getting on. They were very much excited, and came on the Laura the best way they could. We had to tell them several times to be calm, that there was no danger." The captain ordered two or three men to remain, but not one single one of them

did remain; and as the Laura left the Savory, her captain was heard to remark, in reference to her, "There are $5000 gone!"

Subsequently, and on their way down the lake, the captain of the Savory told the captain of the Laura, as that officer swore, that he was "going to try to get a tug to bring the Savory out;" to which the captain of the Laura told him that "he could not get one in the whole basin that would come out and bring his boat in, as the weather was too rough." The captain of the Savory swore that he said he was going ashore to get a tug to bring his boat in.

The Laura now arrived at the railway-landing where both vessels had been bound, and there, in about three hours after she left the Savory, and in about three-quarters of an hour after her arrival at the landing, she had landed her own passengers and those which she had taken from that steamer. Here the owner of the Laura, one Frigerio, came on board. After the freight was discharged and the Laura was about to make a return trip, her captain went to Frigerio: "I told him," said the captain, "that it was my duty to go over there and save that steamer, and asked him if he would let me go." He replied, "that I was the captain of the boat, and had to use my own discretion." The captain hereupon went on his trip for the other end of the lake, meaning to make fast to the Savory and tow her to the Tchefuncta River, the place whence the Savory had come, and near to which, as already said, was the town of Mandeville, where he himself was going in regular course. The captain of the Savory, while on the landing, saw the Laura reach the Savory, take her in tow, and start to sea with her, heading northward for Mandeville. After that, and on the same Saturday afternoon, he went to New Orleans and engaged a tug, then lying in the New Basin, to go after the Savory. The tug did go after her; setting off on Sunday morning at 9 o'clock; the captain of the Savory on board. "We had heard, before we started," said the chief engineer of the tug, "that the Savory had been taken off by the Laura; and she was by us supposed to be at Mandeville.

Statement of the case.

We went in sight of Mandeville, saw that the Savory was not there; then changed our course for Madisonville, but did not find her there. We found the Laura there. The captain of the Savory went aboard of the Laura; returned, and ordered us back to New Orleans."

The history had been thus: The Laura, on arriving at the Savory, found her wheel-house, as already mentioned, considerably torn by the contact which she had made with her when signalled to come to her relief; that her chimneys were loosened and careened, and that, though the vessel was not leaking, the waves were breaking over her decks, and water getting into her hold. Her captain went alongside, struck her bulwarks a little, but not so, he thought, as to make her leak, caused the chain to be cut, put three men aboard of her to keep her clear of water, and took her in tow; his "intention being," as he testified, "to save the boat, if he could, by towing her into smooth water on the north shore, which was the only place where there was smooth water." The sequel was thus told by the captain himself:

"I towed her about ten or twelve miles, with her chimney hanging pretty well on her starboard side, which was loose and shaking from one side to the other. I found the boat was coming more to the starboard all the time, and then sung out to the men to heave some of the wood and lumber overboard, off the starboard side. This was done, but did not help her much. The water went in her so strong that finally she capsized bottom up. One of the men was in the pilot-house when she capsized, the other two finally came up amongst the broken-up cabin. I then went and picked up the three men, and went on my trip to Mandeville."

The captain gave it as his belief, that "had the Savory remained at anchor where she was, and with the weather that prevailed, she would have gone down in six hours, as the norther blew until next day, and harder that night than in daytime."

When she went down, the captain of the Laura said that "that would be the fate of all the high-pressure steamers on the lake."

Argument for the Savory.

The owners of the Savory, after the disaster, filed a libel both against the Laura and her owner, Frigerio, alleging that when the vessel was lying at anchor in Lake Pontchartrain, near Lakeport, and within a half-mile of the shore, and when she was neither abandoned nor in need of assistance, the Laura, under the direction and at the instance of Frigerio, did wrongfully take her from her anchorage and tow her out into the lake, and then sink her.

Frigerio, answering for himself, and as claimant of the Laura, set up that the Savory was in a sinking condition, abandoned by her officers and crew, and that in an effort to save her by towing her to a place of safety, she capsized and sunk; that this result was without fault on his part or of the officers of the Laura, but was the result of a severe gale and of the crippled condition of the Savory.

Evidence was taken and the facts as above presented, including the alarm of the captain of the Savory, and indeed of an extreme anxiety for his own personal safety, fully established. On the hearing in the District Court, however, and in the face of this he denied that he knew that the Union was down, and swore that he gave no orders for signals of distress. He swore also that he had a permit from the custom-house to carry passengers; while the inspector of steamboats for New Orleans showed that he had none.

The District Court decreed in favor of the libellants. The Circuit Court reversed this decree and dismissed the libel. The owners of the Savory now brought the case here.

Mr. J. Hubley Ashton, for the appellants:

1. The Savory and the Laura were opposition boats, running on Lake Pontchartrain, by regular trips between New Orleans and the same towns. There was a good deal of rivalry and jealousy between them; and obvious ill feeling on the part of the owner and master of the Laura to high-pressure steamers. It is perhaps not a greatly-strained conclusion that the Laura meant to destroy this vessel. Such is the impression certainly of the libellants.

2. The Savory was anchored not more than three or four

miles from the entry of the Old Basin, and somewhat nearer the New Basin, and although she might easily have been towed into the New or the Old Basin, if the master of the Laura really meant to save her, and although the master of the Laura professes to have believed she would have gone down at her anchorage if he had never touched her; nevertheless he cut her anchor chain, attached a hawser to her, and attempted to cross the lake, a voyage of thirty miles, in the face of a head wind and a rough sea, with the Savory in tow. The result was as might have been expected. In three hours, the gale being very heavy, little or no progress was made, but the Savory went down; pulled obviously to pieces.

3. It is not pretended that the master or owner of the Laura had any authority from the owners or master of the Savory to touch that vessel. The right to do what was done, if right existed at all, must be rested on the fact that she was derelict.

But the Savory, at the time she was taken by the Laura, was not derelict. The owners were in constructive if not actual possession of her. The master swears that he gave no orders for signals of distress, and that he did not know that the flag had the Union down. All this shows that the condition of the vessel was not one of great peril, and that the case could not have been one of derelict. What constitutes a case of *derelict* has been authoritatively defined by this court:

"The abandonment must have been final, without hope of recovery, or intention to return. If the crew have left the ship temporarily, with intention to return after obtaining assistance, it is no abandonment, nor will the libellants be entitled to salvage as of a derelict."*

The British admiralty authorities are likewise clear to the point, that in every case of derelict there must be an abandonment *animo derelinquendi;* and that the intention *at the*

* The Island City, 1 Black, 128.

time of going is the point on which the question of derelict must be decided.* The evidence shows affirmatively that the master of the Savory left her temporarily, for the purpose of obtaining a tug to tow her into the basin. Conclusive proof of his purpose is furnished by his subsequent acts in execution of his original intention of obtaining assistance. We have seen that he went at once to New Orleans and engaged the services of a tug, and followed the Savory with her to Madisonville.

The case in short is one of a trespass, and the vessel having been lost the Laura and her owners are responsible.

Mr. T. J. Durant, contra.

Mr. Justice MILLER delivered the opinion of the court.

Some attempt is made to show that the Laura and the Savory were rival vessels in the same trade, and that the result was due to the wish of the owner or the master of the Laura to remove a competitor in business. But of this there is nothing but suspicion. On the contrary, there is strong evidence that the master of the Laura, who controlled her entirely in the matter, though her owner was on board, was governed by a sincere wish to afford all the relief he could to the Savory and her passengers and crew.

It is also argued that the master showed a culpable want of skill and judgment in attempting to carry the Laura across the lake, instead of trying to get her into the mouth of the old or new canal, within a mile or two of where she was abandoned. But though there is some apparent conflict of testimony on this point, we are satisfied that the master of the Laura was justified in assuming that in such a gale as was then blowing, it was more dangerous to attempt to land her in either canal than to tow her across the lake to calmer water, and a safe harbor on the other side.

The only question of any doubt in the case arises on his right to interfere at all to save the vessel. The libellants

* The Cosmopolitan, 6 Notes of Cases, 24; The Aquila, 1 C. Robinson, 40; The Barefoot, 14 Jurist, 841; The Sarah Bell, 4 Notes of Cases, 146.

deny this right on two grounds: 1st, that she was safe where she was; and, 2dly, that the master of the Laura was distinctly informed by the master of the Savory, that he was going ashore to get a tug to relieve her.

1. In regard to the condition of the vessel at the time the Laura took her in tow, we are of opinion that it justified the belief that her condition was one of great peril and that she would sink in a short time if left alone.

The testimony of the master of the Savory, which it is argued shows a state of facts that would not justify this conclusion, is so fully contradicted, and he appears to have been so overcome with fear at the time of leaving the vessel, that but little credit can be given to any of his statements.

2. It is sworn by the master of the Savory that on his way to the railroad landing he told the master of the Laura that he was going ashore to get a tug to bring his boat in. The master of the Laura swears that the master of the Savory did say that he was going to try to get a tug to bring the Savory out, to which he replied that he could not get a tug in the whole basin that would come and bring the boat in, as the weather was too rough.

This conversation evidently had reference to the tugs in the basin at the mouth of the canal, and the efforts of the master to get a tug in New Orleans were not in pursuance of this conversation, for he expressly says that he saw the Laura start with the Savory before he left the shore for New Orleans. This effort was to bring her back from such place as the Laura might have carried her to, and shows that he did not think it probable she could be navigated without such assistance.

In the case of *The Esperance* the claimants received a letter from the master, who, with the crew, had left the vessel, advising them of the fact, and immediately sent proper persons to take charge of her and her cargo. But before they arrived other salvors had taken the vessel and finally brought her in and libelled her. Sir W. Scott said it was a clear case of derelict; there was first the chance of the party sent

by the claimants not finding her; and, secondly, that if found, she would be a complete wreck.*

In the case of the brig *John Gilpin*,† Judge Betts, in considering a question of derelict somewhat analogous, said, that "she" (the vessel) "was apparently abandoned, and if her crew might have been absent to procure assistance from other vessels and more force, their ability to return to the wreck, or the chance of affording any aid after the lapse of a few hours, must, in the then condition of things, have been most dubious contingencies."

In *The Coromandel*,‡ Dr. Lushington, in speaking of a case very similar to this, remarks: "It may be perfectly true that the master and these fifteen men, when they had got on board the Young Frederick, and were sailing away to Yarmouth, intended, if possible, to employ steamers to go and rescue the vessel, which was at no great distance. But is not that the case every day? A master and crew abandon a vessel for the safety of their lives; he does not contemplate returning to use his own exertions, but the master hardly ever abandons a vessel on the coast without the intention, if he can obtain assistance, to save his vessel. That does not take away from the legal character of derelict." This language applies with a precision remarkable to the case before us. And the casual observation of the master abandoning the vessel in great fear for his own immediate personal safety, that he designed to get a tug to bring his boat in, is of the class of intentions referred to by Dr. Lushington above, and that he made no response to the reply of the captain of the Laura, that he could get no tug to try it in such rough weather, shows the truth of Dr. Lushington's remarks.

We think that the master of the Laura was authorized to conclude that the Savory was in a condition of immediate peril, and abandoned so far as any timely effort to save her was contemplated; that he acted in good faith, and with reasonable judgment and skill, and that, therefore, the libel

* L'Esperance, 1 Dodson, 46. † Olcott, 78. ‡ 1 Swabey, 208.

of appellants was properly dismissed by the Circuit Court. The decree is accordingly

AFFIRMED.

THE CONTINENTAL.

1. Although one vessel may be sailing at night with lights other than those whose use is made obligatory on her by acts of Congress, and may by actually misleading another vessel tend to cause a collision, yet this will not discharge the other vessel if she, on her part, have suffered herself to be misled by the wrong lights when, if she had been intelligently vigilant, other indications would have pointed out or led her to suspect that the vessel was not what her lights indicated.
2. Accordingly, where one vessel was using wrong lights, and the other was not thus intelligently vigilant, the two vessels were made to divide equally a loss by collision between them.

AN act of Congress—that of July 25th, 1866*—prescribes that all coasting steamers and those navigating *bays*, *lakes*, *or other inland waters*, shall carry a green light on the starboard side, a red light on the port side, and in addition thereto *a central range of two white lights*, *the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel;* the head-light to be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel; *and the after light to show all around.* It also enacts that *ocean-going steamers* shall carry "at the foremast-head a bright white light," on the starboard side a green light, and on the port side a red light; these two last so fixed as to throw the light from right ahead to two points abaft the beam, and fitted with in-board screens projecting three feet, so as to prevent these lights being seen across the bow.

A previous act, the well-known one of April 29th, 1864, "for preventing collision on the waters,"† thus prescribes:

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* 14 Stat. at Large, 228.

† 13 Id. 58.

Statement of the case.

ARTICLE 5. Sailing ships under way . . . shall carry the same lights as steamships under way, *with the exception of the white masthead lights, which they shall never carry.*

ARTICLE 13. If two ships under steam are meeting end on, so as to involve risk of collision, the helm of both shall be put to port so that each may pass on the port side of each other.

ARTICLE 15. If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship.

ARTICLE 16. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.

These two statutes being in force, the steam propeller North Hampton and the side-wheel steamboat Continental, two vessels of rival lines, were in the habit of making regular daily trips between New York and New Haven, on the Long Island Sound; the North Hampton leaving New York about 6 P.M. on one day, and the Continental leaving New Haven about midnight on the same day.

On the night of the 23d of October, 1868, the rival vessels were making their customary trips. That night, though cloudy and with occasional spits of rain, was not very dark nor windy. The sea was open and comparatively smooth. About midnight, the wind being north-northeast, the North Hampton approached New Haven, and by the captain's order steered straight east-northeast for the New Haven light-house; a right course apparently for her to steer when about to enter the harbor. She soon saw the lights of a steamer, which she inferred, and rightly, was the Continental coming down and out of the harbor. After the Continental came down the harbor, she changed her course to go down the Sound towards New York. "When she first changed her course," said the captain of the North Hampton, who was examined as a witness, "she headed directly for the North Hampton, which," said he, "I could tell by her range of lights, they being exactly in range after she got her course." He continued:

Statement of the case.

"After a little her course varied, a little southerly. She was then, when she hauled up, on her course westerly, distant about three miles. I continued going our course east-northeast until I was distant from the Continental, I should judge, about three-quarters of a mile. She was then bearing a very little on our port bow, nearly ahead. I then gave one blast of the whistle and changed my course one point easterly to east by north. I received no response to that whistle for, I should say, nearly or quite a minute. I then heard two blasts of the Continental's whistle, which I immediately answered by one whistle, rung two bells to stop the boat, and in the meantime told the pilot to heave the wheel hard aport."

Notwithstanding this the two steamers came violently together, the Continental striking the North Hampton on her port side a little abaft midships, nearly square on, and running through her in such a way that she went down in half an hour; her passengers just escaping with their lives.

The defence set up by the Continental for this collision was, the fact that the North Hampton had had no "central range of two white lights;" for want of which, as the Continental alleged, she took the steamer for a sailing vessel, and starboarded her helm instead of porting it. On the subject of the North Hampton's lights generally, one of the boat's hands of that vessel who had been at the wheel prior to the collision, and left it when he saw the steamer coming down the Sound, testified thus:

"I found the bow light burning brightly. The side lights were also burning brightly. The stern light I found burning dim. There were two lanterns in one box. They showed as one light. I went aft and lowered it down. After I got the box down, I went into the door where the space is, out of the draft, so they would not blow out, and when there picked up the wicks of both lights, one after another. After that was done, I took them to the staff and put them in the box and hoisted them up. I heard the North Hampton blow one whistle. I was aft then, at the time of this first whistle, was just stepping inside the passage-way with the lights, as near as I can recollect. After an interval there was a reply with two whistles from the Continental. I was then coming out of the passage-

way, as near as I can remember. The North Hampton blew one whistle again, directly after. I was then in the act of hoisting the lights at that time. After hoisting up the lights I saw the Continental coming for us, and I ran forward on starboard side. I got part of the way forward, when the vessels came together and the concussion knocked me down."

It appeared from the testimony of those on board the Continental that they had, in point of fact, mistaken the North Hampton for a sailing vessel.

The lookout of the Continental—her forward deck lookout, who had no other duty than that of lookout—"not seeing the vessel itself, but seeing a green and white light"—which he judged to be then a mile or a mile and a half distant—reported, five or six minutes before the collision, "Sail off starboard bow," and was answered at the pilot-house, "Aye, aye!"

The wheelsman, who heard the lookout's report, saw also a green and white light, "but no red light then four or five minutes before the collision, as he judged, and a mile or a mile and a half off, the North Hampton's lights bearing pretty much the whole time, until it was too late to avoid the collision, about three points on the Continental's bow." *He thereupon starboarded his helm so as to keep her off.*

The captain, who had been on the line for thirty years, and who was in the pilot-house with the wheelsman, said:

"I saw the North Hampton's green and white light; she had no stern light; sometimes in a sailing vessel they come forward and stick out a white light when they get frightened; sometimes they have a light forward to overhaul the anchor-chain."

The captain added:

"A lookout reports a steamer as a steamer, and a vessel as a vessel; all he knows by is the lights; at night, he reports four lights as a steamer, and two lights as a vessel. If the vessel seen has one colored and only one bright light, he reports her as a sail vessel. That's his orders."

On board the Continental there happened to be, going

down the Sound that night, one Horton, for seven years a Hellgate pilot. He had been in the pilot-house, and saw a green and white light—the white light forward, but he saw no aft light. The vessel on which they were seemed to him, he testified, to be a sailing vessel. He said:

"I guessed she was a sailing vessel because she did not have any stern light; I could not see her hull when I first saw her. It is generally the case for a vessel coming into port to take a light forward, to get her chain and anchor ready to drop anchor. I went away from the pilot-house to the lower cabin after I saw the lights. From the time I left the pilot-house till the collision was five or six minutes. After the collision, I saw a stern light halfway up the flag-mast."

As already mentioned, the Continental was starboarded under the impression that the North Hampton was a sailing vessel, and with a view of keeping out of her way. The North Hampton being in fact a steamer, and knowing that the approaching vessel was one, ported. A collision came of course.

The owners of the North Hampton having libelled the Continental in the District Court of Connecticut, that court dismissed the libel, considering that the North Hampton was in fault; having had no stern-light, and running in direct violation of law, which required her to have a central range of two white lights. The Circuit Court affirmed this decree, and the owners of the North Hampton brought the case here.

Messrs. C. Donohue, C. R. Ingersoll, and J. S. Beach, for the appellants:

Assuming that the steamer could see only the bow and side-lights of the propeller, it was a fault on her part to act as if they were the lights of a sailing-vessel. A white light is prohibited to a sailing vessel under way. She is forbidden to carry any other light than the green light on her starboard side, and the red light on her port side. Sea-going steamers are required to carry the single white light with the side colored lights. Coasting and inland water steamers carry

the colored side-lights with the bow and stern white lights. The lights, therefore, which the steamer saw, were lights which a sea-going steamer must carry, but which a sailing-vessel *must never carry*. And the steamer assumed that the vessel carrying it was not the kind of vessel which the lights declared it to be, but was the kind of vessel which the lights declared it not to be. This was recklessness.

If a steamer sees a light which does not clearly indicate the character of the vessel carrying it, she has no right to jump to the conclusion that it is carried by a vessel of any particular class, and especially not of that class which is forbidden to carry such a light. It is her duty to ascertain the truth by all the cautionary means in her power. She must use all necessary vigilance to discover whether the strange light is a fixed light or not—and if fixed, whether it is on a vessel in motion or at anchor—and if on a vessel in motion, what is the course of that vessel as indicating whether she is moved by the wind or by steam. She must look for the strength of the light seen as distinguishing a regulation-light from an ordinary hand-lantern, commonly used about a vessel's deck—and watch for the sails of the vessel—her hull—the noise of her paddles, and the lights of her saloon, if a steamer—and for all the usual indications characterizing the different classes of vessels. And if this inquiry cannot be made without slackening her speed, she must slacken her speed. If not without blowing her whistle, as a signal, she must blow her whistle. She has no right to go on at all if she is in any reasonable doubt on the subject. If, without exercising all reasonable precautions, she insists upon going on, and a collision occurs, she takes the risk, and the fault is justly visited upon her. In the case of *The Gray Eagle*,* that vessel was held to be in fault because she did not, by watching the bearings of the light of another vessel coming towards her—*The Perseverance*—discover that the light was in motion, and therefore could not be upon a vessel at

* 9 Wallace, 505; see also Nelson *v.* Leland, 22 Howard, 48; The Louisiana *v.* Isaac Fisher et al., 21 Id. 1; The Birkenhead, 3 W. Robinson, 75.

anchor. And she was condemned as in fault, although the Perseverance was carrying a light she had no right to carry. And such is the law of negligence everywhere. If a man goes upon a railroad track with shut eyes and deaf ears and is run over, it is in vain for him to complain that the whistle was not blown. In the present case no precaution whatever was taken by the steamer to discover the character of the approaching vessel. For it was manifest to the steamer, or should have been, that the vessel was approaching, and was bound into New Haven harbor. The steamer knew that the propeller was due at that place at that time. The two boats were accustomed to meet on every trip of the propeller, and were perfectly well known to each other. It was therefore the steamer's duty to look out for the propeller, just when and where the lights of this approaching vessel appeared. But at least there was reason for a doubt, and, if so, it was clearly her duty to settle that doubt. But those on board did not allow any doubt whatever to enter their mind. They assumed at once that it was a sailing-vessel thus coming toward them, right in the eye of the wind, and they adhered to that assumption stubbornly, until it resulted in disaster.

2. The character of the light was manifested to the steamer, beyond any question, by its bearings.

Those bearings are given to us by the wheelsman of the Continental as three points on the starboard bow when the light was first seen, and they continued the same without alteration until the collision, or until it was too late to avoid the collision. Now these bearings ought to have told those navigating the steamer, that the vessel carrying those lights was directly approaching the steamer. Otherwise they would have changed.

3. And the wind, it is admitted, was north-northeast. The vessel with the lights, therefore, was approaching *directly in the eye of the wind.* And yet the captain of the Continental swears that he supposed the North Hampton to be a sailing-vessel all the while, and the court below tells us that he was justified in that supposition.

Again: the wind being north-northeast, a sailing-vessel,

in order to show her green light to the steamer, must have been on her starboard tack, and could not have lain closer to the wind on that tack than a northwest course. This course would have been nearly at right angles to the steamer's course, and, if the vessel sailing on it was first seen three points on the steamer's starboard bow, every minute would carry her further out of the steamer's way, and would of course change the bearings of her lights, and the relative distance between her lights.

4. The orders which the captain of the steamer testifies he had given to his lookout,* and upon which the lookout seems to have acted, on this occasion, shows him to have had a very confused notion of the object of the regulation lights, and indicates a habit of inattention to their particular significance. It is not surprising that a lookout, receiving such orders, should report the propeller as a sail, and is certainly not to be wondered at that the officer who could give them should adopt such a report as infallible, and shut his eyes and ears to any further evidence on the subject.

Messrs. E. H. Owen and T. C. Doolittle, contra:

The North Hampton was running in open violation of statutory requirement and of the well-settled rules of navigation adopted for the purpose of preventing collisions, in that she had no "after light."

It is probable that at no time was the after light such as the statute requires, for it is clear that it had been a poor, defective light for some time previous to its being taken down. But however this may have been, it was taken down at the exact moment that it was specially needed to be up, and kept down until the Continental was completely misled by the want of it, and a collision became inevitable.

The statute, by positive requirement, makes a central range of white lights obligatory in inland waters. The requirement applies to all vessels under steam except "ocean-bound steamers." And there is the greatest reason for the

* See *supra*, foot of p. 348.

requirement, for without the central range of white lights the true course and direction of an approaching steamer cannot be had in narrow work. With nothing but the colored lights, steamers may be approaching nearly end on, and so as to involve the risk of collision, when one of them is not visible. The colored lights are to be so constructed as to shine from a point right ahead to two points abaft the beam, so that one steamer approaching another on nearly a parallel course, a very little off either hand, would only see one colored light, and could not thereby determine how near the two were approaching "end on." The bow light alone would not enable the approaching steamer to determine this fact without the aid of the after light, giving thereby a central range of two white lights. If approaching directly end on, the two white lights will be in range, and if not, they will be "open."

It is no excuse for the North Hampton that her stern light, having become dim, had been temporarily removed for the purpose of being trimmed.*

The absence of the necessary range of lights did in fact deceive, and could not fail to deceive, those in charge of and navigating the Continental. The North Hampton was taken to be a sailing-vessel; she was reported as such, and the movements made on the part of the Continental were based upon that idea.

It is no answer to say that those navigating the Continental, *upon reflection*, might have known that the North Hampton could not have been a sailing-vessel, because a sailing-vessel does not carry a white light forward, and because, with that wind, a sailing-vessel could not have been heading as she was. Although sailing-vessels are not permitted by law to carry a white light, yet it was proved to be not unusual in the night, when making preparations for landing, to have a light on the forward deck in getting lines and chains ready. As she did not have the lights which steamers are required to carry, the Continental was not bound to pre-

* Rogers *v* St. Charles, 19 Howard, 108; Chamberlain *v* Ward, 21 Id. 548.

sume, from the mere fact that a white light was seen at her bow, that the vessel whose lights were seen was a steamer. There is no evidence that "ocean-bound steamers," which carry a white light forward, ever frequent or are ever seen navigating any part of the Sound.

The North Hampton was also in fault in not having a lookout. The fact that she had one is not asserted on the other side. This was gross negligence. She was bound by law to have one. It was necessary for her guidance. The master and pilot had other duties to perform which rendered them incompetent.* The fact that the Continental was seen by the master and pilot does not obviate the objection. If she had had a vigilant lookout, the lights of the Continental and her direction would have been more carefully reported, and the collision might have been avoided. A vigilant lookout in the night, in a thoroughfare, is an absolute and inflexible necessity. No one can tell what might have been the effect of having a vigilant lookout forward.

The North Hampton was clearly in fault for sounding one blast of her whistle, and in attempting to cross over and pass the Continental on her left or port side, thus throwing herself right across the bows of the latter vessel.

The Continental was properly navigated and was not in any respect in fault. She was pursuing her lawful and proper course on her voyage. She had all the lights required by law properly set and burning brightly. She had a competent lookout properly stationed and faithfully attending to his duty. She had a competent engineer at his post who answered all the orders from the pilot-house promptly.

Mr. Justice CLIFFORD delivered the opinion of the court.

Ships and vessels are held liable for damage occasioned by collision, either on account of the culpable neglect or complicity, direct or indirect, of their owners, or on account of the negligence, unskilfulness, or carelessness of those employed in their control and navigation. When employed in

* The Ottawa, 3 Wallace, 268.

navigation ships and vessels should be kept seaworthy and be well manned and equipped for the voyage, and in cases where they are not seaworthy or not well manned or equipped, and a collision ensues between such a vessel and one without fault in that respect, the owners of the vessel not seaworthy or not well manned and equipped cannot escape responsibility, if it appears that the unseaworthiness of the vessel or the want of a competent master or of a sufficient crew or of suitable tackle, sails, or other motive power, as the case may be, caused or contributed to the disaster; and as the owners of the vessel appoint the master and employ the crew, they are also held responsible for their conduct in the control and navigation of the vessel.

Controversies growing out of collisions are cognizable in the admiralty, and when prosecuted in that jurisdiction, the rules of decision are different in several respects from those which prevail even in similar controversies when prosecuted in the courts of common law. Where the collision occurs exclusively from natural causes and without any fault on the part of the owners of either vessel or those intrusted with their control and management, the maritime rule, as defined by the Federal courts is, that the loss shall rest where it falls, on the principle that no one is responsible for such a disaster when produced by causes over which human skill and prudence could exercise no control.* Admiralty courts everywhere have now adopted that rule, but it cannot be applied where both or either of the vessels are in fault—as where the vessel of the respondent is alone in fault the libellant is entitled to a decree for his damages, and the converse of the proposition is equally true, that if the vessel of the libellant is alone in fault, proof of that fact is a sufficient defence to the libel, but if both vessels are in fault, then the damages must be equally apportioned between the offending vessels. Much uncertainty often attends the inquiry by which of those rules a given controversy should be determined, and where the evidence is conflicting the issue presented is frequently one of doubt and difficulty.

* Union Steamship Co. *v.* N. Y. and Va. Steamship Co., 24 Howard, 313.

Full damages are claimed by the libellants in this case, upon the ground that the steamboat of the respondents was alone in fault, or if that theory cannot be sustained, then they contend that both steamers were in fault and that the damages should be divided. On the other hand, the respondents contend that the vessel of the libellants, the propeller, was wholly in fault, and that the decree of the Circuit Court dismissing the libel should be affirmed.

Daily trips were run by the propeller between the ports of New Haven and New York, carrying passengers and freight, and she was on her return trip from the latter port and near the entrance to the harbor of her home-port when she was struck by the Continental, the steamboat of the respondents, on her port side, abaft her midships, and damaged to such an extent that she sunk in half an hour. Corresponding trips were run by the steamboat of the respondents between the same ports, the Continental, however, usually leaving the port of New Haven on the same day that the propeller, the North Hampton, left New York on her return trip to the port where both steamers belonged. Accustomed as they were to start on their respective trips at stated hours, each knew pretty nearly when they would meet and where they would pass each other on the route, except when one or the other was detained by stress of weather or other special circumstances, and the proofs exhibited furnish no reason to suppose that either of the steamers met with any detention during this trip. Testimony was taken on both sides and both parties having been heard, the District Court entered a decree for the respondents. Prompt appeal was taken by the libellants to the Circuit Court, but the Circuit Court affirmed the decree of the District Court, and the libellants appealed to this court.

Before the Continental came out of the lower harbor her lights were seen by those on board the propeller when the two steamers were four or five miles apart. Distant from each other as they then were, the better opinion is that they were not at that time on courses which involved any risk of collision, but the Continental, shortly after she came out of

the lower harbor, hauled up as usual on her Sound course, heading more directly towards her ultimate destination, and from that moment the course of the two steamers was such that the rules of navigation as well as the dictates of common prudence made it the duty of each to adopt proper precautions to prevent a collision. Beyond doubt they were approaching each other nearly end on, within the maritime meaning of that phrase, and under such circumstances all must admit that the rules of navigation require that "the helms of both shall be put to port, so that each may pass on the port side of the other."*

Extended argument to establish that theory of fact does not appear to be necessary, as it agrees with the first finding of the District judge and is supported by all the attending circumstances as well as by the weight of the direct testimony. Evidently the two steamers were far enough apart at that time to have adopted whatever precautions were necessary to have prevented a collision, and it is clear that if each had obeyed the rules of navigation, they would have passed each other in safety. Fault is imputed to the steamboat Continental, because she did not port her helm as required by the rules of navigation established by the act of Congress, but the respondents contend that they were deceived and misled as to the character of the approaching vessel and consequent nature of their duty by the failure of those on board of the propeller to display proper lights, as they also were required to do by the same Congressional regulations, as amended by a subsequent act.†

Evidence to that effect was given by one of the witnesses called by the libellants. He testified that he was at the wheel prior to the collision; that he saw the Continental coming down the harbor and spoke to another seaman to take his place; that the seaman spoken to did as requested; that he went and called the master and the mates; that he looked at the lights; that the bow light and both the side lights were burning brightly, but that the stern light, which

* 13 Stat. at Large, 60.

† 14 Id. 228.

consisted of two lanterns and showed as one light, he found was "burning dim;" that he went aft and took down both lanterns and went forward in the passage-way on the starboard side and having picked up the wicks carried the lanterns back and put them in the box where they belonged; that he stepped forward into the passage-way to get out of the draft, so that the wind might not blow the lights out, and he further states that he heard the propeller give one whistle just as he was stepping into the passage-way with the lanterns; that he also heard two whistles from the Continental in reply just as he was returning to replace the lights in the box; that the propeller, just as he was hoisting the lanterns, again blew one whistle; that after he replaced the lights he saw the Continental approaching the propeller, when he ran forward part way and was knocked down by the concussion.

Such a disaster could not have occurred without fault on the part of one or both vessels, as they had an open sea and good weather, and the night, though cloudy, was not very dark, as fully appears from the fact that those on board the propeller saw the lights of the Continental when she was at least four miles distant.

Coasting steamers are required to carry a central range of two white lights as well as the red and green lights prescribed for ocean-going steamers, the after light to be carried at least fifteen feet above the light at the head of the vessel, and the requirement of the act of Congress in respect to it is that it shall "show all around the horizon."* Signal lights are required by the acts of Congress in order that they may be seen by an approaching vessel in season to enable those in charge of the vessel to adopt the necessary precautions to prevent a collision with the vessel whose lights are so displayed, and when it appears that they were burning so dimly as not to fulfil the purpose and object for which they are required, they cannot be regarded as constituting a compliance with the prescribed requirement.† Apply that rule to the present case and it is quite clear that the propel-

* 14 Stat. at Large, 228–9. † Chamberlain *v.* Ward, 21 Howard, 566.

ler was in fault, and it appears that the District and Circuit Courts both came to the conclusion that she was solely in fault and denied to the libellants all claim for damages, either as owners of the propeller or as bailees of the cargo. Whether that decision is correct or not must depend upon the evidence, as it is clear that the absence of one or more of the lights required by the act of Congress will not necessarily cast upon the delinquent party the entire consequences of such a disaster. Absence of lights in a case falling within the acts of Congress renders the owners of the vessel liable for the consequences resulting from the omission, but it does not confer any right upon the other vessel to disregard or violate any rule of navigation or to neglect any reasonable or practicable precaution to avoid a collision which the circumstances afford the means and opportunity to adopt.

Steamers displaying proper signal lights are in that respect without fault, but they have other duties to perform to prevent collision besides complying with that requirement, and if they neglect to perform such other duties they will not be held blameless because they displayed proper lights as required by the act of Congress upon that subject.*

Some conflict undoubtedly exists in the testimony as to the precise manner in which the two steamers were approaching each other after the Continental came out of the harbor and hauled up upon her Sound course, but the better opinion we all think is that they were approaching each other nearly end on, or substantially in that manner, as found by the District Court. Inquiry as to what their respective courses were before that time would be useless, as the respondents do not claim that either the lookout or master of the steamboat saw the propeller or her lights before the steamboat was put upon her Sound course. Unquestionably the lights of the propeller might have been seen earlier, but it is clear that they were not, if the witnesses are to be believed.

Lookouts are required to be vigilant, and it is not doubted

* The Gray Eagle, 9 Wallace, 510.

if proper vigilance had been exercised in this case those on board the steamboat might have ascertained the character of the approaching vessel in season to have adopted every necessary precaution to have avoided a collision. They must have expected to meet the propeller about that time, and under the circumstances they had no right to assume without a closer scrutiny that the approaching vessel was a sail-vessel because she did not show a stern light. She did show a bow light, which might well have satisfied them that the vessel was not a sail-vessel, as it is more reasonable to suppose that the stern light of a steamer has become dim or extinguished than that a sail vessel will show a light not required nor authorized by the prescribed regulations. Proper scrutiny as to the character of the approaching vessel would or should have induced greater caution on the part of the master of the Continental, and if any doubt remained after such scrutiny was made the steamboat should have slackened her speed or have stopped until every reasonable degree of uncertainty was overcome. Navigators have no right arbitrarily to assume under all circumstances that every vessel approaching which does not show both the signal lights and the central range of two white lights is a sail-vessel which is bound to keep her course, and that if she does not she may be run down and sunk.

Prior to the enactment of the sailing rules neither steamers nor sail vessels, except on the lakes, were required to carry lights of any kind, and yet the rules of navigation were substantially the same as those prescribed in the existing acts of Congress. Lights are now required, but the omission of one vessel to comply with the requirement will not excuse the other from the exercise of all due and reasonable care to prevent a collision.*

Viewed in the light of these suggestions, as the case must be, the court is fully satisfied that those in charge of the steamboat did not exercise due care and vigilance to ascertain the character of the approaching vessel, and that if

* 13 Stat. at Large, 58; 9 Id. 382; 14 Id. 228; Steamship Company *v.* Rumball, 21 Howard, 384

they had done so they would have been enabled to have adopted reasonable precautions to have prevented the collision. Consequently the court is of the opinion that both vessels were in fault, and that the damages should be equally apportioned between the offending vessels.*

Where two steamers are approaching each other in an open sea on a night when the lights of a vessel may be seen five miles, the defence that one of the steamers mistook the other for a sail-vessel cannot be admitted as valid, unless it is established by full proof; and where, as in this case, it appears that the approaching steamer showed a bow light in addition to the red and green lights, the court will be still less inclined to give credence to the theory as a valid defence.

DECREE REVERSED, and the cause remanded for further proceedings in conformity to the opinion of this court.

PUGH *v.* MCCORMICK.

1. The 5th section of the act of July 14th, 1870 (16 Stat. at Large, 257),—by which the power of collectors of internal revenue to post-stamp certain instruments of writing and remit penalties for the non-stamping of them when issued, is extended in point of time,—applies to notes issued before the passage of the act as well as to notes issued subsequently.
2. Though error may have been committed by a court below on the then state of statutory law, yet where a statute has been passed since that court gave their judgment, changing the then existing law, so that if the judgment were reversed and the case sent back, the court would now and in virtue of the new statute have to rightly give the same judgment, that they gave before erroneously, this court will affirm.
3. An indorsement of a promissory note need not be stamped under any existing statutes of the United States.
4. Nor a waiver in writing, by an indorser, of demand of payment and notice of dishonor.

ON the 12th of April, 1863, R. C. Martin, at Assumption, Louisiana, drew his promissory note at one year for $7000,

* Catharine *v.* Dickinson, 17 Howard, 170; 1 Parsons on Shipping, 527; The Morning Light, 2 Wallace, 557.

in favor of W. W. Pugh, which note after being indorsed there by Pugh came into the hands of James McCormick. The note, as issued, had no stamp upon it.

It was not paid at maturity and no notice of non-payment was given to Pugh, the indorser, who was thus of course discharged. More than eighteen months after the non-payment, however, Pugh wrote upon the note—

"ASSUMPTION, October 16th, 1865.

"Notice of demand, non-payment, and protest waived, and all legal responsibility assumed.

"W. W. PUGH."

Neither the indorsement nor the waiver of protest, &c., had any stamp.

On the 1st and 14th of July, 1862, the 3d March, 1863, and the 30th of June, 1864, Congress had passed acts* requiring all notes, under penalty of their being incapable of being sued on and void, to bear certain stamps; making also some benignant mitigations of the law in cases where, without fraudulent intent, they had not been stamped; neither acts nor modifications being necessary to be here stated.

On the 13th of July, 1866,† however, was passed an act necessary to be more fully mentioned. That act—amending the 158th section of the act of June 30th, 1864, and enacting that "any person who shall make, sign, or issue, or who shall cause to be made, signed, or issued any instrument, document, or paper . . . or shall accept, negotiate, or pay, or cause to be accepted, negotiated, or paid any bill of exchange, draft, or order, or promissory note for the payment of money without the same being duly stamped . . . with intent to evade the provisions of the act, shall for every such offence forfeit the sum of $50;" and, enacting further, that such instrument, document, or paper, bill, draft, order, or note, not being stamped according to law, shall be deemed invalid and of no effect—went on in its 9th section to make certain provisos by which the instrument, though void when

* 12 Stat. at Large, 480, 561; Ib. 725; 13 Id. 291, 481. † 14 Id. 143.

made, from not being stamped, might be validated and made operative by being post-stamped. The 2d, 3d, and 4th of the provisos ran thus:

"*And provided* (2*d*) *further*, That hereafter, in all cases where the party has not affixed to any instrument the stamp required by law thereon, at the time of making or issuing the said instrument, and he or they, or any party having an interest therein, shall be subsequently desirous of affixing such stamp to said instrument, he or they shall appear before the collector of the revenue of the proper district, who shall *upon the payment of the price* of the proper stamp required by law, *and of a penalty of fifty dollars* . . . affix the proper stamp to such instrument or copy, and note upon the margin thereof the date of his so doing, and *the fact that such penalty has been paid*, and the same shall *thereupon* be deemed and held to be as valid, to all intents and purposes, as if stamped when made or issued.

"*And provided* (3*d*) *further*, That where it shall appear to said collector, upon oath or otherwise, to his satisfaction, that any such instrument has not been duly stamped at the time of making or issuing the same, by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States of the stamp, or to evade or delay the payment thereof, then, and in such case, if such instrument shall *within twelve calendar months after the first day of August, eighteen hundred and sixty-six, or within twelve calendar months after the making or issuing thereof*, be brought to the said collector of revenue to be stamped, and the stamp tax chargeable thereon shall be paid, it shall be lawful *for the said collector to remit the penalty* aforesaid and to cause such instrument to be duly stamped, and the instrument may be used in all courts and places in the same manner and with like effect as if the instrument had been originally stamped.

"*And provided* (*lastly*) *further*, That in all cases where the party has not affixed the stamp required by law upon any instrument made, signed, or issued, at a time when and at a place where no collection district was established, it shall be lawful for him or them, or any party having an interest therein, to affix the proper stamp thereto, . . . and the instrument to which the proper stamp has been thus affixed prior to the first day of January, one thousand eight hundred and *sixty-seven*,

shall be as valid to all intents and purposes as if stamped by the collector in the manner hereinbefore provided."

In this state of enactment McCormick, the holder of the note, sued on the 25th March, 1868, Pugh, the indorser, in one of the inferior State courts of Louisiana, upon it. The trial coming on January 12th, 1870—and there being no question but that a stamp of $3.50 was the proper stamp as respected amount, for the note (on which $5000 had been paid)—the note was offered in evidence, when it was found to have a $3.50 stamp upon it, but also a certificate thus:

Internal revenue stamps to the amount of $3.50 affixed to this instrument and cancelled, by me, at the request of James McCormick, Esq., *this 7th day of October*, 1869. *Penalty remitted*, interest collected.

J. S. CHAPMAN,
Collector of United States Internal Revenue
for the Second District of Louisiana.

COLLECTOR'S OFFICE, BATON ROUGE, LA., October 7th, 1869.

The defendant objected to the introduction in evidence, of—

1st. The note itself, because a note which had been issued unstamped could not *after twelve months* be post-stamped, unless the penalty was paid; that after twelve months the collector could not stamp and *remit* the penalty.

2d. To the introduction of the indorsement of the defendant to the instrument, because the said indorsement was not stamped at the time of making it, nor at any time since.

3d. To the writing showing a waiver of demand, protest, and notice of protest, because the said waiver was not, and had never been, stamped.

The court overruled the objections, considering—

1st. That the stamping of the note by Chapman, the collector of internal revenue, was regular enough.

2d. That no stamp was needed for the indorsement.

3d. That none was needed for the waiver.

Judgment accordingly was given, January 12th, 1870, for the plaintiff, and that judgment being taken to the Supreme

Statement of the case.

Court of Louisiana, the judgment was, on the 7th of March, 1870, there affirmed. The case was now here for review.

The reader perceives, of course, that in *remitting* the penalty the collector of internal revenue had proceeded under the *third* of the provisos, quoted on page 363, his capacity to do which was given but for twelve months from August 1st, 1866, or twelve months from the issuing of the note, *i. e.*, in this particular case, twelve months from the 12th April, 1863; whereas here the collector's certificate showed that the remission had been on the 12th of October, 1869; plainly too late; though had the penalty been *paid*, then, under the previous proviso,—where no limit of time was fixed to the collector's power to post-stamp—the post-stamping would have apparently been good.

In this state of things Congress, on the 14th July, 1870,* passed yet another act, amending the act of July 30th, 1866, containing the provisos above quoted. It was amended:

"By striking out the words 'fifty dollars,' in the second proviso, and inserting in lieu thereof the following, 'double the amount of tax remaining unpaid, but in no case less than $5;' also by striking out the words 'sixty-six' in the third proviso, and inserting in lieu thereof the words 'seventy-one;' also by striking out the words 'sixty-seven' in the last proviso, and inserting in lieu thereof the words 'seventy-two.'"

Of course, with the act of 1866, thus amended—assuming that the amendatory act operated retrospectively (that is to say, on notes made previously to July 14th, 1870, the date of its passage), though not unless that assumption was made—if the collector any time after its passage and prior to the 1st of August, 1871, affixed the stamp and remitted the penalty the post-stamping would have been good. Here it had been done on the 12th of October, 1869.

The questions before this court were:

1. Whether this amendatory act of July 14th, 1870, operated retrospectively.

2. Whether, assuming that it did, the court would reverse

* 16 Stat. at Large, 257.

the judgment below, since though the court below might have wrongly decided at the time that the case came before it (January 12th, 1870), that the collector had power on the 7th October, 1869, to remit the penalty, yet, when by reversal, the case should come again before it the same decision would in virtue of the subsequently passed amendatory act of July 14th, 1870, and its retrospective operation, have to be made, and the same judgment have to be now rightly given which was then given wrongly.

3. Whether the indorsement by Pugh required a stamp.

4. Whether the waiver of demand and notice did.

The case came up to be argued in this court February 7th, 1872.

Mr. Miles Taylor, for the plaintiff in error; Mr. T. J. Durant, contra.

Mr. Justice CLIFFORD, on the 19th of February, 1872, delivered the opinion of the court.

Reference will be made to the parties as they existed in the State court where the suit was commenced.

Martin, on the twelfth of April, 1863, by his promissory note of that date promised to pay, twelve months after date, to the order of the defendant, at the place mentioned in the note, seven thousand dollars with eight per cent. interest, and the note is indorsed by the defendant without date.

On the seventh of December of that year the defendant paid two thousand dollars, which is indorsed on the note, and on the seventeenth of May following he made another payment of three thousand dollars, for which a receipt was given by the plaintiff. Prior to that, however, to wit, on the sixteenth of October of the preceding year, the following waiver of protest was signed by the defendant, to wit: "Notice of protest, demand, and protest waived, and all legal responsibilities assumed."

When the note was executed no internal revenue stamps were affixed to it, and it remained without any such stamps until the seventh of October, 1869, when such stamps, to

the amount of three dollars and fifty cents, were, at the request of the plaintiff, affixed to it and cancelled by the collector of internal revenue for the district, the interest being collected and the penalty remitted as more fully appears by the certificate of the collector set forth in the record.

Payment being refused, the plaintiff, as the holder and indorsee of the note in good faith and for value, on the twenty-fifth of March, 1868, instituted the present action of assumpsit to recover the balance due on the note. Service was made and the defendant appeared and pleaded that the plaintiff acquired the note directly from the maker of the same; that no consideration ever passed between the defendant and the plaintiff or between the defendant and the maker of the instrument in regard to the note, and the defendant also denied that he was ever legally bound by the instrument or that he ever at any time rendered himself liable to pay the amount. Neither party demanding a jury the cause was heard and determined by the court, and judgment was rendered for the plaintiff in conformity with the declaration.

Exceptions were filed by the defendant, and by the exceptions it appears that the defendant, when the plaintiff offered the note in evidence, objected to its admissibility upon three grounds: (1) Because the face of the instrument was not legally stamped with the internal revenue stamps, as required by law; (2) because the indorsement on the note was not legally stamped; (3) because the certificate waiving demand, notice, and protest was never stamped, and he insisted that the note for the want of such stamps could not be admitted in evidence. All three objections were overruled, and judgment having been rendered for the plaintiff the defendant appealed to the Supreme Court of the State, where the judgment was affirmed. Whereupon the defendant sued out a writ of error to the State court and removed the cause into this court for re-examination.

Two principal questions are presented by the assignment of errors: (1.) Whether the stamps affixed to the note were legally affixed. (2.) Whether the certificate waiving demand,

notice, and protest was an instrument which the internal revenue laws required should be stamped. Evidently a satisfactory response to these questions cannot be given without a careful examination of the several provisions in the acts of Congress imposing such revenue duties, and the modifications of the same as enacted by Congress prior to the time when the note and the certificate of waiver were offered and admitted in evidence.

Promissory notes, except bank notes issued for circulation, where the note was given for a sum exceeding twenty dollars and not exceeding one hundred dollars, were by the act of the first of July, 1862, subjected to a stamp duty of five cents. Nine other gradations were prescribed in the same schedule by which the rate per cent. of the duty was somewhat diminished as the amount of the note was increased. Where the note exceeded five thousand dollars the amount of the stamp duty imposed by that schedule was one dollar and fifty cents, and one dollar in addition for every twenty-five hundred dollars or part of twenty-five hundred dollars in excess of five thousand dollars, which shows that the note given in evidence in this case was subject under that act to a stamp duty of three dollars and fifty cents.*

Persons who made, signed, or issued, or caused to be made, signed, or issued any instrument, document, or paper of any kind, without the same being duly stamped, were declared by the ninety-fifth section to be subject to a penalty of fifty dollars, and the further provision in the same section was that such instrument, document, or paper should be deemed invalid and of no effect. Section one hundred also provided that if any person made, signed, or issued, or caused to be made, signed, or issued, or accepted or paid or caused to be accepted or paid, with design to evade the payment of any such stamp duty, any bill of exchange, draft, or order, or promissory note for the payment of money and liable to any such duty, he should, for every such bill, draft, order, or note forfeit the sum of two hundred dollars.†

* 12 Stat. at Large, 480.

† Ib. 475, 477.

Instruments, documents, and papers made, signed, or issued without being duly stamped were, by the ninety-fifth section of that act, declared to be invalid and of no effect, but the twenty-fourth section of the act of the fourteenth of July in the same year provided that no instrument, document, or paper made, signed, or issued prior to the first day of January then next should be deemed invalid or of no effect because it was made, signed, or issued without being duly stamped. Provision, however, was made in the same section that no such instrument, document, or paper should be admitted or used as evidence in any court until it was duly stamped nor until the holder proved to the satisfaction of the court that he had paid five dollars to the collector for the use of the United States.*

Exemption from such declared invalidity and nullity was further extended to such instruments, documents, and papers made, signed, or issued prior to the first day of June, 1863, by the sixteenth section of the act of the third of March, passed in the same year, but the same section also provided that no such instrument, document, or paper, or any copy thereof, should be admitted or used as evidence in any court until the required stamps were affixed, together with the initials of the person affixing the stamps and the date when the same were so affixed.†

All laws in force in relation to stamp duties when the act of the thirtieth of June, 1864, was passed were by that act continued in force until the first day of August of that year, and the same act adopted a new schedule of stamp duties, which took effect from and after that day. By that schedule persons making, signing, or issuing promissory notes not exceeding one hundred dollars were required to stamp the same with a five-cent stamp, and to add another of the same amount for every additional hundred dollars or fractional part of one hundred dollars.‡

Neither deeds, instruments, documents, or papers, nor any copy thereof, not stamped, as required by previous laws,

* 12 Stat. at Large, 561. † Ib. 725. ‡ 13 Id. 291, 298.

could be recorded or admitted or used as evidence under that act until the same was stamped as therein required, but the act provided that no instrument, document, or paper, made, signed, or issued *prior to the passage of that act*, without being stamped, should be deemed invalid or of no effect for that cause if the stamp or stamps required should be subsequently affixed, and the act gave authority to the person desiring to use or to record any such deed, instrument, document, writing, or paper as evidence to affix the stamp or stamps thereon required in the presence of the court, register, or recorder.*

But persons making, signing, or issuing any instrument, document, or paper of any kind, or who caused the same to be made, signed, or issued, or who accepted or paid, or caused to be accepted or paid, any bill of exchange, draft, order, or promissory note without the same being stamped, were by that act subjected to a forfeiture of two hundred dollars, and the further provision was that such instrument, document, or paper, bill, draft, order, or note, should be deemed invalid and of no effect.†

Stamps were also required by the act of the thirty-first of March, 1865, where bills of exchange and promissory notes were negotiated as well as where they were accepted and paid, but the forfeiture created by the preceding act for the intentional evasion of the requirements was reduced to fifty dollars instead of two hundred dollars, as provided in the prior law.‡

Provision was also made that persons desirous of affixing stamps to instruments, not stamped as required by prior laws, might appear before the collector of the proper district and affix the same upon paying the price of the proper stamp and the penalty of fifty dollars, with interest on the stamp duty if it exceeded the amount of the penalty. Such acts being done, that is, the proper stamp being affixed, the penalty paid, and a note of those acts and the date thereof made in the margin of the instrument, the section provides

* 13 Stat. at Large, 295. † Ib. 294. ‡ Ib. 481.

that the instrument "shall thereupon be deemed and held to be as valid to all intents and purposes as if stamped when made or issued."*

Fifty dollars forfeiture for making, signing, or issuing such an instrument, or for causing the same to be made, signed, or issued, or for accepting, negotiating, or paying, or causing to be accepted, negotiated, or paid, any bill of exchange, draft, or order or promissory note, without the same being duly stamped, was also imposed by the act of the 13th of July, 1866, in cases where the act was done with intent to evade the provisions of that act, but the collector was empowered by that act to remit the penalty and to cause the instrument to be duly stamped in all cases where it appeared to his satisfaction that the omission to affix the stamp happened by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the revenue, or to evade or delay the payment of the duty. Twelve calendar months from the first day of August then next were allowed to the delinquent party by that act to avail himself of that provision, and the section specifically points out the acts to be done by the party and the collector to render the instrument as valid as if it had been stamped at the time it was made, signed, or issued.

Original instruments, or a certified or duly proved copy thereof, duly stamped so as to entitle the same to be recorded, may under that act be presented to the clerk, register, or recorder, or other officer having charge of the original record, and such officer may, upon the payment of the lawful fee, make a new record thereof, and note upon the original record the fact that the error or omission in the stamping of the original instrument has been corrected pursuant to law, and the provision is that the original instrument, or such certified copy thereof, or the record thereof, may in that event be used in all courts and places, in the same manner and with like effect as if the instrument had been originally stamped.†

* 13 Stat. at Large, 481–2.

† 14 Id. 143.

Errors or omissions of the kind which occurred or happened before the first day of August, 1866, might be remedied under that act at any time within twelve calendar months from that date, and subsequent errors and omissions of the kind might also be remedied in the same way at any time within twelve calendar months from the time the instrument, document, or paper was made, signed, or issued without being stamped as required by law, but it is quite clear that the case before the court does not fall within that proviso, as the application to the collector was not made in season to bring the case within either of those regulations.

Had legislation stopped there the ruling admitting the note in evidence would certainly be erroneous, but the act of the fourteenth of July, 1870, amends the preceding act by striking out the words sixty-six, in the third proviso, and inserting in lieu thereof the words seventy-one, whereby the collector of the proper district is still empowered to remit penalties of the kind occurring or happening under the circumstances described in the third proviso of the prior act.

Since the passage of that act it is conceded that the collector may remit the forfeiture therein imposed if it occurred "by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States of the stamp or to evade or delay the payment thereof," but it is insisted that the new provision does not operate retrospectively, that it does not empower the collector to remit the penalty for any such omission if it occurred prior to the passage of the act, but the court here is of a different opinion for several reasons.

Special attention is called in the first place to the peculiar phraseology of the new provision, which is that section one hundred and fifty-eight of the act of the thirtieth of June, 1864, as amended by the ninth section of the act of the thirteenth of July, 1866, be and is hereby amended as therein provided. Three amendments are then made in the last-named act, as follows: (1.) By striking out the words fifty dollars in the second proviso and inserting in lieu thereof the following: Double the amount of the tax remaining un-

paid, but in no case less than five dollars. (2.) By striking out the words sixty-six in the third proviso and inserting in lieu thereof the words seventy-one. (3.) By striking out the words sixty-seven in the last proviso and inserting in lieu thereof the words seventy-two.*

Section one hundred and fifty-eight of the act first named provided that the forfeiture, where the omission to affix the stamp was with the intent to evade the duty, should be two hundred dollars, but the succeeding act passed the next year reduced the forfeiture to fifty dollars.†

Such an omission subjected the party to a penalty of fifty dollars also under the act of the thirteenth of July, 1866, but the penalty under the present act cannot exceed a sum which is double the amount of the tax unless that sum is less than five dollars.

Legislation in respect to the amount of the forfeiture in the earlier acts of Congress upon the subject would have been unnecessary if it had not been intended to extend the jurisdiction of the collector or some other officer to delinquencies of the kind which arose under the acts of Congress therein mentioned. All agree that the collector might, within the period of time designated in those acts, remit such forfeitures or penalties for past delinquencies if the application, as before explained, was seasonably made, and the court is unanimously of the opinion that the better construction of the act under consideration is that Congress intended to give such delinquent party a further opportunity to remedy such errors and omissions on the terms and conditions prescribed in the new provision.

Extended argument in support of the conclusion does not seem to be necessary, as the reasons to support it are apparent from its statement. Grant all that and still it may be suggested that the ruling in this case was made before the present act was passed, and it must be admitted that the suggestion is correct, but the new act shows to a demonstration that the ruling in question has become immaterial, hav-

* 16 Stat. at Large, 257.

† 13 Id. 293; Ib. 481.

ing ceased to be prejudicial to the defendant, as the collector now possesses the power to do what he then did, that is, to affix the stamps to the note, remit the penalty, and make the proper memorandum of his doings; and it is so clear that the plaintiff would have a right to require those acts to be done if a new trial were ordered that the court is unhesitatingly of the opinion that the judgment ought not to be reversed for that cause, as the proper stamps were affixed to the instrument and the amount of the required duty was deposited in the treasury before the note was used as evidence.*

Where the case is brought here by a writ of error to a State court for re-examination the court is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial and that the same party will be entitled to judgment if a new trial is granted. Payment of the stamp duty was made to the collector at the time he affixed the stamps to the note, and inasmuch as the government makes no complaint, and the whole transaction is characterized by good faith, the court is of the opinion that the judgment of the State court may be sustained.

II. Objection is also made that the note was not admissible as evidence because the indorsement was not stamped, but the court is of the opinion that the objection is without merit, as a stamp is not required to such a writing.†

III. Whenever a party in a suit upon a bill of exchange or promissory note is required to prove demand and notice or protest, he may comply with those conditions by proving that the opposite party waived the requirement.

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* Campbell *v.* Wilcox, 10 Wallace, 422; Tobey *v.* Chipman, 13 Allen, 124; Corbin *v.* Tracy, 34 Connecticut, 326; U. S. *v.* Anderson, 9 Wallace, p. 68.

† Tilsley on Stamps, 172; Richards *v.* Frankum, 9 Carrington & Payne, 221; Penny *v.* Innes, 1 Crompton, Meeson & Roscoe, 439; Bacon *v.* Simpson, 3 Meeson & Welsby, 78; Edwards on Stamps (2d ed.), 140; Tilsley's Digest, 28.

Syllabus.

Proof to that effect was offered in this case, which consisted of the usual memorandum signed by the party and written on the back of the note, and the statement in the bill of exceptions is that the defendant, when the note was offered, objected to the admissibility of that writing, but the court admitted it and the defendant excepted.

Satisfactory proof of waiver in such a case is in all respects equivalent in law to a compliance with the requirement.*

Such a waiver need not be in writing, as an oral declaration to that effect would be equally effectual, and it does not appear that any one of the internal revenue acts contains any requirement if it is in writing that it should be stamped, nor is any authority referred to as a support to the objection taken to the ruling of the court. On the contrary, the Supreme Court of California has decided the other way and this court is of the same opinion.†

JUDGMENT AFFIRMED.

INSURANCE COMPANIES *v.* WEIDES.

1. A statement in figures of the value of certain merchandise destroyed by fire, which statement professed to be a copy of another and original statement contained in a book—itself destroyed in the fire—accompanied by proof that on a certain day the witnesses took a correct inventory of the merchandise and that it was correctly reduced to writing by one of them and entered in the volume burnt, and that what is offered is a correct copy, may, on a suit against insurers, be received in evidence to fix the value of the merchandise burnt, even though there be no *independent* recollection by the witnesses affirming to the correctness of the original statement of what they found the value of the merchandise to be.
2. Under a policy one of whose conditions is that in case of loss the assured, after furnishing evidence of his loss, shall submit to an examination

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* Taunton Bank *v.* Richardson, 5 Pickering, 444; 2 Starkie on Evidence, 274; Woodman *v.* Thurston, 8 Cushing, 157; Marshall *v.* Mitchell, 35 Maine, 221; Collins on Stamps, 30.

† Pacific Bank *v.* De Ro, 37 California, 542; Chitty on Stamps, 192-200.

under oath, and until such examination should be permitted no loss should be paid, *Held* that the insurers could not, as a condition of recovery, compel the assured to answer questions as to the sum per cent. of claim for which he had settled with other parties insuring him.

3. Under a policy one of whose conditions is that in case of loss the assured should produce "*certified copies*" of all bills and invoices, the originals of which had been lost, and exhibit the same for examination to any person named by the insurers, and that until the proofs, declarations, and certificates were produced and examinations and appraisals permitted the loss should not be payable—*Held*, in the absence of proof *when* the insured was requested to produce duplicate bills of purchase—whether before the commencement of the action or afterwards, and of proof whether there was neglect or refusal of the insured to comply—that the insurers, even though they gave proof tending to show that the insured were requested to produce *duplicates* of invoices, could not properly ask an instruction that if the jury believed the assured were requested by the insurers to produce "*duplicates*" of invoices of goods purchased by them, the originals of which were alleged by them to be destroyed, and neglected to do so before the commencement of the action, no right to recover existed.
4. Under a policy one of whose conditions is that fraud or false swearing on the part of the assured in an examination which, by the terms of the policy, he was bound to submit to on a claim by him for loss, it is only fraudulent false swearing in furnishing the preliminary proofs or in the examination which avoids the policy; and whether there has been *such* false swearing is a matter for the jury to determine.

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

C. & J. R. Weide insured in four different companies a stock of goods which they had; all the policies being alike, and each containing clauses thus:

"In case of loss the assured shall forthwith give notice of said loss to the companies, and as soon after as possible render a particular account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving the actual cash value of the property, their interest therein, for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used; when and how the fire originated; and shall also produce a certificate, under the hand and seal of a magistrate, . . . nearest to the place of the fire, stating that he has examined the circumstances attending the loss,

knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property insured, to the amount which such magistrate shall certify; and the *assured shall, if required, submit to an examination under oath, by any person appointed by the companies*, and subscribe to such examination when reduced to writing; and shall also produce their books of account and other vouchers of all property hereby insured, whether damaged or not damaged; and shall also produce *certified copies* of all bills and invoices, the originals of which have been lost, and exhibit the same for examination by any one named by the company. . . . All fraud, or attempt at fraud, or *false swearing* on the part of the assured, shall cause a forfeiture of all claim under this policy."

A fire having occurred and the goods insured having been burnt, the Weides sued the companies on the policies. On the trial it became material to prove what was the quantity and value of the goods which the plaintiffs had when the fire occurred. As bearing upon this, evidence was introduced, without objection, tending to show that the plaintiffs took a correct inventory of their stock on the 28th of February, 1866, which was correctly reduced to writing by one of them in an inventory book; that the prices or values were correctly footed up therein; that at the same time the footings were correctly entered by one of the plaintiffs upon the fly-leaf of an exhausted ledger, and afterwards transferred also by one of the plaintiffs to the fly-leaf of a new ledger; that neither of the plaintiffs could remember the amount of such inventory or footings, and that both the inventory book and the exhausted ledger had been destroyed. The plaintiffs then offered the entry of the footings upon the fly-leaf of the new ledger, which the court, in the face of objection by the other side, received.

The reception of this evidence made the first exception.

The plaintiffs then offered in evidence "the said first item on the debit side in their present ledger of said merchandise account therein," which the court received under objection; and afterwards "the said merchandise account in said ledger

contained," received in like manner. The reception of these two items of evidence made the second and third exceptions.

There being evidence tending to show that the real loss of the plaintiffs was far less than the total amount of insurance made by the companies sued, and that certain other insurance companies had made insurance on the plaintiffs' stock of merchandise; and also that the plaintiffs had made certain settlements at the rate of 54 cents on a dollar with certain of the said other insurance companies; and that on an examination of the plaintiffs before this action was commenced under oath, required by the defendant of the plaintiffs, under the already quoted conditions of the policies, the plaintiffs disclosed the fact that they had made such settlements, but on such examination refused to answer questions put to them by the defendant as to *the amounts for which they made such settlements;* the companies' defendant requested the court to instruct the jury thus:

"If the jury shall believe that the plaintiffs, or either of them, in the course of an examination on oath, under the policy, refused to answer any questions by which defendant could fairly estimate or reasonably infer the plaintiffs' real loss in the insured property, and have not before the commencement of this action answered the said questions under oath, then the jury must find for the defendant."

Which instruction the court refused to give; this refusal being the subject of a fourth exception.

There being also evidence tending to show that the plaintiffs were requested to produce *duplicate bills of purchases*, the defendant moved the court to instruct the jury as follows:

"If the jury believe from the evidence, that the plaintiffs were requested by the defendants to produce *duplicates of invoices of goods* purchased by them, the originals of which were alleged by them to be destroyed, and neglected to do so before the commencement of this action, their right of action never accrued, and the jury must find for the defendant."

Which instruction the court refused to give; this refusal being the matter of the fifth exception.

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So to the testimony of the plaintiffs tending to show material discrepancy from material statements made by them in their proofs of loss and their examination on oath under the policy, the defendant moved the court, as his fourth prayer, to instruct the jury as follows:

"If the jury shall believe that the plaintiffs testifying on this trial have made statements materially differing from statements knowingly made under oath in their proofs of loss, whether in their particular account made to the defendant, or any examination on oath submitted to by them, under the terms of the policy, this is false swearing, and the jury must find for the defendant."

Which instruction the court refused to give.

In the examination on oath made by the plaintiffs under the policy, the plaintiffs having stated their outstanding debts to be between $18,000 and $20,000, and having stated in evidence before the jury that their indebtedness did not exceed $8000 at the time of the fire, and there being evidence tending to show that plaintiffs knowingly made the statement in their examination on oath, and subscribed and made oath to the same, the defendant moved the court, as a fifth prayer, to instruct the jury as follows:

"In their examinations under the policy, plaintiffs seem to have sworn that the outstanding debts of their firm amounted to between $18,000 and $20,000 at the time of the fire. In their testimony here they state positively that their indebtedness did not exceed $8000 at that time. If the jury shall believe that they knowingly made the statement set forth in their examination on oath and subscribed and made oath to the same, the jury must find for the defendants."

Which motion or request the court refused to give; their refusal of these fourth and fifth prayers making a sixth and seventh exception.

The reception of the evidence of the footings on the fly-leaf of the new ledger and the refusals to charge as requested were the matters assigned for error.

There were two other errors assigned arising from a refusal by the court to lay down as rules of law a certain rule

for the jury to pursue, in computing the amount of stock from certain data. But the counsel of the companies in this court, while asserting that the rule was undoubtedly correct arithmetically, candidly admitted that it could not be stated as a rule of law to be laid down by the court. The requests, therefore, need not be stated.

Messrs. J. M. Carlisle and J. D. McPherson, for the plaintiffs in error; Messrs. W. H. Peckham and Lorenzo Allis, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is contended in the first place, that there was error in the court's receiving the entry of the footings upon the fly-leaf of the new ledger. It will be observed that the footings upon the fly-leaf of the ledger were not offered or received as independent evidence. They were accompanied by proof that they were correct statements of the values of the merchandise, and that they were correctly transcribed either from the inventory book or from the fly-leaf of the exhausted ledger, both of which appear to have been originals. How far papers, not evidence *per se*, but proved to have been true statements of fact, at the time they were made, are admissible in connection with the testimony of a witness who made them, has been a frequent subject of inquiry, and it has many times been decided that they are to be received. And why should they not be? Quantities and values are retained in the memory with great difficulty. If at the time when an entry of aggregate quantities or values was made, the witness knew it was correct, it is hard to see why it is not at least as reliable as is the memory of the witness. It is true a copy of a copy is not generally receivable, for the reason that it is not the best evidence. A copy of the original is less likely to contain mistakes, for there is more or less danger of variance with every new transcription. For that reason even a sworn copy of a copy is not admissible when the original can be produced. But in this case the inventory book and the fly-leaf of the exhausted ledger

had both been burned. There was no better evidence in existence than the footings in the new ledger. And we do not understand the bill of exceptions as showing those footings to have been copied from a copy. It does not appear whether they were taken from the inventory book or from the fly-leaf of the old ledger. And it is of little importance, for as those entries were made at the same time, neither ought to be regarded as a copy of the other, but rather both should be considered originals. We do not, however, propose to discuss this exception at length, for we regard it as settled by the decision in *Insurance Company* v. *Weide*,* that the evidence under the circumstances was properly received.

The second and third exceptions are disposed of by what we have already said, and they are unsustained.

There is nothing also in the fourth exception. By the policies the assured after furnishing proofs of loss were bound, if required, to submit to an examination under oath, and it was stipulated that until such examination should be permitted the loss should not be payable. Of course it is to be understood that the examination contemplated relates to matters pertinent to the loss. In these cases the plaintiffs did submit to an examination, but declined to answer questions respecting the amounts for which they had made settlements with other insuring companies. We are unable to perceive that the questions proposed had any legitimate bearing upon the inquiry, what was the actual loss sustained in consequence of the fire. If the plaintiffs had claims upon other insurers, and compromised with some of them for less than the sums insured, it is not a just inference that their claim against these insurers was exaggerated. A compromise proposed or accepted is not evidence of an admission of the amount of the debt. There was then no sufficient foundation laid for the instruction requested by the defendants, that if the jury should believe that the plaintiffs, or either of them, in the course of an examination on oath, under the policies, refused to answer any questions by which

* 9 Wallace, 677.

the defendants could fairly estimate, or reasonably infer plaintiffs' real loss in the insured property, and had not before the commencement of the actions answered the questions under oath, the verdict must be for the defendants. There was no evidence of refusal to answer *such* questions.

The fifth exception is to the refusal of the court to instruct the jury that if they believed from the evidence the plaintiffs were requested by the defendants to produce duplicates of invoices of goods purchased by them, the originals of which were alleged by them to be destroyed, and neglected to do so before the commencement of the actions, their right of action never accrued, and that the verdicts must be for the defendants. The prayer for this instruction was founded on the clause in the policy that the assured should produce certified copies of all bills and invoices, the originals of which had been lost, and exhibit the same for examination to any person named by the company, and that until the proofs, declarations, and certificates (stipulated for in case of loss) were produced and examinations and appraisals permitted, the loss should not be payable. The bills of exception state that there was evidence tending to show that the plaintiffs were requested to produce duplicate bills of purchases, but there does not appear to have been any evidence when the request was made, whether before the commencement of the actions or afterwards, or whether there was neglect or refusal of the plaintiffs to comply. Moreover, the request was for duplicates, and not for certified copies. We cannot, therefore, say there was error in refusing the instruction asked for.

Nor was there error in denying the defendants' third and fourth prayers. It is true the policies stipulated that fraud or false swearing on the part of the assured should work a forfeiture of all claim under them. The false swearing referred to is such as may be in the submission of preliminary proofs of loss, or in the examination to which the assured agreed to submit. But it does not inevitably follow from the fact that there was a material discrepancy between the statements made by the plaintiffs under oath in their proofs

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of loss, and their statements when testifying at the trial that the former were false, so as to justify the court in assuming it, and directing verdicts for the defendants. It may have been the testimony last given that was not true, or the statements made in the proofs of loss may have been honestly made, though subsequently discovered to be mistaken. It is only fraudulent false swearing in furnishing the preliminary proofs, or in the examinations which the insurers have a right to require, that avoids the policies, and it was for the jury to determine whether that swearing was false and fraudulent.

The remaining two assignments of error are not pressed, and it is properly conceded that the court could not lay down as a rule of law the mode of computation designated in the prayers for instruction.

JUDGMENT AFFIRMED.

BANK OF BETHEL *v.* PAHQUIOQUE BANK.

1. A National banking association may be sued in any state, county, or municipal court in the county or city where such association is located, having jurisdiction in similar cases.
2. Such an association does not lose its corporate existence by mere default in paying its circulating notes, and upon the mere appointment of a receiver.
3. Such an association may be sued though a receiver have been appointed, and is administering its concerns.
4. The decision of the receiver upon the validity of a claim presented to him for a dividend is not final; the creditor may proceed afterwards to have the validity of the claim judicially adjudicated in a suit in a proper State court, against the bank.

IN error to the Supreme Court of Connecticut; the case being thus:

On the 3d of June, 1864, Congress passed its well-known "act to provide a National currency, secured by a pledge of United States bonds;"* under which act numerous new

* 13 Stat. at Large, 99.

banks were organized, and numerous State ones, availing themselves of power given by the act, were converted into National ones, and like those first created by the act placed under the control of the laws and officers of the United States, including specially a Comptroller of the Currency, under whose directions a limited amount of notes were to be given to the banks; these notes being the only ones that the banks could issue.

The act, after providing for the mode in which the new banks were to be organized under articles of association, enacts:

SECTION 8. That every association formed pursuant to its provisions shall "be a body corporate," and "*have succession* by the name designated in its organization certificate *for a period of twenty years* from its organization, unless sooner dissolved.

(1st.) According to the provisions of its articles of association, OR,

(2d.) By the act of its shareholders, owning two-thirds of its stock, OR,

(3d.) *Unless the franchise shall be forfeited by a violation of this act.*"

"By such name," continues the section, "it may sue and be sued, complain and defend as fully as natural persons."

The 32d section, after enacting that all the banks in certain cities of the United States shall redeem their circulating notes at par in New York, provides:

"That nothing in this section shall relieve any association from its liability to redeem its circulating notes at its own counter, at par, in lawful money on demand."

The 46th section enacts:

"That if any such association shall, at any time, fail to redeem in the lawful money of the United States any of its circulating notes when payment thereof shall be lawfully demanded . . . the holder may cause the same to be protested, in one package, by a notary public, . . . and such notary public on making such protest or upon receiving such admission shall forthwith forward such admission, or notice of protest, to the Comptroller

of the Currency. . . . And after such *default*, . . . it shall not be lawful for the association suffering the same to pay out any of its notes, discount any of its notes, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits."

The 50th section enacts:

"That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned and is in default, the Comptroller of the Currency may forthwith appoint a receiver . . . who . . . shall take possession of the books, records, and assets of every description of such association, collect all debts, dues, and claims belonging to such association, and upon the order of a court of competent jurisdiction may sell or compound all bad or doubtful debts, and on a like order sell all the real and personal property of such association, on such terms as the court shall direct. . . . And such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the comptroller. . . . And from time to time the comptroller, after full provision shall have been first made for refunding, &c., . . . shall make a ratable dividend of the money so paid over to him on all such claims as may have been proved to his satisfaction, or *adjudicated in a court of competent jurisdiction*."

A proviso to this section says, however,

"That if such association against which proceedings have been so instituted on account of any alleged refusal to redeem its circulating notes as aforesaid, shall deny having failed to do so, such association may . . . apply to the nearest circuit or district or territorial court of the United States to enjoin further proceedings in the premises, and such court . . . after the decision of the court or the finding of a jury that such association has *not* refused to redeem its circulating notes . . . shall make an order enjoining the comptroller or any receiver from all further proceedings on account of such alleged refusal."

The 45th section enacts:

"That all associations under this act when designated for that purpose by the Secretary of the Treasury, shall be depositories of the public money (except receipts from customs), under such

regulations as may be prescribed by the secretary; and they may also be employed as financial agents of the government; and they shall perform all such reasonable duties as depositories of the public moneys and financial agents of the government as shall be required of them."

The 52d section enacts:

"That all transfer of the notes, bonds, bills of exchange, and other evidences of debt owing to any association, or of any deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or *creditors;* and all payments of money for either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

The 53d section enacts:

"That if the directors of any association shall knowingly violate or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this act, all the rights, privileges, and franchises of the association derived from this act shall be thereby forfeited. *Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose* by the Comptroller of the Currency, in his own name, before the association shall be dissolved."

The 57th section (and this is an important one to be noted in the case) enacts:

"That suits, actions, and proceedings against any association, under this act, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established; *or in any state, county, or municipal court in the county or city in which said association is located; having jurisdiction in similar cases.* Provided, however, that all proceedings to *enjoin* the comptroller under this act shall be had in a circuit, district, or territorial court of the

United States, held in the district in which the association is located."

In this state of statutory law about National banks, the First National Bank of Bethel, in Connecticut, on the 21st of February, 1868, failed to redeem some of its circulating notes. They were protested, and on the 26th of February a receiver was appointed under the above-quoted 50th section of the Currency Act, who immediately entered on the duties of his office.

The National Pahquioque Bank of Danbury, Fairfield County, in the same State, asserted that it was a creditor of the Bethel Bank, and presented its claim to the receiver. The receiver, however, disallowed it.

The Pahquioque Bank thereupon, on the 30th of May, 1868, brought assumpsit in the Superior Court of Fairfield County, a court of Connecticut having jurisdiction in similar cases, against the Bethel Bank. The Bank of Bethel defended itself against the claim on these, in substance, among other grounds:

1. That the courts of the United States alone had jurisdiction after the appointment and acceptance of the receiver.

2. That prior to the suit brought the Bank of Bethel had forfeited its charter by a violation of the Currency Act, in not paying its notes, and could not be sued anywhere.

3. That it could not be sued because it was, at the time, under the control and in possession of a duly appointed receiver, "incapable of self-defence, and entitled to the legal protection and guardianship thrown about it by the law."

4. That the decision of the receiver on the presentation of the claim was conclusive on the parties to the suit as an adjudication, unless set aside by the Comptroller of the Currency, or by some court of the United States having jurisdiction.

But the court gave judgment for the Pahquioque Bank for the full amount of its claim. The Bethel Bank then took the case on error before the Supreme Court of the State, where the judgment of the Superior Court of Fair-

field County was affirmed. To review this final judgment of the Supreme Court this writ of error was brought.

Messrs. C. B. Goodrich, Roger Averill, and L. D. Brewster, for the Bank of Bethel, plaintiff in error:

1. The National banks, under the act of 3d June, 1864, have been established as instruments by which the government may perform some of its trusts. They are controlled by the Treasury department. They are allowed to receive from the Comptroller of the Currency notes which they may circulate as money. They cannot issue any instrument for circulation or use as money, or as a substitute for money, except the notes intrusted to them by the comptroller. Their existence, as bodies corporate, can be sustained under the Constitution, only, because they may be employed by the government in the execution of its functions. The act imposes upon the Comptroller of the Currency certain duties of a public character, to perform which he is clothed with certain powers. The legality and propriety of the supervision and control which is exercised by the Comptroller of the Currency of the United States over National banking associations, and the effect of his acts in relation thereto, are to be determined, *exclusively*, by the laws of the United States; the construction of which is ultimately to be given by the courts of the United States. The suit brought in the Superior Court of Fairfield County, a State court of Connecticut, was thus brought in a court without jurisdiction.

2. An association under the act is to have succession (that is to say, corporate existence) for the period of twenty years from its organization, *unless the franchise* (which consists in a right of banking) *shall be forfeited by a violation of the act.* Now the Bank of Bethel committed a violation of the act, a "default," as the act itself calls it, on the 21st of February, 1868, at which time it failed to redeem some of its circulating notes; which failure was duly ascertained by the Comptroller of the Currency, who, on the 26th of February, acted thereupon, by the appointment of a receiver. This action of the comptroller was not enjoined by any District, Circuit,

or Territorial Court of the United States; the only courts competent to enjoin or act in the matter. The result is that the power of succession (corporate capacity) ceased to exist prior to the 30th May, 1868, on which day the Pahquioque Bank instituted their suit. The association was dissolved; the receiver was clothed with power to reduce the assets to money, by suit in his own name; was directed to pay the money to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, for the use of those entitled as creditors, giving priority of payment to the United States; the remainder or surplus of the proceeds, after the payment of debts, to be paid by the comptroller to the shareholders of the association or their legal representatives, in proportion to the stock by them respectively held, and not to the association in its corporate capacity.

3. On the 30th May, 1868, on which day the Pahquioque Bank commenced its suit, the Bank of Bethel had no authority to pay, was prohibited from paying, any creditor; it had no means within its control with which to pay. If the bank had authority, after notice by the comptroller, to pay a creditor, it might by such payment defeat the provision of the act which gives to the United States, from the assets of the association, priority of payment for any deficiency in the redemption of its circulating notes after applying the bonds deposited for their redemption. It results, from the want of authority to pay a creditor, at the time the suit by the Pahquioque Bank was instituted, that no suit at law, in any court, State or National, could be instituted against the Bank of Bethel.* If one creditor, after the appointment of a receiver, may institute a suit in a court of law, every creditor can, and by such course of proceeding disregard the winding up under the direction of the comptroller.

4. After an association has been placed in the hands of a receiver, the statute prescribes the mode of *winding up*, which includes an ascertainment of the creditors, and the amount severally due to them. This mode of proof excludes all

* Atlas Bank *v.* Nahant Bank, 23 Pickering, 480; Hubbard *v.* Hamilton Bank, 7 Metcalf, 340.

others. This cannot be doubted, except by holding that the act conferring authority upon the Comptroller of the Currency to appoint a receiver, to receive proof of claims, to wind up the affairs of the corporation, is unconstitutional.

Messrs. W. F. Taylor and O. S. Seymour, contra:

1. The whole argument against the jurisdiction of State courts is answered by the 57th section of the act which in cases like that where the Pahquioque Bank sued, gives the jurisdiction in express words to "any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

2. The association does not become extinct, *ipso facto*, by the appointment of a receiver. The 50th section speaks of it as existing. The powers of the receiver may be superseded, if the bank shows that it did not fail to redeem its notes. Default in paying notes only curtails its privileges. But even if it were a cause for forfeiture, still by the undoubted rules of the common law and by the express provisions of the 59th section of the act, a judgment of forfeiture by a judicial tribunal is necessary, and the corporate existence continues till such judgment is had. Questions of forfeiture cannot be tried in a collateral way. The only evidence which the law admits is the copy of the judgment of forfeiture, by a competent tribunal, in a proceeding instituted directly for the purpose of an adjudication of forfeiture.

3. A judgment by a State or other court, for a sum of money (such a judgment was given in the courts below), does not take things out of the receiver's hands. It does not interfere with any duties which the Currency Act imposes on him. It merely ascertains the justice of a claim and fixes its amount. Payment of the claim can be made only in subordination to the Currency Act. No number of judgments would prevent "the winding up under the direction of the comptroller." The only result is that the claim being "adjudicated by a court of competent jurisdiction" the creditor under it comes in for a dividend.

Then is the disallowance by the receiver of the claim pre-

sented to him before the judicial adjudication, a decisive adjudication of that claim? Certainly not. The comptroller and receiver are not judges of the United States. They cannot hold a court, summon a jury, compel the appearance of witnesses, or swear witnesses if they should appear. Every citizen of the republic may of common right appeal to a judicial tribunal for the adjudication of his rights. The right of trial by jury is secured by the Constitution to controversies of the character of that between these two banks, and the right of trial by jury implies that the controversy may be brought before a court that has power to summon a jury. There is in the act no provision for the establishment of a special tribunal to adjudicate claims against the insolvent bank. The failure to make any, leaves their adjudication to the courts in the ordinary course and manner of settling disputed claims. This would be the necessary inference from mere silence, and is confirmed and established by the provision in the 50th section, that the comptroller is to make a ratable dividend "on all such claims as may have been proved to his satisfaction or *adjudicated in a court of competent jurisdiction.*"

Mr. Justice CLIFFORD delivered the opinion of the court.

Associations for banking, formed pursuant to the act to provide a National currency, and duly authorized by the Comptroller of the Currency to commence the business of banking, become bodies corporate and have a succession for the period of twenty years from their organization, unless sooner dissolved according to the provisions of their articles of association, or by the act of the shareholders owning two-thirds of the stock, or unless the franchise shall be forfeited by a violation of the act under which the association was formed. Such an association is allowed to select, subject to certain conditions and the approval of the Comptroller of the Currency, another such association at which it will redeem its circulating notes at par, but the provision is that nothing in that section shall relieve any such association from its liability to redeem its notes in circulation at its own counter, at par, in

lawful money, on demand; and in case of failure so to do, the holder may cause the same to be protested in one package by a notary public, unless the president or cashier of the association which issued the notes, or the president or cashier of the association designated as the place for redeeming the same, will waive demand and notice of protest and execute an admission in writing stating the amount demanded and the fact of non-payment, and it is made the duty of the notary forthwith to forward the admission or notice of protest, as the case may be, to the Comptroller of the Currency for his information and action in the premises.

Notes to a large amount, issued by the corporation defendants for circulation, were held by the corporation plaintiffs, and the plaintiffs presented the same to the defendants for redemption, and the defendants failing to redeem the same, the plaintiffs offered the notes for protest, but the defendants having waived demand and notice of protest, and having tendered an admission in writing stating the amount demanded and the fact of non-payment, the plaintiffs accepted the written admission, and the notary forwarded the same to the Comptroller of the Currency as required under such circumstances. Pursuant to the requirement of law the Comptroller of the Currency appointed a special agent to ascertain whether the facts set forth in the protest were true, and the agent so appointed having reported that the defendants had failed to redeem in lawful money their circulating notes when payment thereof was duly and lawfully demanded, he, the Comptroller of the Currency, appointed a receiver of the delinquent association, with all the powers, duties, and responsibilities given to or imposed upon such an appointee in such case made and provided, and the record shows that the receiver entered upon the duties of his office and took possession of all the books, records, and assets, real and personal, of the association, and that he has ever since had the exclusive possession of the same, to be disposed of according to law. Before the commencement of the suit the Comptroller of the Currency caused notice to be published requiring all claimants to present and make proof

of their claims against the delinquent association, and the record also shows that the plaintiffs presented the claim in controversy to the receiver for allowance, and that the receiver having disallowed the same, the plaintiffs instituted the present suit in the State court to recover the amount. Appropriate proceedings followed, as in an action of assumpsit, and the parties having been heard the subordinate court where the suit was brought made a finding of facts, but reserved the question whether the case ought to be dismissed for want of jurisdiction, and if not, what judgment ought to be rendered in the case, and all questions of law arising upon the facts found, for the opinion and advice of the Supreme Court of Errors. Proper measures were adopted to obtain the opinion and advice of the appellate tribunal, and they were duly received, and thereupon the subordinate court rendered judgment in favor of the plaintiffs for the whole amount claimed in the declaration. Proceedings in the nature of a writ of error were instituted by the defendants, by which the cause was removed into the Supreme Court of Errors, where the parties were again heard and the decision of the Court of Errors was that the judgment should be in all things affirmed. Final judgment having been rendered in the State court, the defendants sued out a writ of error under the twenty-fifth section of the Judiciary Act and removed the cause into this court.

Four only of the errors assigned will be examined, as the others, in the view of the case taken by the court, either involve substantially the same considerations or present questions not re-examinable in this court under a writ of error to a State court. Briefly stated the errors assigned to be examined are as follows:

(1.) That the State court had no jurisdiction of the case or of the parties at the time the suit was commenced.

(2.) That the defendant association prior to the institution of the suit had forfeited its franchise by a violation of the act under which it was formed and had been dissolved by the action of the Comptroller of the Currency.

(3.) That the defendant association could not be impleaded

at the time the action was commenced, as prior to that time the association was prohibited by the act of Congress from paying or satisfying any of its creditors.

(4.) That the decision of the receiver disallowing the claim of the plaintiffs was final and was not subject to review in the State court.

Support to the first proposition is supposed to be derived from the conceded fact that such associations are created by an act of Congress and that they are instruments of the National government intrusted with the power of carrying on the business of banking and of employing and circulating treasury notes as a National currency, subject to the supervision and direction of the Comptroller of the Currency and of the Secretary of the Treasury. Banking associations, it is said, were established as instruments by which the government may perform the trust of furnishing and regulating the National paper currency, and the argument is that inasmuch as they are instruments of the government to carry into effect a National purpose they cannot be impleaded in a State court. Confirmation of that view is also attempted to be drawn from the fact that such associations are controlled by the Treasury Department, that all the notes which they circulate as money are received from the Comptroller of the Currency, and that they cannot issue any instrument for circulation or use as money except the notes intrusted to them by the Comptroller of the Currency, as authorized by the act of Congress.

Beyond all doubt such associations are created by an act of Congress and for the purposes assumed by the defendants, but the conclusion attempted to be drawn from those facts cannot be sustained, as express provision is made by the fifty-seventh section of the act that suits, actions, and proceedings against any such association may be had "in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Commenced as the action was in the proper court of the State where the association is located and in a court having jurisdiction in similar cases, which is not de-

nied, it is quite clear that the objection to the jurisdiction of the court founded upon the character of the association as an instrument of the National government, must be overruled. Jurisdiction in such suits is unquestionably vested in any circuit, district, or territorial court of the United States held within the district in which such association may be established, but the decisive answer to the objection of the defendants is that the same section of the act of Congress gives authority to creditors to prosecute such controversies in "any state, county, or municipal court in which said association is located" in all cases where it appears that such courts have jurisdiction under the State laws in similar controversies. Proceedings to enjoin the Comptroller of the Currency under that act must, it is true, be instituted and prosecuted in a circuit, district, or territorial court of the United States, but the act allows creditors to sue in the proper State courts in all suits, actions, and proceedings against the association, as specifically provided in the fifty-seventh section of the act. Authorities to support the proposition are not necessary, as it rests upon an express provision in the act of Congress.*

II. Associations of the kind have a succession for the period of twenty years from their organization, unless sooner dissolved in some one of the modes pointed out in the act under which such associations are formed, and throughout that period, unless sooner dissolved, they may make contracts in the name designated in their organization-certificate and may sue and be sued or complain and defend in any court of law or equity as fully as natural persons. Such corporate franchises cease to exist when the term for which they were granted expires, and the association may at any time go into liquidation and be closed by the vote of its shareholders owning two-thirds of the stock, but it is not necessary to remark upon those topics, as it is not pretended that the defendant association has ceased to exist or been dissolved in either of those modes. All such associations

* 13 Stat. at Large, 116.

are bound to redeem their circulating notes either at their own counter or at such other similar association as they are allowed to select for that purpose, and the provision is that if any association shall fail either to make the selection or to redeem its notes as required, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided in the act, to wind up its affairs. Holders of the circulating notes of such an association may demand payment thereof at the office of such association or at its place of redemption designated as aforesaid, and if the association fail to redeem the same in lawful money they may cause the same to be protested, as before explained, and the notary on making such protest or upon receiving such admission, shall forthwith forward the same to the Comptroller of the Currency for his information and action in the premises. Being informed of the default of the association in that mode, it is made the duty of the comptroller to make an examination into the facts, and if satisfied that the default has been committed, to give notice to the association; and the same section provides that from that time it shall not be lawful for the association suffering the default to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it and to deliver special deposits. On receiving such notice the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent to examine into the facts of the case, and if satisfied from the protest or the report of the special agent that the charge of default as made is true, he shall, within thirty days, declare the bonds and securities pledged by the association forfeited and give notice to the holders of the circulating notes to present the same for payment at the treasury, and the provision is that in that event he may in his discretion cause an amount of the bonds pledged, equal at current rates to the amount paid to redeem the outstanding notes of the association, or he may cause such an amount of the bonds pledged as may be necessary to redeem the outstanding notes, to be sold at

public auction; or, if he shall be of the opinion that the public interest will be best promoted thereby, he may sell at private sale any of the bonds so pledged and receive therefor either money or the circulating notes of such failing association. Power is also conferred upon the Comptroller of the Currency in such a case forthwith to appoint a receiver to take possession of the books, records, and assets of every description of the association and to collect all debts due and claims belonging to it, and upon the order of a court of record of competent jurisdiction he may sell or compound all bad or doubtful debts and may sell all the real and personal property of the association on such terms as the court shall direct, and may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders, as enacted by the twelfth section of the act. All moneys so made by the receiver he is to pay over to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, and he is also to make report to that officer of all his acts and proceedings. Receivers may also be appointed for other causes than those already mentioned; as, for example, in case the money reserve which the association is required to have on hand shall fall below the prescribed amount, and when notified to make it good the association shall fail for thirty days to comply with the requirement, or shall fail for thirty days to increase the capital stock of the association to the minimum amount required, where the same has been reduced below that amount by the delinquency of the shareholders and consequent sale and reduction of the stock; or, in case any such association which is required to keep undiminished the twenty per centum surplus mentioned in the twelfth section of the act, shall fail to keep it good, in which event the provision is that the Comptroller of the Currency may compel said banking association to close its business and wind up its affairs, as provided in the act under which it was organized. Whenever a receiver is appointed the comptroller is required to give notice of the fact, requesting all persons having claims against the association to present the same and to make legal proof thereof.

Provision is first to be made by the comptroller for refunding to the United States any such deficiency in redeeming the notes of the association as is mentioned in the act, and having refunded that amount the comptroller is required in the next place to make a ratable dividend of the money paid over to him by the receiver on all such claims as may have been proved to his satisfaction *or adjudicated in a court of competent jurisdiction.* Claims proved to the satisfaction of the comptroller are to be included in the list, and he is also to include in the list all claims adjudicated in a court of competent jurisdiction, which shows conclusively that claims disallowed by the comptroller may be prosecuted in a court having jurisdiction in such cases.* Where the whole assets are not collected and distributed in the first dividend, further dividends on claims proved and adjudicated may be made as the proceeds of the assets are collected and paid to the treasurer, and the remainder, if any, shall be paid to the shareholders.

None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered and the balance, if any, is paid to the owners of the stock or their legal representatives.

Delinquent associations whose notes have been protested, and whose officers have been notified by the comptroller that proceedings for liquidation under the act have been instituted, cannot lawfully pay out any of their notes, or discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to the association, and to deliver special deposits, which of itself refutes the theory that the association at that stage of the proceedings has ceased to exist. Evidence to refute that theory is also found in the proviso to the fiftieth section of the act, which empowers the association, if they deny having failed to redeem their circulating notes, to apply, within ten days after being so notified by the comp-

* Kennedy *v.* Gibson, 8 Wallace, 506.

troller that such proceedings have been commenced, to the nearest circuit, or district, or territorial court of the United States to enjoin further proceedings in the premises, and those courts are invested with full jurisdiction to hear and determine the matters put in issue by such an application.

Such associations are authorized to elect or appoint directors, and the directors are empowered to exercise all such incidental powers as shall be necessary to carry on the business of banking. They may make by-laws, discount and negotiate promissory notes, drafts, bills of exchange, or other evidences of debt; receive deposits, buy and sell exchange, coin, and bullion; loan money on personal security and obtain, issue, and circulate notes, according to the provisions of the act to provide a National currency. Throughout they are enjoined to conform to the regulations of that act, and the provision is that if they knowingly violate any of its provisions or knowingly permit them to be violated, all the rights, privileges, and franchises of the association derived from the act shall be thereby forfeited; but the further provision is that such violation, before the association shall be declared dissolved, shall be determined and adjudged by a proper circuit, district, or territorial court of the United States, which shows conclusively that the act of the comptroller in appointing a receiver does not work a complete dissolution of the association, as is supposed by the defendants.*

III. Express power to sue and be sued, complain and defend, in any court of law and equity, is conferred on such associations by the eighth section of the act providing for their organization, and it seems quite clear that the association is a proper party to be sued in all matters in which the corporation is interested, unless the association is disqualified for that purpose by virtue of the appointment of a receiver or by his subsequent action as such under his appointment. Neither power to sue nor to be sued in such cases is

* Frost *v.* Coal Company, 24 Howard, 283; Angel & Ames on Corporations, 9th ed. 777; Abbott's Digest, title "Corporation," 338; Grant on Corporations, 295.

anywhere in terms conferred upon the receiver, nor upon the Comptroller of the Currency in any case except when he institutes a suit to forfeit the rights, privileges, and franchises of the association, and in that case the provision is express that the suit shall be in his own name.* Beyond doubt the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records, and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, but the corporate franchise of the association is not dissolved, and the association, as a legal entity, continues to exist, as is shown to a demonstration by the fact that it is required safely to keep the money on hand belonging to it, and may deliver special deposits in its keeping to the rightful owners.

Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly if not entirely upon the construction of the act of Congress, and suffice it to say that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs under the provisions of the act which authorized its formation.

Suits and proceedings under the act, in which the United States or their officers or agents are parties, whether commenced before or after the appointment of a receiver, are to be conducted by the district attorney under the direction of the solicitor of the treasury, and no doubt is entertained that the directors, from the time a receiver is appointed, cease to have any power in respect to such matters, and that

* Case *v.* Terrell, 11 Wallace, 201.

the control and supervision of the same are vested in the proper officers of the United States. Claims presented by creditors may be proved before the comptroller or may be established by a suit against the association in any court of competent jurisdiction.* Creditors, say the court in that case, must seek their remedy through the comptroller, in the mode prescribed in the act of Congress, and cannot proceed directly in their own names against the stockholders or debtors of the corporation. Suits may be brought by the receiver, both at law or in equity, and the express decision there is that he may sue in his own name or in the name of the association *for his use*, and no reason is perceived to doubt the correctness of the rule adopted in that case, though the act of Congress does not in terms give him authority to sue in his own name.†

IV. Enough has already been remarked to show that the fourth proposition of the defendants cannot be sustained, as the act of Congress provides that the receiver, in making the basis for a dividend, shall include in the list not only claims proved before him to his satisfaction, but claims also adjudicated in a court of competent jurisdiction.

Attempt is made to show that the adjudicated claims there referred to are only such as had been adjudicated before the receiver was appointed, but the court is of the opinion that such a construction is not warranted either by the language employed, or the subject-matter to which it relates, or the purpose to be accomplished, or by the analogies of the law or the usual rules of interpretation which courts apply in ascertaining the meaning of a legislative provision of a remedial character. Tested by any one or all of these criterions the court is of the opinion that the construction assumed by the defendants is quite too narrow to carry into effect the intention which the framers of the provision had in view at the time it was adopted. Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of

* Kennedy *v.* Wilson, 8 Wallace, 506.

† Booth *v.* Clark, 17 Howard, 322.

establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the comptroller according to the act of Congress in such case made and provided.

Nothing further need be remarked in respect to the other errors assigned, as it is clear that the conclusions announced dispose of all the questions in the case which are examinable under a writ of error to a State court.

JUDGMENT AFFIRMED.

O'DOWD *v.* RUSSELL.

1. A notice by one of three defendants to his co-defendants of his intention to prosecute a writ of error, and a refusal by them to co-operate, is equivalent to the old proceeding of summons and severance, and the one defendant can take his writ accordingly.
2. A judgment in a court of last resort, that a judgment against A. (who had been sued for not faithfully discharging the duties of a vendue-master of a city and been held discharged under the Bankrupt Act) be reversed, is a final judgment within the meaning of the Judiciary Act; as is also a judgment in a court of last resort that a judgment in an inferior court, holding B. and C. (the sureties of A. on his bond as vendue-master) liable, be affirmed.
3. When the record does not show that a copy of the writ was lodged within ten days in the clerk's office, nor that the bond was approved and filed within the same term, the writ cannot be made to operate as a *supersedeas*.

ON motion to dismiss a writ of error to the Supreme Court of the State of Georgia.

Walker, Jones, and O'Dowd were sued in the Superior Court of Richmond County, Georgia, upon a bond given by

Walker, as principal, and Jones and O'Dowd, as sureties, for the faithful discharge by Walker of his duties as vendue-master in the city of Augusta.

The breach alleged was that Walker, having received, as vendue-master, certain goods for sale, and having sold them and received the proceeds in his capacity as vendue-master, failed to account. The defendants pleaded Walker's discharge under the bankrupt act, and the plea was sustained; but the sureties were held liable under the 33d section of that act, notwithstanding the discharge of their principal. Two writs of error were prosecuted upon this judgment to the Supreme Court of Georgia. One by Jones and O'Dowd to reverse the judgment against them, upon the ground that the discharge of Walker was a bar to the suit against them as sureties; and one by the plaintiff in the action, upon the ground that Walker could not avail himself of his discharge, the debt having been created by his defalcation as a public officer, and while acting in a fiduciary capacity.

The judgment of the Superior Court in favor of Walker was, on the 31st of October, 1871, reversed by the Supreme Court, and the judgment against the sureties on the same day affirmed. To reverse the judgment of the Supreme Court, O'Dowd prosecuted a writ of error. He had given written notice to both Walker and Jones of his intention to carry the case to this court, and requested their co-operation; but each declined to carry on the controversy longer.

The writ (dated by mistake, October 16th, 1871), issued November 10th, 1871, returnable to the first Monday of December following, and was served by filing in the clerk's office, and the case on that day removed by service of the writ. The bond was dated on that same day, but when it was allowed, or when it was filed, did not appear; nor did it appear that any copy was lodged in the office of the clerk of the Supreme Court for the defendant in error.

Mr. H. M. Hilliard, for the defendant in error, now moved to dismiss the case on these, among other grounds—

1st. Because it had been prosecuted by O'Dowd alone, and without summons and severance of Walker and Jones.

2d. Because the judgment was not "final" within the meaning of the Judiciary Act, which gives a writ of error only on judgments which are "final."

3d. Because the writ, the bond, the citation, and the copy of the writ of error for the defendants, were not seasonably served or filed.

As to this last ground assigned for dismissing the writ, the reader will, of course, remember that the 23d section of the Judiciary Act enacts that—

"A writ of error shall be a *supersedeas* and a stay of 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 rendering the judgment and passing the decree complained of."

Mr. J. P. Carr, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Several grounds are assigned for dismissing this writ. It will be necessary to notice but three of them.

The first of these is, that the writ of error is prosecuted by O'Dowd without summons and severance of his co-defendants. Formerly this was held to be necessary when one of several defendants desired to prosecute his writ of error alone. But, in the case of *Masterson* v. *Herndon*,* we held that such a writ of error would be sustained, if it appeared from the record that the defendants, not joined, had been notified in writing, and had refused to join. In this case it appears, by the record, that written notice was given to the co-defendants of O'Dowd, and that they declined to join. This was equivalent to summons and severance.

It is also insisted that the motion to dismiss must be allowed, because the judgment was not final. The judgment against Walker was reversed, because he was held not entitled to the exemption which he claimed under the Bank-

* 10 Wallace, 418.

rupt Act, and the judgment against the sureties was affirmed, because they were held not entitled to the benefit of his discharge. We think that both judgments were final, and that both are brought under review by the writ of error.

Another reason assigned for dismissal is, that the writ of error, the bond, the citation, and the copy of the writ of error for the defendants, were not seasonably served or filed. It appears, from the record, that the judgment of the Supreme Court was rendered on the 31st of October, 1871, and on the 10th of November, 1871, a writ of error was issued returnable on the first Monday in December, and was served by filing in the clerk's office. The writ is dated on the 16th of October, 1871. This was before the judgment was affirmed, and is obviously a mistake. It does not, however, vitiate the writ. The case was removed by service on the 10th of November.

The citation was served on the 3d of February, 1872. This was sufficient to advise the opposite party that the cause had been removed to this court, and was served and returned within the term.

It does not, however, appear, from the record, that any copy of the writ was lodged for the defendants in error in the clerk's office of the Supreme Court. It was necessary that such a copy should be filed within ten days to make the writ of error a *supersedeas.** Nor does it appear when the bond was allowed and filed. It bears date of the 10th of November. The allowance is not dated; nor is its filing noted.

We are of opinion, therefore, that a writ of error cannot operate as *supersedeas;* but the motion to dismiss must be

Denied.

* Railroad Company *v.* Harris, 7 Wallace, 574.

THE STEAMER WEBB.

1. Although an engagement by a steamer to tow a sailing vessel does not impose more than an obligation to carry out the contract with that degree of caution which prudent navigators usually employ in similar services, yet there may be cases in which the result is a safe criterion by which to judge of the act which has caused it. And when a steamer undertaking to tow a ship and having a well-known and straight course to pursue, suffered the ship, after towing her for but an hour or an hour and a half, to run aground at the end of a course of nine miles, on a shoal between three and four miles from the proper line of the voyage, the court held the steamer liable, especially as there was very considerable evidence that her compasses were untrue. And this decision was not affected by the fact that the voyage lay through waters where the currents were variable in the direction of their flow (the direction and force, however, being well known), and though for a part of the nine miles there was a thick fog.
2. The court refused to reverse a decree which on the merits they approved because a deposition which ought not to have been read was read before a commissioner to whom the case was referred to compute damages: there being other evidence that the damages were as great as this court finally awarded.
3. Decree in admiralty in the District and Circuit Courts for a greater amount than the sum for which sureties were bound, on stipulations for a discharge of the vessel from the marshal's custody, reformed by this court so as not to exceed that sum.

APPEAL from the Circuit Court for the District of Southern New York; the case, as assumed by the court on a considerable body of evidence, which it examined and recapitulated, having been essentially thus:

In March, 1859, the steamer Webb, a steamer of good character, belonging to the port of New York and engaged in towing ships at sea, was in Boston, having just then, under charge of a coast pilot named Sherwood, towed a ship to that port. This pilot Sherwood had had twelve years' experience as a coast pilot and was recommended by insurance companies. The owners of the Webb had engaged him to take the steamer back to New York, and they had agreed also with the owners of another ship, then lying at New Bedford, to stop for her on the way and tow her to

New York, and that this towage should be under direction of the same pilot.

In these circumstances one Hazard, master of the ship Shooting Star, lying at Portsmouth, New Hampshire, applied to the owners of the Webb to tow her to New York. The owners agreed in writing accordingly "to tow the ship and *furnish coast pilot* for $625." Having gone to Portsmouth and taken her tow, the Webb, under the pilotage of Sherwood, set off with a good complement of men on her voyage for New York. The course of the voyage lay south, past and round Cape Cod, through the waters that lie between the island of Nantucket on the south side and Barnstable County, Massachusetts, on the north, into what is known as the Vineyard Sound; and so through Long Island Sound to New York. The approaches to the Vineyard Sound (which for the purpose of this case may be considered as beginning with "Handkerchief Shoal" on the east of it, and as you leave the main ocean to enter the passages made by islands and the main land of Massachusetts) abound with shoals and with currents, which last, though close to each other, run in opposite directions. But the currents follow each its own direction, and, like the shoals, are marked with precision upon the charts.

About a hundred yards south of Handkerchief Light—a light upon the shoal—the Webb and her tow found themselves at about 2 or 2½ o'clock A.M.—nearer the latter time, perhaps, than the former—on the morning of March 23d. This was the exact position where they ought to have been in order to reach New York; and their route to that port was by a single straight course west, three-quarters south, to a light called Cross Rip Light, eleven nautical miles (rather less than thirteen statute or land miles) distant from the Handkerchief. This Cross Rip Light is on a boat where there is a fog-bell, audible in fogs, three miles off. The rate of the vessels as they passed the Handkerchief was about twelve knots an hour. The tide, at this time, had just turned ebb, the effect of which was to make the current for about halfway from Handkerchief to Cross Rip run north, and for the

rest of the distance to run southwest. There was a light wind from the southeast; it was raining, but not so that they could not see the coast-lights which they had passed, and even that on the northeast point of Nantucket, more than five miles off. Soon after passing the Handkerchief Light the wind died out, the weather became misty, and in half an hour, and by the time that they got half-way from the Handkerchief to Cross Rip it was so thick that they could not see even the lights of the ship astern; though up to this point the fog had not been thus thick. Lookouts were properly posted. When the fog rose they were on the course mentioned, going, as already stated, twelve knots. The pilot decided to keep up this speed for thirty minutes, expecting at the end of that time to be within hearing of the bell from Cross Rip. Captain Hazard objected *to going on through this fog and desired to anchor*, but on the pilot's statement that a vessel which once anchored where they were had been obliged to cut some spars to avoid running aground, and on an assurance that there was no danger in running to Cross Rip, he yielded and consented to keep on. The pilot gave the course west half south, but the steamer was headed by her compass west-southwest, in order to allow for a variation from local attraction caused by iron on board the vessel, which Captain Hazard supposed to be one and a half points south of their true course when running west, diminishing to zero, when running south. They ran on this course at full speed for thirty-two minutes, and then, not hearing the bell, shut off steam, reducing their rate to between two and three knots, and having the lead cast by another pilot named Wilson, the captain of a Boston packet, who as a friend of Sherwood's had been allowed a free passage to New York. After running slow for forty-five minutes they found themselves in shallow water, which Sherwood took for a shoal called Horseshoe Shoal, that lies about a mile north of Cross Rip. To avoid this he turned his steamer towards the south, and immediately the ship was aground. She had run on Tuckernuck Shoal, a point about four miles southeasterly from both the Horseshoe and Cross Rip, about nine miles

Statement of the case.

southwest by west half west from the Handkerchief Light, and fully *three and a third miles to the south of the course in which the vessels ought to have been.* This was at half-past three, or a very little later, in the morning. After some vain endeavors to drag her off, the steamer left the ship and cast anchor in the neighborhood.

After daylight the steamer tried to approach the ship, to give her the end of the towing hawser, the ship having drifted off the shoal and then riding at anchor. The crew began to heave on the anchor. As was alleged by the people on the steamer, they on the ship hove short, and the vessel picked up her anchor and drifted away. But the ship had, in fact, lost her anchor. She soon went ashore again, her stern resting on the sand. The wind getting very strong and the sea violent, under a gale which had suddenly sprung up, the ship, in order to prevent her bow being thrown upon a ridge, which, if she struck, her captain thought might dash her to pieces, after losing the port anchor cast out the starboard one. The ship swung directly upon the flukes of this anchor and knocked holes in her bottom through which she filled with water. Before this she had not leaked. The gale was so high and the sea so rough and boisterous that communications between the vessels could not be made. The steamer then went to Edgartown, a town on the island of Martha's Vineyard, for a steam-pump and wreckers. In the meantime, and before the Webb got back, one Levi Hotchkiss—a part owner of the vessel, who happened to be aboard—got on to a sloop and, acting with energy, procured relief from Boston and Nantucket. Thus aided, the ship got off, and her leaks having been temporarily stopped, she was got into New York and sent into dock for repairs.

After the accident, the Webb's compass was carefully examined and tested; and considerable testimony tended to prove that the variation from local attraction (the iron on the vessel) on the west course was one and a half points to the north, instead of to the south, as had been supposed by the captain and pilot.

Hereupon the owners of the ship, by proceeding *in rem*,

libelled the Webb for $17,500 damages, and the marshal seized her. She was, however, discharged from his custody on her owners entering into bonds for $18,000 as the value of the ship, and $250, the sum estimated as possible amount of costs, conditioned to pay what might be awarded by final decree.

To establish the case of the ship the testimony of Hotchkiss, already mentioned, *one of her part owners*, had been taken, June 20th, 1859, "saving the exception as to the competency of the witness;" the statute of July 16th, 1862, which allows parties and interested witnesses to testify not having then passed. Damages suffered by the ship, and much exceeding $18,000, were proved by the bills of repairs produced and by other witnesses than Hotchkiss. The deposition of Hotchkiss was not read in the District Court; without hearing which that court decreed against the steamer, and referred the case to a commissioner to ascertain damages. The commissioner, however, did hear the deposition, and awarded $20,378 damages; this being followed by a final decree in the District Court for $24,590. On appeal to the Circuit Court, that court not reading the deposition, affirmed the decree, and gave a final decree there for $28,292. From that decree the case was brought here by the owners of the steamer, the record which came here including Hotchkiss's deposition.

Mr. E. C. Benedict, for the appellants:

The owners of the steamboat were not common carriers nor insurers. All they contracted for was a propelling power to tow the ship with reasonable skill and care. They did not guarantee successful towing, free from all accident and injury. Like the professional man, they are responsible only for actual negligence, for the lack of such care as a careful man would give to his own property.* And this negligence must be proved by the libellant. The presump-

* The Julia, 1 Lushington, 231; Wells *v.* The Steam Navigation Company, 2 Comstock, 208-9.

Argument in favor of the tug.

tion is against the negligence, and the burden is on him to prove it affirmatively, not only that there was negligence, but culpable negligence that caused the damage.*

Now here the steamer and the care and precaution on board of her were of the best kind. The pilot, Captain Sherwood, was a competent pilot, of large experience and well recommended; and he had the aid of Wilson, a skilful friend. The lead was heaved, shoals were watched, and there was a good lookout.

The damage was caused by the perils of the sea—the inevitable accidents of the navigation—the act of God; the rain, the fog, the darkness, the variable, conflicting, and imperceptible currents and the winds. The waters through which this navigation lay are very peculiar waters. Islands and shoals, and swashes, and channels abound. The currents do not flow regularly, six hours one way and six hours another. At different parts of the tide it will run in the same place two hours in one direction, and in the next two hours in the opposite direction in the same ebb or flow; and in some places, when the tide will be running west, the same tide, at a little distance off, will be running southwest, or south. These uncertain and contradictory currents and tides, make the navigation dangerous in the night in fair weather, even when the many lights in light-houses and light-ships are visible. Of course they make it doubly so when nothing is visible in consequence of dense fog. And when such a fog shuts suddenly down, there is no retreating nor evading or escaping, except by slow and careful going on, with abundant lookout and a constant casting of the lead. All that we gave. We slackened speed; we heaved the lead; we kept a sharp lookout, with in fact two pilots.

Shutting off the steam was a plain duty, and yet doing this caused the vessel to run more slowly, and allowed the currents to have more effect on it. The ship would thus be under the influence of two equal forces operating nearly at right angles; steam driving her to the westward and the

* The Farragut, 10 Wallace, 334.

current bearing her to the southward. The combination of those two forces would force her between the two on a diagonal line directly upon Tuckernuck Shoal on which she struck.

There is no sufficient evidence to discredit the compasses. They were in good condition. Their variation, caused by the iron on board, as is the case in all steamers, was regular and well known. On an east or west course it was a point and a half; that is to say, to make a west course you would have to steer west by south half south, and on an east course, the same rule. This variation was properly allowed for in all courses.

But after all, the injury to the ship was caused by her own mismanagement after she struck the shoal and cast her port anchor. She got off the shoal where she first grounded without any injury, and if after that she had been guilty of no negligence there would have been no damage. Instead of remaining quietly at her anchor where the steamer might take hold of her, and take her out with a long chain, on her voyage, they hove the anchor short, and the ship then picked up her anchor and went ashore—broke adrift, and drove astern on to the shoals. This heaving short was a great negligence, and was the first and material cause of damage. She then lay with her stern on the sand, her bow swinging and straining on her short chain, which parted; and if left to herself she would have gone over the shoal into deep water. It was a great negligence which let go the starboard anchor on the starboard side of the ship when she was swinging to starboard, her stern lying aground. As a natural consequence she swung on the anchor and stove holes in her bottom, the second and the principal cause of the damage. If no anchor had been thrown out, the ship would have gone through the shoal into deep water and floated without any damage except scraping the copper.

Neither was the steamer in fault. Her duty to the ship was to tow her to New York, to act as her propelling power, to use all reasonable care and diligence to do so, and if she got in difficulty to endeavor to extricate her. It had this

extent; no more. The captain of the steamer was not under the least obligation to throw his boat alongside of that ship in the midst of breakers and uneven and rolling shoals in a tempestuous gale. It could not possibly do the ship any good, and might destroy them both. It was his duty not to do it, and it was his duty to go to the nearest port and procure surf-boats and wreckers to aid her, which was just what he did. During the time that the ship was ashore, the steamer tried to get to her, making repeated efforts, backing in towards her, but was unable to get to her. The noise made by the gale prevented hailing, and the ship could not fail to know when the steamer turned toward Edgartown that it was going for assistance, without which nothing useful could be done.

Under the contract "to furnish a coast pilot," the pilot was the servant of the ship and not of the steamer. The mate of the tug was not responsible for the conduct of the pilot. His only contract as to the pilot, was to get a pilot for the owner of the ship, and to get one of good repute for skill and diligence. Hazard was the agent of the owner of the ship, who accepted and approved his choice of a pilot.

The commissioner also allowed the deposition of Captain Hotchkiss, which was incompetent, to be read in evidence before him on the question of damages. The deposition, not being competent when taken, did not become competent by lapse of time, or by any subsequent statute. This improperly affected the final decree, which on account of the result which the error caused ought to be reversed.

The libellants at best are entitled to a decree for but $18,250. The sureties are only bound to the extent of the obligation expressed in their bond.*

Mr. D. D. Lord, contra.

Mr. Justice STRONG delivered the opinion of the court.

The libel filed in this case against the steamer is to recover the damages sustained by the ship in consequence of

* Ann Caroline, 2 Wallace, 538

the alleged careless and unskilful towage, and the first question is whether the towage was either unskilful or negligent.

It must be conceded that an engagement to tow does not impose either an obligation to insure, or the liability of common carriers. The burden is always upon him who alleges the breach of such a contract to show either that there has been no attempt at performance, or that there has been negligence, or unskilfulness to his injury in the performance. Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been in fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. Had the ship in this case been towed upon a shoal ten miles north or ten miles east of Handkerchief Shoal, after leaving that shoal for Cross Rip, it cannot be doubted that the fact of the stranding at such a place, would, in the absence of explanation, be almost conclusive evidence of unskilfulness, or carelessness in the navigation of the tug. The place where the injury occurred would be considered in connection with the injury itself, and together, they would very satisfactorily show a breach of the contract, if no excuse were given. At least they would be sufficient to cast upon the claimants of the tug the burden of establishing some excuse for the deviation from the usual and proper course.

In the present case the departure from the true course was not so great, but it was enough to devolve upon the tug the duty of explanation. The ship was, as we have noticed, towed upon a shoal more than three miles south of the proper course to Cross Rip Light. Had the course been a long one the deviation would not have been so remarkable. But as the entire distance from Handkerchief Shoal to Cross Rip is less than thirteen statute miles, and as the ship was stranded when only about three-quarters of this distance was

passed, it is apparent there must have been either bad management of the tug, or some unusual cause must have operated to produce the disaster, a cause against which ordinary prudence was not bound to guard. Certainly this is enough to impose upon the tug the necessity of explaining how she came to be so far off her course in running so short a distance. We do not say that in order to excuse her it must be shown the accident was inevitable, but it ought to appear that so remarkable a deviation from her correct course, made so soon after leaving Handkerchief Light, was consistent with cautious and skilful management.

The weight of the evidence is that the ship was run upon the shoal in a little more than an hour, manifestly not more than an hour and a half, after she passed Handkerchief Light. All the witnesses agree that it was between three and four o'clock when she took ground. It follows that the entire departure from the true course was made within this period of an hour, or at most, an hour and a half.

The excuses set up in behalf of the steamer are that the night was foggy and dark, and that the currents were variable, conflicting, and imperceptible. There is no evidence that there was any wind which could have caused embarrassment until some time after the ship had stranded. It blew lightly from the south and east, and its tendency, therefore, was to keep the steamer up to the northward of her true course. It was raining, but there was no fog until after Handkerchief Light had been passed. Soon afterwards the weather began to grow misty and thick, but the clear preponderance of the testimony is that it was not until they had passed over about half the distance to Cross Rip that the fog became so dense that the lights could not be seen. If this is so there was no difficulty in determining the position of the steamer. It is not perceived, however, that this is very material. The fog, whether dense or thin, was itself no embarrassment to the steamer's taking and keeping the right course, a course marked on the chart, and well known by the pilot and by the captain.

Though the currents were variable in the direction of

their flow, yet both their direction and their force were well known. All that was needed was to give them careful attention, and to make allowances for their operation. So much prudent navigation required. There is no evidence that they were of unusual strength on the night of the disaster, or that they ran in an unusual direction, and there was nothing in the state of the weather to cause a difference from what was common. Ordinary skill was quite sufficient to enable the pilot of the tug to counteract their force, and to keep both the tug and the tow on the proper course. It was during the first third of the tide that the passage was made over the first third of the course from Handkerchief Light to Cross Rip, as stated by the pilot. During this time the current or tide was setting northwest, bearing the steamer northward, and on the last half of the course, on which she entered before the steam was shut off, the ebb-tide was setting southwest. Such is the evidence, as also that, after the steam was shut off, the motion of the steamer through the water was at the rate of two or three knots an hour, and that she was thus moving about forty-five minutes before the ship struck. If this is so, she was constantly making westing during that three-quarters of an hour, if headed right; and, if she was in the right position when the steam was shut off, the calculation is easy that shows a southwest current could not have carried her on to Tuckernuck Shoal. It is plain, therefore, the stranding of the ship was not the fault of the currents. They do not account for it, even if nothing was done to counteract their known tendency.

There is nothing else in the case that tends to show that the disaster was not due to the negligence of the tug. On the contrary, there is very considerable evidence that her compasses were untrue, and so deranged as on a westerly course to head her too much to the south. This, of itself, would account for the deviation, and this of course would be the steamer's fault.

It has been strenuously argued that the great injury to the ship was caused by her own mismanagement after she

had struck the shoal and cast her port anchor. After daylight, when the steamer was about to back down in order to attach herself again to the ship, which had then got off the shoal and was riding at anchor, the ship's crew commenced heaving on the anchor; and it is alleged they hove short, so that the anchor was picked up, and, a gale coming on to blow suddenly, she went again upon the shoal. The anchor, however, instead of being picked up, was lost, and it was proper to heave upon it in order to bring the ship nearer the stern of the steamer, and thus aid in the effort to renew attachment to the steamer. We do not discover in this any negligence on the part of the ship. What was done was rendered prudent, if not necessary, by the prior misconduct of the tug. Nor was casting the starboard anchor, after the ship broke adrift, negligence under the circumstances, though it proved unfortunate, and though the ship afterwards swung upon it and bilged. The port anchor had been lost, and the wind was then blowing a gale. Probably the bilging was what saved the ship from total destruction; and, if casting the starboard anchor was an act of mistaken judgment, it cannot excuse the tug, which negligently brought the ship into the peril from which she sought thus to escape.

The attempt to escape responsibility under the allegation that the wrong, if any, was that of the pilot, and that the pilot was the employee of the ship and not of the steamer, wholly fails. Neither the written contract for towage nor the antecedent negotiation establishes any such thing. Under the engagements of the steamer, assumed before the contract of towage was made, it was impossible to have any other pilot than Sherwood, who was the pilot of the steamer, and there is nothing to show that the ship undertook to run the risk of pilotage.

It is finally objected that the deposition of Levi Hotchkiss was allowed to be read, though he was incompetent when it was taken. It does not appear to have been used in either the District or the Circuit Court, though it was read before the commissioner appointed to ascertain the damages. Ob-

jection was made to it there, and it must be conceded the deposition should not have been received, but its reception can hardly justify us in sending the case back for a new trial. When the commissioner received it, if it was intended to insist upon the objection, application should have been made to the court for an order to exclude it. This was not done. Conceding, however, that the error was not thus cured, still the evidence before the commissioner related only to the amount of damages, and without the testimony of Hotchkiss, the damages were plainly more than the libellants are entitled to recover in this proceeding. The libel was *in rem*, against the steamer, and the decree cannot be for more than is within the jurisdiction of the court. The steamer was discharged from arrest, on stipulation in the sum of eighteen thousand dollars for value, and two hundred and fifty dollars for costs. The stipulators, to the extent of their stipulation, have been substituted for the steamer, and thus nothing but the eighteen thousand dollars value and two hundred and fifty dollars for costs is within the control of the court. To that extent and no greater the stipulators have subjected themselves to the judgment of the court, and they cannot be made liable as stipulators beyond it. This was determined in the case of *The Ann Caroline*,* and we need not repeat what was then said. The decree in this case was largely in excess of the stipulation, and while it is affirmed upon its merits, it must be modified in regard to the amount of damages recoverable from the stipulators.

The decree of the Circuit Court is AFFIRMED, WITH THE MODIFICATION that it be reduced to the sum of eighteen thousand dollars damages and two hundred and fifty dollars costs; and it is further ordered that each party pay his own costs in this court.

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* 2 Wallace, 538.

Statement of the case.

SMITH *v.* MASON, ASSIGNEE.

1. Where an assignee in bankruptcy claims a fund as the property of his bankrupt, which some time before the bankruptcy a firm of which the bankrupt was a member transferred to a third party, and which the transferee now claims adversely to the assignee, the proceedings in the District Court should not be summary and under the first section of the Bankrupt Act, but formal and under the second clause of the third section.
2. An appeal from a proceeding in bankruptcy disposing, under the first section, of such a claim, lies (other requisites allowing it) from the Supreme Court of the District of Columbia to this court.

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

The Bankrupt Act* enacts:

"SECTION 1. That the several District Courts of the United States be courts of bankruptcy, and they shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy, and they are hereby authorized to hear and adjudicate upon the same *according to the provisions of this act*. . . .

"The said courts shall be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time, and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority as when sitting in court.

"And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; *to the collection of all the assets of the bankrupt;* to the ascertainment and liquidation of the liens and other specific claims thereon; *to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the different funds and assets so as to secure the rights of all parties and due distribution of the assets among all the creditors;*

* 14 Stat. at Large, 517.

and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt and the close of the proceedings in bankruptcy. The said courts shall have full authority to compel obedience to all orders and decrees passed by them in bankruptcy, by process of contempt and other remedial process, to the same extent that the Circuit Courts now have in any suit pending therein in equity."

The *second* section, in its first clause, gives to the *Circuit* Courts "a general superintendence and jurisdiction of all cases and questions arising under this act; and, except when *special provision is otherwise made*," authorizes *them*, upon bill, petition, or other proper process of any party aggrieved, to hear and determine the case as in a court of equity.

By its third clause the act enacts thus:

"Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of said bankrupt transferable to or vested in such assignee."

The eighth section of the act gives appeals and writs of error from the District to the Circuit Courts, when the debt or damage claimed amounts to more than $500. The section proceeds:

"And any supposed creditor, whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court from the same district."

The ninth section enacts:

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

Statement of the case.

The forty-ninth section enacts:

"That all the jurisdiction, power, and authority conferred upon and vested in the District Courts of the United States by this act in cases in bankruptcy are hereby conferred upon and vested in the Supreme Court of the District of Columbia . . . when the bankrupt resides in the District of Columbia."

So far as to provisions of what is called the Bankrupt Act.

The Supreme Court of the District of Columbia, referred to in the section last quoted, and from which court this appeal came, was reorganized by an act of March 3d, 1863.* The act gives it a general jurisdiction in law and equity. It is made to consist of four judges. Any one of them may hold the District Court of the United States for the District of Columbia, in the same manner and with the same powers and jurisdiction possessed and exercised by other District Courts of the United States.

In this state of statutory law Frederick P. Sawyer, the bankrupt in this case, was the senior member of the firm of Sawyer, Risher & Hall, of Washington, D. C., who held a claim against the United States, which they had put in the hands of George Taylor, for collection. On the 20th January, 1867, and while the claim was pending, the firm assigned it to Biddle & Co., of New York, by an order on Taylor to pay the proceeds over to them when collected, which order was accepted by Taylor. Biddle & Co. assigned the order in turn, on the next day, to one Smith. Taylor collected about $1000 on the claim, which he remitted to Smith, according to the arrangement. Some time after this payment, and before any further collection was made, Sawyer went into bankruptcy (one Mason being appointed his assignee), and the firm of Sawyer, Risher & Hall was dissolved, Risher and Hall closing the business of the firm, as remaining partners. After this date Taylor, by consent of all parties, received a further sum of $4744.19, and there was an uncollected draft yet to be paid to him.

At the time of these collections the accounts between the

* 12 Stat. at Large, 762.

bankrupt partner and the remaining ones were unsettled, and the partnership debts were unliquidated. The assignee, therefore, filed a bill for an account, but the remaining partners had not answered. At this stage of the proceedings Mason, the assignee of Sawyer, on the 13th of October, 1868, presented a petition to one of the judges of the Supreme Court of the District of Columbia, sitting in bankruptcy, setting forth that he had filed his bill against Risher & Hall, the partners, carrying on the business of Sawyer, Risher & Hall, for the settlement of the partnership accounts; that Taylor had collected the sum of $4744.19, above mentioned, and that other funds would come into his hands for Sawyer, Risher & Hall; that prior to the bankruptcy of Sawyer the firm made the assignment (already mentioned) to Biddle & Co., as collateral security for the payment of a debt to the said firm, which debt had been paid; and that Biddle & Co. had assigned its claim to Smith.

Mason accordingly prayed an injunction on Taylor against his payment of the money pending his suit against Sawyer, Risher & Hall. This application for an injunction was in truth apparently made at Taylor's instance, in order that in any payments which he made of money that he received, he might act under an order of court. He did not appear, and the injunction was granted. Mason then, on the 7th of April, 1869, filed a petition against Smith, asking for an order on him to show cause why the money should not be decreed to him, Mason, as assignee. Smith appeared and set up his claim to the money.

On the 10th of April, 1869, Risher & Hall, the remaining partners, now intervened, and also claimed the money, on the ground that the order on Taylor was a mere hypothecation of the claim, and that Biddle & Co. had been fully paid.

The court thereupon went into an examination of the accounts between Sawyer, Risher & Hall, and Biddle & Co., and (Biddle & Co. not being present, and having had no notice or order served upon them) decided that the debt originally due to Biddle & Co. had been satisfied; and that

the funds in the hands of Taylor should be paid over to Mason, the assignee of Sawyer.

From this decree an appeal was taken by Smith. The court in banc reversed the decision of the court in bankruptcy, dissolved the injunction, and ordered the money to be paid over to Risher & Hall, the solvent and surviving partners, thus deciding the right of Biddle & Co. and Smith without notice to Biddle & Co., and in favor of the surviving partners.

From this decree Smith took the present appeal. Counsel for the appellee appeared generally. The record, which was not a very full one, did not perhaps show very well notice of the appeal, but it showed clearly enough that the appeal had been duly claimed, and that the appellant filed his appeal bond in open court, and that it was duly approved by the chief justice of the Supreme Court of the District, who presided at the hearing when the final decree was entered in the case.

Messrs. Moore and Bright, for the appellant:

If any jurisdiction existed under the first section of the Bankrupt Act, and in a summary way, all parties to be affected should certainly have had notice. The court, without notice to Biddle & Co., and in their absence, went into the examination of their accounts and decided that their claim had been paid and discharged, and that they were bound to return the order on and acceptance of Taylor to the firm of Sawyer, Risher & Hall.

But the case was not one for summary jurisdiction under the first section at all. The case was plainly one for a proceeding in equity under the third clause of the second section, when all parties in interest would have been regularly brought in and accounts could have been regularly taken.

Mr. G. W. Paschall, contra:

No appeal lies in a case from the general term of the Supreme Court of the District of Columbia to this court in a strictly bankrupt proceeding. If it be conceded that the

ninth section of the Bankrupt Act, by a negative pregnant, allows appeals from the Circuit Court to this court in all cases where the matter in controversy exceeds $1000, it does not follow that such appeal lies from the Supreme Court of the District of Columbia, much less that such power has been exercised in a manner to give this court jurisdiction.

There is, in fact, no appeal order by the court; there is no appeal bond, such as is required by the statute; there is no notice of appeal, and no evidence that the appeal was taken in term, or ever, in fact, taken at all. These are all jurisdictional facts.

But conceding the jurisdiction, we insist that, under the first and second sections of the Bankrupt Act, and the broad principles of *Ex parte Christy*,* the court, in the exercise of the powers given, had the right to do precisely what was done in this case; that is, to determine the right of the claimants to a fund in which the bankrupt estate had an interest. The suit was brought originally by the assignee against the partners of the bankrupt for account. This fund was in the District, in the hands of the attorney of this firm, and the assignee brought the suit to enjoin the payment, either to the non-accounting partners or to Smith, who was understood to have set up some claim to the fund. Smith was properly cited to assert his claim to the fund. At this point the surviving partners intervened and set up their rights. The bankrupt court, in the exercise of its legitimate powers, acquired a summary equitable jurisdiction over the subject-matter and the parties; and, having become thus possessed of the cause, it might fully proceed to adjudicate the right.

Smith, as also Risher and Hall, were claiming an interest in the bankrupt's assets, and no disposition could be made of this fund until the rights of these claimants should be settled. The jurisdiction of the District Court expressly extends "to the collection of all assets of the bankrupt;" "to the marshalling and disposition of the different funds and

* 3 Howard, 321.

assets among all the creditors; and to all acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the bankrupt's estate, and the close of the proceedings in bankruptcy." The Circuit and District Courts have given an enlarged interpretation to this section.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Jurisdiction, power, and authority in cases in bankruptcy, when the bankrupt resides in this District, are conferred upon, and vested in, the Supreme Court of the District, to the same extent and subject to the same rules, regulations, and restrictions as are enacted and prescribed in respect to the jurisdiction, power, and authority of the District Courts of the United States, where the bankrupt resides in any one of the judicial districts within the several States.†

By the terms of the act establishing the Supreme Court of the District the court consists of four justices, any three of whom may hold a general term, and any one of them may hold a Circuit Court or special term for the purposes and under the conditions therein prescribed, or may hold a District Court of the United States, in the same manner and with the same powers and jurisdiction as are possessed and exercised by the Federal District Courts within the several States.‡

Enough appears in the record to show that one Frederick P. Sawyer, of the firm of Sawyer, Risher & Hall, was adjudged bankrupt by the Supreme Court of this District sitting in bankruptcy, and that George Mason, the appellee in this case, was appointed assignee of his estate by decree of the bankrupt court. He commenced the proceeding in this case by the petition exhibited in the transcript, in which he represents that George Taylor, as agent of that firm, had collected from the United States the sum of four thousand seven hundred and forty-four dollars and nineteen cents for

* See 2 Brightly's Digest, p. 74, notes *a*, *b*, *c*.

† 14 Stat. at Large, 541. ‡ 12 Id. 763.

the firm, and that other funds due to the firm, it was expected, would soon come into his hands; that Risher & Hall, the other two members of the firm prior to the bankruptcy of the senior partner, made an assignment of the claim, from which that amount was realized, to George E. Biddle & Co., as collateral security for the payment of a certain indebtedness of their firm to the said assignees, which indebtedness the petitioner believes has been paid; that the assignees of the claim afterwards made an assignment of their interest in the same to James R. Smith, as collateral security for their indebtedness to him, which, as the petitioner believes, has also been paid: wherefore he prayed that the said George Taylor might be restrained from paying out said money, or any other money which might come into his hands belonging to the same firm, pending the petition, and that the respondent might be required to give bond for the safekeeping of the money and for its production in court when ordered.

Such an order was issued, and the party holding the money was enjoined and required to give bond as prayed. Subsequently the petitioner presented another petition to the same court, in which he represented that James R. Smith also claimed an interest in the fund in question, and prayed that an order might be made requiring him to show cause on a day therein named why the fund should not be paid to the petitioner. Smith appeared and filed an answer to the rule, to the effect following: (1.) That the court had no jurisdiction to proceed against him in that mode. (2.) That the money enjoined came to him by regular assignment for a valuable consideration before the senior partner of the firm was adjudged bankrupt, and that he was, and is, the *bonâ fide* owner of the claim. (3.) That neither the assignee of the bankrupt's estate nor his creditors have any right to any part of said funds.

Before the hearing the other partners of the firm, to wit, Risher and Hall, intervened, and alleged that the money enjoined rightfully belonged to them and not to the respondent in the rule, because the assignment of the claim, as they

represented, was made by the senior partner of their firm merely as a security to the said assignees, to be applied by them to the payment of the debt due by their firm to those assignees; that it was expressly understood that if the assignors paid the debt before the claim was collected from the United States the claim should revert to them, the assignors; that they paid their entire debt to those parties before the claim was allowed at the Treasury Department, and that they, as the representatives of the firm since the bankruptcy of the senior partner, are entitled to the money: wherefore they pray that an order may be passed directing the depositary to pay the same to them, or, if it be paid to the said assignees, that it be so paid to their use.

Evidence was introduced by the intervenors tending to show that the indebtedness of the original owners of the claim to the assignees of the same had been paid, and that the respondent in the rule held the claim merely as collateral security for his assignors. On the other hand the respondent in the rule was examined, and he testified that he obtained the assignment of the claim in good faith and for value, without notice that his assignors held it subject to any conditions, or that it was not their property in case the indebtedness of their assignors was discharged before the claim was collected. He produced the assignment duly executed by the original owners, directing the depositary to pay the amount to the assignees when collected at the proper department, and also introduced the deposition of the senior partner of the firm to which the claim was assigned, and he deposed that his firm transferred and assigned the same to the respondent in the rule with the knowledge and consent of the original owners; that they, the assignees, took the order or draft at its date in the regular course of business, and that they assigned the same for value to the respondent, and that the accounts of the original owners with his firm have never been settled, but that they are still largely indebted to his firm. Hearing was had, but the court was of the opinion that the respondent took the order or draft

merely as collateral security; that he was not a *bonâ fide* purchaser of the same; that he was to credit the proceeds when collected to his assignors, and that they were to credit the same to the original owners.

Pursuant to that finding the court entered a decretal order that the depositary of the claim should pay the net balance in his hands to the assignee in bankruptcy for the benefit of the creditors of the original owners. Immediate application was made by the respondent for an appeal to the general term, which was granted on the following day. Due appearance was entered not only by the appellant but also by the intervenors as well as by the assignee in bankruptcy, and they were again heard before all the justices of the court; and the court being of opinion that there was error in the decree and that the intervenors, as the solvent partners of their firm, were entitled to the money, entered a decree dissolving the injunction, and directing the depositary of the money to pay the net balance in his hands to those parties as the survivors of the original owners of the claim: whereupon the respondent appealed to this court.

Instituted as the proceeding was to restrain the depositary of the claim from paying out the money which he had collected, or any which might thereafter come into his hands, it is quite clear that the alleged purpose of the petitioner was accomplished when the injunction was granted as prayed in the petition, as the party respondent in that proceeding never filed any answer and testified in the case that the order restraining him from paying out the money was procured by him so that he might not be required to act without the directions of the court. Had the matters terminated there the appellant would not have had any right of appeal to this court, as he was an utter stranger to the proceedings. He was not made a party to the petition nor was he served with process, nor did he voluntarily appear. Whatever the purpose of the petition was, or by whomsoever the injunction was procured, the proceeding was commenced and terminated without the knowledge of the appellant, and before any steps were taken by the petitioner or any one else to

connect the appellant with the litigation. More than a year and a half before that petition was filed the original owners of the claim had assigned and transferred the same to the assignors of the appellant, and had directed, in writing, the depositary in whose hands they had placed it for collection to pay the same when collected to their said transferees, and the record shows that the depositary of the claim accepted the draft or order at the time and agreed to pay the same as directed whenever the same should come into his hands, less expenses and commissions. None of these facts are contradicted, and the appellant proved that the assignees of the claim, within a few days after receiving the same, assigned and transferred the same to him for full value in the usual course of business.

Beyond all doubt, therefore, the case is one where the appellant claimed absolute title to and dominion over the matter in controversy between him and the assignee of the bankrupt's estate. Absolute title to the matter in controversy is also claimed by the assignee in bankruptcy, as appears by his second petition, in which he prayed that the appellant might be summoned to show cause why the fund should not be paid to him as such assignee.

Suggestion may be made that the decree gives the fund to the intervenors, but the court will at present re-examine the case as between the parties first made in the second petition, before the solvent members of the firm to which the claim originally belonged were permitted to intervene in the litigation, as it is quite obvious that the whole proceeding subsequent to their intervention is irregular, and that the decree must be reversed if it be held that the bankrupt court had no jurisdiction to proceed and determine the right of property as between the assignee and the transferee of the same for value in that mode of proceeding.

Neither the depositary of the fund nor the appellant claimed anything from the estate of the bankrupt, and the appellant contends that the bankrupt court cannot take jurisdiction in such a case by a rule to show cause, served on a stranger to come in and answer in support of his title or

claim to such a fund or to any other property over which he claims absolute dominion.

Power and jurisdiction in all matters and proceedings in bankruptcy are conferred upon the District Courts, and those courts as courts of bankruptcy are authorized to hear and adjudicate upon the same according to the provisions of the Bankrupt Act. Examined separately the clause of the first section of the act, which provides that the powers and jurisdiction therein granted and conferred may be exercised as well in vacation as in term time, and that a judge sitting in chambers shall have the same powers and jurisdiction as when sitting in court, would seem to afford some support to the views of the assignee in this case, that all the powers and jurisdiction of the District Courts, when sitting as courts in bankruptcy, may be exercised in a summary way without process, as by a rule to show cause, as in a motion to set aside a verdict in an action at common law, or in a collateral proceeding in a suit in equity. Most matters and proceedings in bankruptcy may doubtless be heard and adjudicated by the District Court in that way, but that general clause in the first section, which is referred to as supporting the unlimited scope of that power and jurisdiction, must be considered in connection with all the other provisions of the Bankrupt Act, as is expressly required by the preceding clause of the same section, in which it is enacted that the District Courts shall hear and adjudicate upon all matters and proceedings in bankruptcy according to the provisions of the Bankrupt Act. Superadded to that general clause, and as an exposition of the same, is another and more important clause, in which is given a specific enumeration of the cases and controversies to which that general jurisdiction extends, and it is plain that the enumeration does not include "suits at law or in equity which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt transferable to or vested in such assignee." On the contrary, the third clause of the second section expressly enacts that Circuit

Courts shall have concurrent jurisdiction with the District Courts of all such suits at law or in equity, provided the suit at law or bill in equity shall be brought within two years from the time the cause of action accrued.*

Controversies, in order that they may be cognizable either in the Circuit or District Court under that act, must have respect to some property or rights of property of the bankrupt transferable to, or vested in, such assignee; and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other, as appears by the express words of the provision. Such a suit, whether at law or in equity, may be commenced either in the District or Circuit Court, at the election of the party suing, and if in the former it is clear that the case, when it has proceeded to final judgment or decree, may be removed into the Circuit Court for re-examination by writ of error, if it was an action at law, or by appeal if it was a suit in equity, provided the debt or damages claimed amount to more than five hundred dollars and the writ of error is seasonably sued out, or the appeal is claimed and the required notices are given within ten days from the rendition of the judgment or decree.† None of those regulations, however, apply to petitions for revision under the first clause of the second section, nor does the Bankrupt Act fix any precise limitation to the right of a party aggrieved by the ruling, decision, or decree of the District Court to file a petition for that purpose in the Circuit Court. Power to revise all cases and questions which arise in the District Courts, in such a proceeding, "except when special provision is otherwise made," is conferred upon the Circuit Courts by the first clause of the same section, but the court is of the opinion that the power conferred by that clause does not extend to any case where special provision for the revision of the case is otherwise made, as where it is provided that an appeal will lie from the District Court to the Circuit Court, or where a writ of error will lie from

* 14 Stat. at Large, 518; Morgan *v.* Thornhill, 11 Wallace, 65.

† Knight *v.* Cheney, 5 National Bankrupt Register, 309.

the Circuit Court to the District Court in the manner provided in the laws of Congress allowing appeals and writs of error.*

Special provision is made for the revision in the Circuit Court of controversies like the one exhibited in this record, and the court is of the opinion that such causes cannot be commenced by a petition for a rule to show cause, as in this case, nor be determined in a summary way by the District Court sitting in bankruptcy, without due process of law.† Cases of the kind before the court fall directly within the third clause of the section under consideration, and must, in the judgment of the court, be determined by a suit in equity or an action at law, as the case may be; and where an action at law is the proper remedy the parties are entitled to a trial by jury if the value in controversy shall exceed twenty dollars. Concurrent jurisdiction in such cases, it must be conceded, is vested in the Circuit and District Courts, and it is equally clear that either party, where the proceeding is correct, may remove the cause, in a proper case, when it has proceeded to final judgment or decree, into the Supreme Court for re-examination, as provided in other causes outside of the Bankrupt Act.

Possession and control of the claim had been surrendered by the original owners long before the senior partner of the firm was adjudged bankrupt, and the depositary of the same had duly accepted the order or draft transferring the proceeds of the same to the assignors of the appellant, showing that the assignee in bankruptcy had neither the possession nor the right of possession to the same at the time the petition for the rule was filed. Independent of the injunction, which was granted without notice to the appellant, he was apparently entitled, and if the evidence he introduced is believed, he was in fact entitled, to demand and to receive the whole fund as his own property. Suffice it to say, without expressing any opinion as to the weight of the evidence, the appellant claimed the fund as his own property, and if his

* Knight *v.* Cheney, 5 National Bankrupt Register, 310.

† Ex parte Bacon, 2 Molloy, 441.

claim is just and legal, the possession of the depositary was his possession, and if the assignee in bankruptcy would divest him of the possession and control of the fund he must do it by a suit at law or in equity, as provided in the third clause of the second section of the Bankrupt Act. Equity would certainly have jurisdiction in such a case, as in that mode of proceeding all the parties could be brought before the court. Extended remarks in respect to the decree in the case appears to be unnecessary, as it is as clear as anything in legal decision can be that the intervenors could not claim to divest the appellant of his interest in the funds by becoming parties to a rule like the one before the court, nor in any other manner than by due process of law.

Objection is also made that the appeal is irregular, as having been prosecuted from the Supreme Court of the District, but the regulations of the forty-ninth section of the act afford a satisfactory answer to that objection, which is all that need be said upon the subject. Want of notice of the appeal comes too late after a general appearance, but the record shows that the appeal was duly claimed and that the appellant filed his appeal bond in open court and that the same was duly approved by the chief justice who presided at the hearing when the final decree was entered in the cause.

Strangers to the proceedings in bankruptcy, not served with process, and who have not voluntarily appeared and become parties to such a litigation, cannot be compelled to come into court under a petition for a rule to show cause, as in this case; nor is the exercise of such a jurisdiction necessary, as the third clause of the second section of the Bankrupt Act affords the assignee a convenient, constitutional, and sufficient remedy to contest every adverse claim made by any person to any property or rights of property transferable to, or vested in, such assignee.

DECREE REVERSED and cause remanded for further proceedings,

IN CONFORMITY TO THE OPINION OF THIS COURT.

MOWRY *v.* WHITNEY.

1. The ancient mode of annulling or repeating the king's patent was by *scire facias* generally brought in the chancery where the record of the instrument was found.
2. In modern times the court of chancery, sitting in equity, entertained a similar jurisdiction by bill when the ground of relief is fraud in obtaining the patent, and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered.
3. But *scire facias* could only be sued out in the English courts by the king or his attorney-general, except in cases where two patents had been granted for the same thing to different individuals, and the sixteenth section of the act of July 4th, 1836, concerning patents for inventions, is based upon analogous principles.
4. Both upon this authority and upon sound principle no suit can be brought to set aside, annul, or declare void, a patent issued by the government, except in the class of cases above mentioned, unless brought in the name of the government or by the authority or permission of the Attorney-General, so as to be under his control.

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

Asa Whitney, of Philadelphia, had obtained, on the 25th April, 1848, a patent for fourteen years for an improvement in annealing and cooling cast-iron car-wheels. This patent expired, of course, by its terms on the 25th of April, 1862.

Just before its expiration, that is to say, on the 21st of March, Albert Mowry, of Cincinnati, also obtained a patent for fourteen years, for a process for annealing car-wheels, of which *he* professed to be the inventor.

In March, 1862, Whitney—the expiration of his patent now approaching—applied to the Commissioner of Patents for an extension of the patent for seven years more. This extension was applied for in pursuance of a provision of the Patent Act of 1848,* which authorizes an extension where the patent has not been remunerative, and the act, therefore,

* Act of May 27th, 1848, 6 Stat. at Large, 231, amending the act of July 4th, 1836; 5 Id. 124.

requires that the patentee when applying for the extension shall—

"Furnish to the Commissioner of Patents a statement in writing, under oath, of the ascertained value of the invention, and of his receipts and expenditures sufficient in detail to exhibit a true and faithful account of loss and profit, *in any manner*, accruing to him from, and by reason of, the said invention."

Whitney did furnish to the commissioner a statement, which purported to be such as the act required; and accordingly the extension was granted April 25th, 1862, for seven years from that date, or in other words, until 25th of April, 1869.

On the 21st of March, 1866, Whitney filed a bill in the Circuit Court for the Southern District of Ohio, to enjoin Mowry against proceeding in his business of annealing car-wheels, on the ground that he Mowry by his process of annealing was infringing his Whitney's patent; and it being decided in the Circuit Court April 5th, 1867, on the hearing of the case, that Mowry was by his plan of annealing, infringing Whitney's patent, the question of damages came up. This being referred to a master, Whitney, in order to swell his damages, sought to prove (as Mowry alleged) that his profits had been very large; greatly larger than what he had sworn they were in the statement which he made before the commissioner, when seeking his extension.*

Hereupon, April 7th, 1870, Mowry filed a bill in chancery in the court below, representing the fact of Whitney's patent, and of the extension of it (annexing as exhibits all the patent, the certificate of extension, and all the affidavits and estimates on which the extension had been granted); setting forth his own patent, that he was sued by Whitney in a suit still pending; that in the progress of investigation necessary to his defence in that suit he had discovered the fraud by which the extension was obtained, and praying that it might be declared that Whitney's letters, granted on the 25th of April, 1848, and extended on the 7th of April, 1862,

* For an account of this controversy see *infra*, p. 621.

were, and are void and of no effect from and after the 25th of April, 1862.

The Patent Act of 1836,* it should be added, by its 16th section thus enacts:

"That whenever there shall be two interfering patents, or whenever a patent, on application shall have been refused on an adverse decision of a board of examiners, on the ground that the patent applied for would interfere with an unexpired patent previously granted, any person interested in any such patent either by assignment or otherwise, in the one case, and any such applicant in the other case, may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge and declare either the patents void, in the whole or in part, or inoperative and invalid in any particular part or portion of the United States, according to the interests which the parties to such suit may possess in the patent or the inventions patented; and may also adjudge that such applicant is entitled according to the principles and provisions of this act to have and receive a patent for his invention as specified in his claim, or for any part thereof, as the fact of priority of right or invention shall in any such case be made to appear. And such adjudication, if it be in favor of the right of such applicant, shall authorize the commissioner to issue such patent, on his filing a copy of the adjudication and otherwise complying with the requisitions of this act: *Provided, however*, That no such judgment or adjudication shall affect the rights of any person except the parties to the action, and those deriving title from or under them, subsequent to the rendition of such judgment."

To the bill filed as above mentioned by Mowry, Whitney demurred, on these two, among other grounds:

1. That it appeared from the bill that the government of the United States was a necessary party complainant, but that the government was not made a party, nor was the suit brought at the instance of, nor by the authority, nor with the consent of the government.

2. That it appeared by the bill that the term for which

* 5 Stat. at Large, 124.

the letters-patent sought to be cancelled were granted and extended had expired before the commencement of the suit.

The court below sustained the demurrer on these grounds and dismissed the bill. From that decree Mowry took this appeal.

Messrs. A. G. Thurman and C. B. Collier, for the appellant:

The bill charging and the demurrer confessing that the extension was procured by fraud, the extended patent must be regarded as void, *ab initio*, and as conferring no monopoly upon the patentee as against the public or the complainant.

Notwithstanding the expiration by limitation of Whitney's patent prior to the filing of the bill, the extended patent, until declared void for fraud, was and is alive and in effect for all purposes of suit for infringements of it that occurred during its existence.*

By reason of the fact that Whitney's patent had expired prior to the filing of the complainant's bill, the government was neither a necessary nor a proper party to the bill, and by reason of such expiration the bill could not have been maintained in the name of the government, it having no interest in the subject-matter of the controversy.†

Mowry, as appears on the face of his bill, has a direct and personal interest in the subject-matter of the suit; he is sued by Whitney for an alleged infringement of his patent in the Circuit Court for Ohio; he cannot avail himself of the fraud of the patentee as matter of defence to the suit in that court and in that cause; he is without remedy save in the court and according to the manner in which he has sought it by this proceeding.‡

The extension of the patent having been confessedly procured fraudulently, and the government not being able to maintain a suit in relation to the patent by reason of its expiration, and having no further interest in it, the suit was properly and could only be brought by one who had a

* Patent Laws, act of 1870, § 55.

† Bourne *v.* Goodyear, 9 Wallace, 811

‡ Wood *v.* Williams, 1 Gilpin, 517.

continuing interest in the patent, and whose rights were, notwithstanding its expiration, affected by it.

The primary object of the suit is that the complainant may be relieved from a prosecution which is contrary to equity and good conscience, and the court is asked to find and declare that the patent, having been procured fraudulently, was *ipso facto* void as antecedent to obtaining the relief prayed for.

Mr. Henry Baldwin, Jr., contra:

There is no provision of law for any such proceeding as this to repeal a patent; and any proceeding for that purpose must be at the instance of the government. Instead of this bill being filed by the authority or with the consent of the government, it is on its face filed by an adjudged infringer against a patentee whose rights he has invaded, and whose statute remedy he now seeks to enjoin.

The demurrer admits the facts stated in the bill only so far as they are relevant and well pleaded. On the complainant's own showing, the allegations of fraud and suppressions and concealment stated in the bill are refuted by the exhibits annexed thereto and making part thereof.

The account rendered by the respondent to the Commissioner of Patents in connection with his application for extension, and a copy of which is annexed to the bill, is a public document on file and of record in the United States Patent Office at Washington City, for more than eight years prior to the commencement of this suit. During all this time it has been accessible to the knowledge and inspection of this appellant. Upon recourse to these records he could have discovered what he now relies on as newly-discovered evidence.*

The bill shows that the extended term of the respondent's patent expired April 24th, 1869, while this proceeding was not commenced until April 7th, 1870, nearly twelve months thereafter.

* Rubber Co. *v.* Goodyear, 9 Wallace, 805; Lord *v.* Goddard, 13 Howard, 198 (211); Truly *v.* Wanzer, 5 Id. 141 (143).

There is consequently no equity to support this application to set the extension aside, nor does anything remain which can be the subject of a suit.*

Mr. Justice MILLER delivered the opinion of the court.

The bill was demurred to, and the demurrer sustained, on two grounds:

First. That the extended patent had expired, by its own limitation, before the bill was filed; and

Secondly. That the complainant could not, in his own right, sustain such a suit.

As regards the first of these propositions we do not deem it necessary to make any decision. When a case arises in which the United States, or the Attorney-General, shall initiate a suit to have a patent declared null, *ab initio*, which, though no longer in force as to present or future infringements, is used to sustain suits for infringements during its vitality, the question will be considered; for we are of opinion that no one but the government, either in its own name or the name of its appropriate officer, or by some form of proceeding which gives official assurance of the sanction of the proper authority, can institute judicial proceedings for the purpose of vacating or rescinding the patent which the government has issued to an individual, except in the cases provided for in section sixteen of the act of July 4th, 1836.

The ancient mode of doing this in the English courts was by *scire facias*, and three classes of cases are laid down in which this may be done.

1. When the king by his letters-patent has by different patents granted the same thing to several persons, the first patentee shall have a *scire facias* to repeal the second.

2. When the king has granted a thing by false suggestion, he may by *scire facias* repeal his own grant.

3. When he has granted that which by law he cannot

* Bourne *v.* Goodyear, 9 Wallace, 811; Minnesota Co. *v.* National Co., 3 Id. 332.

grant, he *jure regis*, and for the advancement of justice and right, may have a *scire facias* to repeal his own letters-patent.*

The *scire facias* to repeal a patent was brought in chancery where the patent was of record. And though in this country the writ of *scire facias* is not in use as a chancery proceeding, the nature of the chancery jurisdiction and its mode of proceeding have established it as the appropriate tribunal for the annulling of a grant or patent from the government. This is settled so far as this court is concerned by the case of the *United States* v. *Stone*,† in which it is said that the bill in chancery is found a more convenient remedy. A bill of this character was also sustained in the English chancery in the case of the *Attorney-General* v. *Vernon*,‡ on the ground of the equitable jurisdiction in matters of fraud. And in the case of *Jackson* v. *Lawton*,§ Chancellor Kent says that in addition to the writ of *scire facias*, which has ceased to be applicable with us, there is another remedy by bill in the equity side of the court of chancery.

It will be observed that in the case of a conflict under two patents granting the same right, the *scire facias* may, according to the authorities cited, be brought in the name of one of the patentees, but in the other cases, when the patent was obtained by a fraud upon the king, by false suggestion, or where it was issued without authority, and for the good of the public and right and justice it should be repealed, the writ is to issue in the king's name or his attorney-general's. It is also said that when a patent is granted to the prejudice of the subject, the king of right is to permit him upon his petition to use his name for the repeal of it, in *scire facias* at the king's suit.‖

The 16th section of the Patent Act of 1836 seems to have in view the same distinction made by the common law in regard to annulling patents, for while it authorizes individuals claiming under conflicting patents, or one whose claim

* 4 Institutes, 88; Dyer, 197-8, and 276, 279.
† 2 Wallace, 525.
‡ 1 Vernon, 277.
§ 10 Johnson, 24.
‖ The King *v.* Sir Oliver Butler, 3 Levinz, 220.

to a patent has been rejected because his invention was covered by a patent already issued, to try the conflicting claim in chancery, and authorizes the court to annul or set aside a patent so far as may be found necessary to protect the right, the suit by individuals is limited to that class of cases. And it is provided that the decree shall be of no validity except between the parties to the suit. The general public is left to the protection of the government and its officers.

It seems reasonable that the remedy by bill in chancery, which is substituted for the *scire facias*, should have the like limitation in its use. The reasons for requiring official authority for such a proceeding are obvious. 1. The fraud, if one exists, has been practiced on the government, and as the party injured, it is the appropriate party to assert the remedy or seek relief. 2. A suit by an individual could only be conclusive in result as between the patentee and the party suing, and it would remain a valid instrument as to all others. 3. The patentee would or might be subjected to innumerable vexatious suits to set aside his patent, since a decree in his favor in one suit would be no bar to a suit by another party. If, on the other hand, an individual finds himself injured, either specially or as a part of the general public, it is no hardship to require him to satisfy the Attorney-General that the case is one in which the government ought to interfere either directly by instituting the suit, or indirectly by authorizing the use of its name, by which the Attorney-General would retain such control of the matter as would enable him to prevent oppression and abuse in the exercise of the right to prosecute such a suit.

It would seriously impair the value of the title which the government grants after regular proceedings before officers appointed for the purpose, if the validity of the instrument by which the grant is made, can be impeached by any one whose interest may be affected by it, and would tend to discredit the authority of the government in such matters.

DECREE AFFIRMED.

IMPROVEMENT COMPANY *v.* MUNSON.

1. By the settled land laws of Pennsylvania no title can exist under a second survey, unless such second survey have been ordered by the board of property.
2. The mere fact that a second survey was made is not evidence, even after a long time, as against another confessedly first, that an order for the second was made by the board of property, and that the order has been lost. And although the loss of such an order may be presumed after a lapse of time, yet the presumption can be made only where the order is shown by some kind of competent proof to have once existed.
3. Where a charge is merely ambiguous, a party dissatisfied with it ought, before the jury leave the bar, to ask the court to make it clear. He should not acquiesce in the correctness of the instruction, take his chance with a jury, and after the verdict is against him, claim the benefit of the ambiguity on error.

IN error to the Circuit Court for the Eastern District of Pennsylvania; in which court, Munson and others brought ejectment against The Schuylkill and Dauphin Improvement Company and two other like companies, all corporations of Pennsylvania, to recover certain valuable lands in the State just named. Judgment having gone for the plaintiffs, the companies brought the case here.

Mr. N. H. Sharpless, for the plaintiff in error; Messrs. G. W. Woodward, F. B. Gowen, and J. E. Gowen, contra.

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

Rules of decision in the courts of the United States, as well as the forms and modes of process, are very largely derived from the laws of the States as construed by the decisions of the State courts, in cases where they apply, except where the Constitution, treaties, or statutes of the United States otherwise require or provide.

Controversy having arisen between the parties in respect to the title to the tract of land described in the record, the

Statement of the case in the opinion.

plaintiffs, on the sixth of February, 1866, brought an action of ejectment against the three corporation defendants and the other defendants therein named, to recover the possession of the tract, alleging that the title to the tract and the right of possession were in them and not in the defendants. Service was duly made and the defendants appeared and pleaded that they were not guilty as alleged in the declaration. Issue was joined upon that plea and the parties went to trial, and the verdict and judgment were for the plaintiffs. Exceptions were duly taken by the defendants, and they sued out a writ of error and removed the cause into this court.

Title to the premises in controversy is deraigned by the plaintiffs from one Benjamin Bonawitz, whose claim to the same is supposed to be established by the following documentary evidences of title, as more fully set forth in the bill of exceptions: (1.) An application to the land office of the State, dated December 14th, 1829, made by him for sixty-six acres of unimproved land in Lower Mahantongo Township, Schuylkill County, bounded as therein described. (2.) Warrant from the State, of the same date, to the applicant for the land described in the application, as fully set forth in the record. (3.) Return of survey made by a deputy surveyor of the county, June 1st, 1829, in pursuance of the warrant, as duly returned to the land office, and accepted the fifth of March of the succeeding year, as follows, to wit: Situate in Lower Mahantongo Township, Schuylkill County, containing sixty-six acres and one hundred and three perches, and allowance of six per cent., returned this third day of March, 1830, in pursuance of a warrant dated the 14th of December, 1829, to Benjamin Bonawitz. Superadded to the return is the following statement, that the lines and corners of the survey were made on the eighteenth of June, 1829, in pursuance of a warrant dated the seventeenth of March of that year, granted to the same person, a return on which was made, but was rejected on account of the survey not answering the description of the warrant. (4.) Sundry *mesne* conveyances from the warrantee and sub-

sequent grantees of the land described in the warrant, to the plaintiffs.

Appended to the statement that those conveyances were introduced is the admission of the counsel for the defendants that Schuylkill County was erected out of Berks County, and that Porter Township, where the premises are situated, as alleged in the declaration, was created out of Lower Mahantongo Township, which is the name of the township where the location was made under the warrant, survey, and return.

Documentary evidences of title were then introduced by the defendants to maintain the issue on their part, as follows: (1.) An application, dated July 1st, 1793, made by Jacob Yeager to the land office for four hundred acres of land adjoining land granted the same day to William Witman, Jr., in the county of Berks. (2.) Warrant from the State, dated July 1st, 1793, to Jacob Yeager for the same land, as more fully set forth in the bill of exceptions. (3.) Return of survey on the warrant by the deputy surveyor of Berks County, on the tenth of July, 1794, of four hundred and forty acres and sixty-four perches of land and allowance, situate in Pinegrove Township, in the county of Berks, returned and accepted August 26th, 1794, as therein certified. (4.) Sundry conveyances were also offered in evidence by the defendants, tending, as they contend, to deduce title to the said corporations, or one of them, to the land located and surveyed under the warrant to Jacob Yeager, which includes the land embraced in the warrant and survey under which the plaintiffs deraign their title.

Rebutting evidence was then introduced by the plaintiffs: (1.) Certified copies of eighteen applications, dated July 1st, 1793, to the land office, for four hundred acres each, the leading one being in the name of James Silliman, and one of the number being the application by Jacob Yeager given in evidence by the defendants, as follows: Jacob Yeager applies for four hundred acres of land adjoining land this day granted to William Witman, Jr., in the county of Berks. (2.) Certified copies of eighteen descriptive warrants, issued

upon those applications, including the warrant given to Jacob Yeager, introduced in evidence by the other party. (3.) Also certified copies of eighteen surveys, including the Jacob Yeager tract, made by a deputy surveyor of Berks County, upon those warrants, corresponding with the descriptions set forth in the warrants, the certificate of the survey in question being fully set forth in the bill of exceptions. (4.) Return and acceptance of those eighteen surveys, made by Henry Vanderslice, July 16th, 1793, as appears in the list annexed to the return. They also introduced a certified copy of a caveat, entered July 18th, 1793, by John Kunckle and Aaron Bowen against granting the tracts either to the said Jacob Yeager or to any one of the other seventeen applicants under the warrants included in that list. (5.) Certificate from the office of the surveyor-general that no proceedings had ever been had upon the said caveat.

By that certificate it appears that diligent and careful search had been made in that department for proceedings on that caveat, and the proper officer certifies that he does not find that any citation was ever applied for, or that any proceedings or action was ever had by the board of property upon or concerning the same, which remains recorded in the office of the surveyor-general. (6.) They also offered in evidence a map, showing the two locations of the Jacob Yeager tract, the first by Henry Vanderslice, and the second by William Wheeler, both deputy surveyors of Berks County. (7.) Both sides admitted that Henry Vanderslice was a deputy surveyor of Berks County, and that the location of the Jacob Yeager tract as made by him was made in the county of Northumberland, within one mile of the line between that county and Berks County, and that the second location of the warrant by William Wheeler was made in Berks County, about twenty-two miles distant from the survey made by the other deputy surveyor.

Responsive to the rebutting evidence given by the plaintiffs the defendants then introduced certified copies of returns of surveys made by William Wheeler, July 10th, 1794, upon the Jacob Yeager warrant, and upon three others of the

eighteen warrants returned and accepted, August 26th of that year, together with a connected chart of the four tracts, as prepared from the original surveys on file in the office of the surveyor-general.

Neither party desiring to offer any further evidence the presiding justice proceeded to charge the jury. Speaking of the warrant and survey introduced by the plaintiffs, he told the jury that the court saw no defect in the plaintiffs' title under that warrant and survey, adding that the only claim which the defendants have set up is under warrants located several miles from the land in controversy by surveys returned and accepted, and to that instruction no exception was taken by the defendants. But the court also told the jury that "no subsequent official survey of the land under those warrants, without a warrant of survey or order of the board of property, was authorized." Therefore, said the justice, if the jury take the same view of the evidence as the court, the verdict should be for the plaintiffs, and the jury followed that instruction, and the defendants excepted.

Two errors are assigned, as follows: (1.) That the court erred in charging the jury that no subsequent official survey of the land under those warrants, without a warrant of survey or order of the board of property, was authorized. (2.) That the court erred in telling the jury that if they took the same view of the evidence as the court the verdict should be for the plaintiffs, as the effect of the instruction, as the defendants contend, was to withdraw from the jury the consideration of the question whether or not the board of property might not have issued an order for a second survey of the tract, the evidence of which had been lost.

Much discussion of the first error assigned is unnecessary, as the defendants admit that the law is well settled in that State that a warrant, where it appears that a survey has been ordered upon it and made, returned, and accepted, is *functus officio*, and that no title under a second survey can be made unless such second survey was ordered by the board of property, which it is admitted is not directly proved in this case.

Such an admission by the defendants is a very proper one, as the decisions of the State court which furnish the rule of decision for this court in this case are very numerous and decisive to that effect. Perhaps the leading case upon the subject is that of *Deal* v. *McCormick*,* in which Gibson, J., said, "The law is well settled that after a survey made and returned into office, a second survey without an order of the board of property is merely void." If the owner of a warrant be prejudiced by the fraud or mistake of the officer, the board of property, which is a board created by statute, will grant him relief, if no new right has attached itself to the land, but a new survey, even pursuant to an order of the board, will not affect an intervening claim.†

Doubtless the official surveyor may correct his survey while the warrant remains in his hands, but his control over it ceases after his return has been made to the land office, and the decisions are direct that no second survey thereon without an order for that purpose is of any validity whatever, either against the State or any other claimant, or, as Justice Strong said, in the case of *Hughes* v. *Stevens*:‡ A second survey without an order for it amounts to nothing, as it is merely an unofficial act, which cannot give the warrantee any rights either against the State or any other claimant of the tract.§

2. Whether the Circuit Court erred, as alleged in the second assignment of errors, depends upon the disputed fact whether there was any evidence in the case which would have warranted the jury in finding that an order for a second survey was ever granted by the board of property, as it is settled law that it is error to submit a question to a jury in a case where there is no evidence upon the subject.

It is clearly error in a court, said Taney, C. J., in *United States* v. *Breitling*,‖ to charge a jury upon a supposed or con-

* 3 Sergeant & Rawle, 346.

† Purdon's Digest, 9th ed., 619, pls. 7 and 8. ‡ 7 Wright, 197.

§ Drinker *v.* Holliday, 2 Yeates, 89; Porter *v.* Ferguson, 3 Id. 60; Vickroy *v.* Skélley, 14 Sergeant & Rawle, 377; Oyster *v.* Bellas, 2 Watts, 397; Bellas *v.* Cleaver, 4 Wright, 260; Gratz *v.* Beates, 9 Wright, 495.

‖ 20 Howard, 254.

jectural state of facts, of which no evidence has been offered, as such an instruction presupposes that there is some evidence before the jury which they may think sufficient to establish the fact hypothetically assumed in the charge of the court, and if there be no evidence which they have a right to consider, then the charge does not aid them in coming to a correct conclusion, but its tendency is to embarrass and mislead them in their deliberations.* When a prayer for instruction is presented to the court and there is no evidence in the case to support such a theory it ought always to be denied, and if it is given, under such circumstances, it is error; for the tendency may be and often is to mislead the jury by withdrawing their attention from the legitimate points of inquiry involved in the issue. Nor are judges any longer required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.† Formerly it was held that if there was what is called a *scintilla* of evidence in support of a case the judge was bound to leave it to the jury, but recent decisions of high authority have established a more reasonable rule, that in every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onus* of proof is imposed.‡

Very strong doubts are entertained whether the construction, of the language employed by the judge, assumed by the defendants, is the correct construction of the same, and

* Goodman *v.* Simonds, 20 Id. 359; Dubois *v.* Lord, 5 Watts, 49; Haines *v.* Stouffer, 10 Barr, 363.

† Ryder *v.* Wombwell, Law Reports, 4 Exchequer, 39; Law Reports, 2 Privy Council Appeals, 335.

‡ Jewell *v.* Parr, 13 C. B. 916; Toomey *v.* L. & B. Railway Co., 3 C. B., N. S. 150; Wheelton *v.* Hardisty, 8 Ellis & Blackburn, 266; Schuchardt *v.* Allens, 1 Wallace, 369.

the settled rule is if the charge is merely ambiguous the party dissatisfied with it should have requested to have it made clear before the jury left the bar; that a party under such circumstances may not acquiesce in the correctness of the instruction by his silence and take his chance with the jury, and then be allowed, if the verdict is against him, to claim the benefit of the ambiguity without having invited attention to the subject and given the court an opportunity to have made the correction to the jury. Much weight is certainly due to the suggestions of the plaintiffs, that the judge did not withdraw the evidence from the jury, if any there was in the case, that the language only warrants the conclusion that he expressed his own opinion, as he had a right to do, if he thought it proper, and left the question to the determination of the jury. Assume that to be the true construction of the language employed, and it is quite clear that the exception cannot be sustained, but the court is not inclined to place the decision upon that ground, as it is even clearer that there was no evidence in the case which would have warranted the jury in finding that an order for a new survey was ever granted by the board of property, as required by law and the repeated decisions of the Supreme Court of the State.

Lost instruments may be proved by parol testimony where it is shown that the instrument once existed and is lost, and the proof of loss, where it is first shown that it once existed, may consist of evidence showing diligent and unsuccessful search and inquiry in the place where it was usually kept or in which it was most likely to be found, if the nature of the case admitted of such proof.* Presumptions of law are frequently absolute and conclusive, as they determine the quantity of evidence requisite for the support of any particular averment, which is not permitted to be overcome by any proof that the fact is otherwise. Such presumptions arise in respect to the intermediate proceedings in cases where lands are sold under licenses granted by courts to executors, ad-

* 1 Greenleaf on Evidence, 2d ed., § 558.

ministrators, guardians, and other officers, where they are required to advertise the sales in a particular manner, and to observe other formalities in their proceedings. Lapse of time, usually for the period of thirty years, affords a conclusive presumption in such cases, if the license and the official character of the party and the deed of conveyance are proved, that all the intermediate proceedings were correct. Were it otherwise great uncertainty of titles, and other public mischiefs, would ensue, but the rule that lapse of time accompanied by the acquiescence of parties adversely interested does not in general extend to records and public documents which are supposed always to remain in the custody of officers charged with their preservation, and which, therefore, must be proved or their loss accounted for by secondary evidence.*

Surveys, it seems, were sometimes made in that State by deputy surveyors in early times without going upon the land, by plotting the chart and marking the lines and corners in their offices, and those surveys are called "chamber surveys," but such surveys were forbidden by the act of the State legislature of the eighth of April, 1785, which enacts that every survey hereafter to be returned into the land office upon any warrant issued after the passing of the act shall be made by actually going upon the land and measuring the same and marking the lines.† Decided cases are referred to by the defendants where it is held that in controversies respecting titles under those surveys there arises a conclusive presumption, after the lapse of twenty-one years from the return of the survey into the land office, that the survey was regularly made upon the ground as returned and required by law.‡ Evidently the cases referred to must be regarded as establishing a rule of property in that State,

* 1 Greenleaf on Evidence, 12th ed., § 20; Hathaway *v.* Clark, 5 Pickering, 490; Brunswick *v.* McKean, 4 Greenleaf, 508.

† Purdon's Digest, 9th ed., pl. 65.

‡ Mock *v.* Astley, 13 Sergeant & Rawle, 382; Caul *v.* Spring, 2 Watts, 390; Norris *v.* Hamilton, 7 Watts, 91; Nieman *v.* Ward, 1 Watts & Sergeant, 68; Ormsby *v.* Ihmsen, 10 Casey, 462.

but the court here is of the opinion that they are not applicable in this case, as the defect in the defendants' title arises from the fact that the new survey was made without any order to that effect ever having been granted by the board of property as required by law. Surveys made under those circumstances are simply void, as shown by the best considered cases upon the subject decided by the highest court of the State.*

Attempt is made in this case to supply by presumption a matter absolutely necessary to give legality to the survey and without which it is a nullity and amounts to nothing, but is held to be as worthless as if there had never been any warrant at all. Viewed in that light, as it must be, it is clear that the case falls within the decision of the court in the case of *Wilson* v. *Stoner*,† which, indeed, is decisive of the controversy. It was there decided that a survey is not evidence without first showing an authority to make it, or proving that such authority existed and was afterwards lost. Possession in that case was proved for upwards of thirty years under a survey in the handwriting of an assistant deputy surveyor, indorsed "copied for return," with a memorandum by him that there was authority to make it, but the court held that those circumstances could not be received as affording presumptive evidence from which the jury might draw the necessary conclusion, as matter of fact, that even if the existence of the location was admitted, some account of its loss would have to be given before secondary evidence of its contents could be received, as without that the survey would be inadmissible for want of a previous authority. Unless it can be shown that the rule laid down in that case is not good law it is quite clear that the second error assigned must also be overruled, as the defendants did not prove possession for any considerable time, or occupation of the premises, nor the making of any improvements upon the same,

* Deal *v.* McCormick, 3 Sergeant & Rawle, 346; Oyster *v.* Bellas, 2 Watts, 397; Cassiday *v.* Conway, 1 Casey, 240; Hughes *v.* Stevens, 7 Wright, 197.

† 9 Sergeant & Rawle, 39.

nor the payment of any taxes assessed upon the land. On the contrary, they proved nothing except the mere lapse of time, unaccompanied by evidence of possession, or of improvements, or the payment of taxes, or any other circumstance, as a ground of presumption to warrant the jury in finding that the board of property ever granted a new warrant of survey or made any order of a character to give legality to the title set up in their behalf, which is all that need be remarked to show that there is no error in the record. Unquestionably lost records may be proved by secondary evidence, but their former existence and loss must first be established by competent proof, and it is clear that evidence merely showing that they do not exist is not sufficient to establish either of those requirements.

JUDGMENT AFFIRMED.

Mr. Justice STRONG having been of counsel for one of the parties did not sit.

NICOLSON PAVEMENT COMPANY *v.* JENKINS.

An assignment of a reissued patent, reciting the date and number of the reissue, and that the original patent had been "given for the term of fourteen years;" reciting that the assignee had agreed to purchase all the right, title, and interest which the patentee had "in the *said invention* as secured by the *said* letters-patent;" and transferring to the assignee all the right, title, and interest which the patentee has "in the *said invention and letters-patent;*" "the same to be held and enjoyed by the said party for the use and behoof of him and his legal representatives to the full end of the term for which the said letters-patent *are* or *may* be granted, as fully and effectively *as the same would have been held and enjoyed by the assignor had the assignment never been made,*" will transfer an extension and renewal of the patent made under the acts of July 4th, 1836, and of May 27th, 1848; and this though the patent be reissued subsequently to the assignment.

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

On the 8th of August, 1854, Samuel Nicolson obtained

Statement of the case.

letters-patent for an improvement on wooden pavements. On the 1st of December, 1863, he obtained a reissue. He then, December 1st, 1864, made an assignment to Jonathan Taylor thus:

"Whereas I, Samuel Nicolson, invented a certain new and useful improvement in wooden pavements, of which letters-patent of the United States of America (numbered 1583 of reissued patents, and bearing date the 1st of December, 1863) have been granted to me, giving to me and my legal representatives the exclusive right of making, using, and vending the said invention throughout the said United States; the original patent being dated August 8th, 1854, and given for the term of *fourteen* years.

"And whereas Jonathan Taylor has agreed to purchase from me all the right, title, and interest which I have in and to the *said* invention for and in the city of San Francisco, as secured by the *said* letters-patent, and has paid to me the sum of one dollar, the receipt whereof is hereby acknowledged.

"Now, therefore, this indenture witnesseth, that for and in consideration of the said sum to me paid, I have assigned, sold, and set over, and do hereby assign, sell, and set over, unto the said Taylor, all the right, title, and interest which I have in the *said* invention and letters-patent for and in the said city of San Francisco, but in no other place.

"The same to be held and enjoyed by the said Taylor for the use and behoof of him and his legal representatives *to the full end of the term for which the said letters-patent* are or *may be granted, as fully and effectively as the same would have been held and enjoyed by me had this assignment never been made.*"

Afterwards, August 20th, 1867, Nicolson obtained another reissue of the same letters-patent on an amended specification; and he having died in January, 1868, intestate, the Commissioner of Patents, on the application of his administrator, on the 7th of July, 1868, renewed and extended the letters-patent for seven years from the 8th of August, 1868, under the well-known 18th section of the act of July 4th, 1836, and the act of Congress of May 27th, 1848.

The right (whatever it was), which was vested in *Taylor under the assignment*, being subsequently transferred to the

Nicolson Pavement Company, and that company having laid a large extent of the patented pavement in San Francisco, after the expiration of the original patent, one Jenkins, who had obtained from the *administrator* of Nicolson whatever right was vested in *him* under the renewal and extension of 1868, sued the company.

The question, of course, was whether the assignment from Nicolson to Taylor of December 1st, 1864, vested any estate, right, title, or interest in the assignee, in or to the extended or renewed term, which was acquired by Nicolson's administrator under the act of Congress, subsequent to the date of the assignment.

The court below thought that it did not, and gave judgment against the company. From that judgment the company brought the case here.

Mr. T. T. Crittenden, for the plaintiff in error:

The Commissioner of Patents having been authorized by statute to grant extensions for seven years, the original letters-patent then became virtually a patent for twenty-one years. No one can in view of well-known decisions of this court deny that the inchoate right of the inventor to the exclusive privileges under an extension of letters-patent is the subject of a sale, and certainly the words of this assignment in the concluding part of it are applicable only to a design to convey both a present and future interest.

Mr. M. H. Carpenter (*a brief of Mr. J. R. Sharpstein being filed*), *contra:*

The recitals in the assignment show that the original patent had been issued for the term of fourteen years, and that before the expiration of the term there had been a reissue of the patent; that Taylor had agreed to purchase a certain interest in said invention, "*as* secured by *said* letters-patent" (the letters-patent recited); that in consideration of the premises he assigned, sold, and set over to said Taylor his interest "in the *said* invention *and letters-patent*," the letters-patent thereinbefore mentioned. Thus far there is

no allusion to any term or letters-patent other than the original term of fourteen years, and the letters-patent originally issued, and the reissued letters recited.

These form the entire subject-matter of the contract. There can be no doubt as to the intention of the parties, unless certain words in the *habendum* clause, contrary to the ordinary rules of construction, can be construed as extending the contract to a subject-matter not before embraced, or referred to, in the recitals or granting portions of the deed. As we have seen, the *habendum* clause is, "the same to be held and enjoyed . . . . to the full end of *the term* for which the *said* letters-patent are or *may* be granted." The words "may be granted" are the only ones in the whole instrument that can be thought to point to an extension that might subsequently be acquired. But they must be read in connection with, and in subordination to, the rest of the instrument, and this very clause refers to "*the term* for which the *said* letters-patent," &c. A single term is referred to, and the *said* letters-patent. The reference is in terms to the term and the letters-patent already mentioned. The phrase "may be granted," seems to be an expression loosely used, and without any definite meaning in the connection in which it is found, unless it refers to other reissues of patents covering the remainder of said term. There had already been one reissue, and the facts show that a second reissue was had for the remainder of the term after this assignment, doubtless to cover some defect. These reissues are authorized by the act of Congress, and often occur. In a certain sense, when the patents thus originally issued are surrendered and others issued in their place, the whole may be regarded as the same letters-patent. They cover the same term. The reissued patent covers no improvement or extension, but is intended to rectify some error, or remedy some defect, and accomplish the identical object intended to be accomplished by the letters originally issued. In this sense they are substantially the same letters-patent. In this view the words "may be granted" may have some significance as used in this instrument, and they are satisfied by applying

them to any further letters-patent that might be issued for the same term and to accomplish the same objects intended by those already issued. And in this instance there was a subsequent reissue for the remainder of the term, to which they might in fact apply. But upon a view of the whole instrument, to construe them as referring to a new term, and letters-patent not yet *in esse*, would be doing violence to the language.

Mr. Justice DAVIS delivered the opinion of the court.

An assignment of an interest in an invention secured by letters-patent, is a contract, and like all other contracts is to be construed so as to carry out the intention of the parties to it. It is well settled that the title of an inventor to obtain an extension may be the subject of a contract of sale, and the inquiry is whether the instrument of sale employed in this case, did secure to the purchaser an interest not merely in the original letters-patent, but in any subsequent extension of them. It recites the invention and the agreement of Taylor to purchase the right to use it in the city of San Francisco, and then conveys to him all the title and interest which Nicolson had in the *invention* and letters-patent for and in the said city; to be enjoyed by Taylor and his legal representatives to the full end of the term for which the said letters-patent are, or *may be granted.* There is no artificial rule in construing a contract, and effect, if possible, is to be given to every part of it, in order to ascertain the meaning of the parties to it. Taking this whole deed together, it is quite clear that it was intended to secure to Taylor and his assigns the right to use the invention in San Francisco, as long as Nicolson and his representatives had the right to use it anywhere else. Manifestly something more was intended to be assigned than the interest then secured by letters-patent. The words "to the full end of the term for which the said letters-patent are or may be granted" necessarily import an intention to convey both a present and a future interest, and it would be a narrow rule of construction to say that they were designed to apply to a reissue

merely, when the invention itself by the very words of the assignment is transferred. It was easy to have restricted the right to use the invention to the end of the term of the original letters and reissues, but this was not done; and in view of the right of the inventor in certain contingencies to a renewal,—which must have been well known to both buyer and seller of this kind of property,—we are led to the conclusion that both parties contracted with reference to it. The case of *The Railroad Company* v. *Trimble** is not different in principle from this, although in that case the language used is somewhat broader.

JUDGMENT REVERSED, AND A VENIRE DE NOVO AWARDED.

UNITED STATES *v.* BALLARD ET AL.

1. Under the act of June 17th, 1864, "To regulate the foreign and coasting trade in the northern, northeastern, and northwestern part of the United States," &c., the collectors mentioned in it are entitled to retain for their own use moneys received by them from the owners of steamers and from engineers and pilots, by virtue of the 31st section of the act of August 30th, 1852.
2. Where a demurrer to a special plea which is a complete avoidance of the whole cause of action is overruled and the plaintiff does not reply, but suffers judgment to be entered against him on the plea, the court may properly enter judgment on the whole case, though another plea (a general issue) had been (against the rules of good pleading) filed, on which issue was taken; provided the issue thus raised on the last plea have by the judgment on the demurrer been in fact disposed of and so rendered immaterial.

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

A statute of August 30th, 1852,† requiring annual licenses for steamboats, after preliminary inspections, examinations, and certificates, enacts by the 31st section:

"That before issuing the annual license to any such steamer,

* 10 Wallace, 367.

† 10 Stat. at Large, 73.

the collector or other chief officer of the customs for the port or district, shall demand and receive from the owner or owners of the steamer, *as a compensation for the inspections and examinations made for the year*, the following sums, in addition to the fees for issuing enrolments and licenses now allowed by law, according to the tonnage of the vessel, to wit:

For each vessel of 1000 tons and over, ...	$35 00
For each vessel of 500 tons and over, and less than 1000 tons,	30 00

* * * * * *

"And each engineer and pilot, licensed as herein provided, shall pay:

For the first certificate granted by any inspector or inspectors, the sum of	$5 00
And for each subsequent certificate	1 00

to such inspector or inspectors, to be accounted for and paid over to the collector or other chief officer of the customs; *and the sums derived from all the sources above specified shall be quarterly accounted for and paid over to the United States in the same manner as other revenue.*"

In February, 1857, the Treasury Department promulgated certain general regulations under the revenue laws, in which, after stating some other fees, the above-quoted enactments were set forth as part, thus:

"The following enumerated fees are still to be charged and collected at such ports, *and accounted for and paid over to the United States by collectors in the same manner as other revenue:*

For admeasuring every vessel in order to the enrolment or licensing and recording the same:	
If of 5 tons and less than 20, ...	$0 30
Of over 20 and not over 70, ...	1 00
Over 70 and not over 100, ...	1 50
For certificate of enrolment, ...	50
For indorsement on certificate of enrolment, ...	20
For license, and granting the same, including the bond:	
If not over 20 tons, ...	25
Above 20 and not over 100, ...	50
Over 100 tons, ...	1 00
For indorsement on a license, ...	20
For permit to land goods, ...	20

For licenses to steamers, *as a compensation for the inspections and examinations made for the year under the steamboat law, approved August 30th*, 1852, in addition to the fees above mentioned, for issuing enrolments and licenses to vessels:

For each vessel of 1000 tons and over, ...	$35 00
For each of 500 and over, but less than 1000 tons, . . .	30 00
* * * * * *	
For the first certificate granted by an inspector or inspectors to each engineer and pilot, ...	5 00
For each subsequent certificate, ...	1 00

But the regulations called the attention of collectors and other officers of customs to the amount and limit of fees in a great variety of other matters, the regulations occupying several pages.

On the 17th June, 1864,* Congress enacted:

"That each of the several collectors of customs in the following districts on the said frontiers, to wit: Cuyahoga, &c., &c., shall receive an annual compensation of $1000, *and in addition thereto the fees now collected under the general regulations of the Treasury Department of February*, 1857, and a commission of 3 per centum on all moneys collected and accounted for by them respectively: *Provided*, That the aggregate compensation derived from salary, fees, and commissions, shall not in any case exceed the sum of $2500. . . . And whenever the aggregate of salary, fees, and commissions shall in any case exceed the said sum of $2500, after deducting the necessary expenses incident to the said office, for and during the same period for which said compensation is allowed, the excess shall, in every such case, be paid into the Treasury of the United States. The fees and emoluments of all kinds to be accounted for as provided by the 12th section of the act of 7th of May, 1822."

This 12th section of the act of 7th of May, 1822,† enacts that collectors, &c., shall account, under oath, for all fees and emoluments of office, and in such manner as the Secretary of the Treasury shall prescribe.

These treasury regulations of February, 1857, and this act of 17th June, 1864, being in force, the United States brought suit on the official bond of one Ballard, collector at Cuyahoga,

* 13 Stat. at Large, 134.

† 3 Id. 695.

assigning as breach his non-payment to the government of moneys received according to law from the owners of steamboats, or compensation for inspection and examination, and of moneys received by him according to law for certificates of engineers and pilots. The defendant pleaded *nil debet*, concluding to the country, and a special plea of confession and avoidance, founded on the above-quoted statute of June 17th, 1864, and asserting that the fees for which he was sued were fees collected under the said general regulations of the treasury, of February, 1857, and such as he had a lawful right to retain; the whole, with commissions of 3 p. c. on moneys collected and accounted for, amounting to but $2322.

Upon the first plea issue was joined; to the second, the plaintiff filed a general demurrer, and the defendant his joinder therein. The Circuit Court overruled the demurrer, and thereupon, without disposing of the issue to the country, rendered judgment for the defendant. Thereupon the government brought the judgment here; the general question in the case being whether, in view of the 2d section of the act of June 17th, 1864, the collectors of the customs mentioned in that act were entitled to retain for their own use moneys received by them from the owners of steamers, and from engineers and pilots, by virtue of the 31st section of the act of August 30th, 1852. A minor point of pleading (arising from the fact that the court below did not send the case to the jury on the issue joined on the first plea) being also raised.

Mr. B. H. Bristow, Solicitor-General, for the United States, plaintiff in error:

1. There is clearly kept up in the treasury regulations of 1857 the distinction between the moneys collected under the act of 1852, and other collections enumerated in the regulations. We do not maintain that the collector has retained more than the maximum compensation allowed by the act of 1864, but only that the amount thus retained by him is made up partly from moneys which he was not entitled to appropriate to his own use. He does not pretend to have

derived any right to such moneys from the treasury regulations, or from any prior statute, but rests his claim upon the act of 1864, and insists that under it he is entitled to appropriate to his own use certain moneys which by prior statute and the treasury regulations were specifically required to be paid into the treasury as other revenue, and were clearly appropriated to other uses. What is there in the language of the act of 1864 to indicate an intention on the part of Congress to repeal the provision of the act of 1852 in this respect? It cannot be argued that so much of the act of 1852 as appropriates the moneys in question to another use, and requires them to be paid into the treasury "as other revenue," is repealed otherwise than by implication. The act of 1852 is not referred to in the act of 1864, and there is nothing in the statute itself to indicate that the subject-matter of the former act was present in the mind of the legislature when the latter was adopted. Nor is the latter in any sense repugnant to the former. The act of 1852 relates exclusively to the payment, by owners of steamers, engineers, and pilots, of certain sums of money as compensation for the services of inspectors, and the only connection of collectors therewith is in the duty imposed upon them to receive the money and pay it into the treasury as other revenue. The act of 1864 relates exclusively to the compensation of collectors, and the chief purpose in view was to change the maximum compensation of collectors of the enumerated districts. Full effect can be given the latter without in any respect disturbing the former. The two may well subsist together, and in such case repeal by implication cannot be allowed.*

2. *Nil debet* is not a sufficient plea to an action of debt on a bond setting out the condition and breach, and it may be conceded that the plaintiff below should have demurred to this plea. However, an issue having been framed on that plea the court ought not to have treated that issue as immaterial, and rendered judgment for the defendants on the

* Henderson's Tobacco, 11 Wallace, 652; The Distilled Spirits, Id. 356.

whole case upon sustaining the demurrer to the last plea, but should have allowed the parties to go to the jury upon the issue joined on the first plea.

Mr. A. G. Riddle, *contra*, submitted that the case was a plain one every way, and he presented arguments which need not be here printed, as they were in substance adopted as true by the court.

The CHIEF JUSTICE delivered the opinion of the court.

The question is whether the description of fees now collected under the general regulations of the Treasury Department of February, 1857, includes the sums collected under these regulations for licenses to steamers, and as compensation for the inspections and examinations made for the year under the Steamboat Act of August 30th, 1852, in addition to the fees for issuing enrolments and licenses.

These sums are collected as fees under the regulations, and are not distinguished from the collector's fees proper, except by the circumstance that they are described as a compensation for inspections and examinations. The provision, that these sums shall be quarterly accounted for and paid over to the United States, does not distinguish them from fees and emoluments to be accounted for under the act of the 17th of June, 1864, or under the regulations of the Treasury Department of February, 1857.

The language of the regulations is, that the fees are to be charged, and collected, and accounted for, and paid over to the United States by collectors, in the same manner as other revenue. This language obviously means that they are to be accounted for in all cases, and paid over, unless retained under authority of law. The act of June 17th, 1864, authorizes the collector to retain the fees and a commission of three per cent. on moneys collected and accounted for, paying over to the Treasury only the excess beyond two thousand five hundred dollars; and there is no distinction in the regulations between the fees for admeasurement, licenses,

&c., and the fees for licenses as a compensation for inspections and examinations.

We think, therefore, that the collector was authorized to retain all descriptions of fees paid him not in excess of two thousand five hundred dollars. It follows that the demurrer was properly overruled; and, as the defendant did not think it proper to reply, but allowed judgment to be entered upon the plea, the other plea of *nil debet* became immaterial, and the judgment was properly entered for the defendant.

It is, therefore,

AFFIRMED.

BLACK v. CURRAN.

1. Under the homestead laws of Illinois, the homestead right is not in an absolute sense an estate in the land. The fee is left as it was before the statutes, subject to a right of occupancy, which cannot be disturbed while the homestead character exists.
2. The disposition of the property by judicial sale is accordingly left unaffected, except so far as is necessary to secure a homestead for the family of the occupant.
3. Hence the land in fee can be sold under execution, subject to the homestead right, and the purchaser has the absolute title when the homestead right ceases.

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

The statutes of Illinois* relating to homesteads enact:

"SECTION 1. . . . There shall be exempt from levy and forced sale, under any process or order from any court in this State, for debts contracted, *the lot of ground and buildings thereon*, occupied as a residence, and owned by the debtor, being a householder and having a family, to the value of $1000. Such exemption shall continue after the death of such householder, for the benefit of the widow and family, some or one of them continuing to occupy such homestead, until the youngest child shall become

* Laws of 1851, p. 25; Chapter 48 Gross's Statutes, p. 327, amended by act of February 17th, 1857; Act of 1857, p. 119.

21 years of age, and until the death of such widow, and no release or waiver of such exemption shall be valid unless the same shall be in writing subscribed by such householder and his wife, if he have one, and acknowledged in same manner as conveyances of real estate are by law required to be acknowledged.

"SECTION 3. If in the opinion of the creditors or officer holding an execution against such householder, the premises claimed by him or her as exempt, are worth more than $1000, such officer shall summon six qualified jurors of his county, who shall appraise said premises, and if, in their opinion, the property may be divided without injury to the interest of the parties, they shall set off so much of said premises, including the dwelling-house, as in their opinion shall be worth $1000, and the residue of said premises may be advertised and sold by such officer.

"SECTION 4. In case the value of the premises shall in the opinion of the jury be more than $1000, and cannot be divided as provided for in this act, they shall make an appraisal of the value thereof, and deliver the same to the officer, who shall deliver a copy thereof to the execution debtor, with a notice thereto attached that unless the execution debtor shall pay to said officer the surplus over and above $1000, on the amount due on said execution, within 60 days thereafter that such premises will be sold.

"SECTION 5. In case such surplus, or the amount due on said execution, shall not be paid within the said 60 days, it shall be lawful for the officer to advertise and sell the said premises, and out of the proceeds of such sale to pay to such execution debtor the said sum of $1000, which shall be exempt from execution for one year thereafter, and apply the balance on such execution, provided that no sale shall be made unless a greater sum than $1000 shall be bid therefor, in which case the officer may return the execution for want of property."

With this statute in force one Craddock, the head of a family, was from 1853 till 1863 the owner of a lot in Illinois which constituted his homestead; his house being built on one half; and the other half, exceeding in value $2000, being used for its necessary purposes; both halves alike, however, constituting, as was assumed by the court, the homestead of himself and family.

Argument for the plaintiff in error.

In 1858, one Spear obtained a judgment against Craddock, but although the homestead property was sufficient to pay his demand and set off to the debtor what he was entitled to under the law, Spear did not pursue any of the modes pointed out by the statute of obtaining satisfaction of his property, but caused the western half to be sold at sheriff's sale under his execution, and having obtained a sheriff's deed for this half conveyed it to one Curran.

Subsequent to this, that is to say, in 1863, Craddock and wife conveyed the whole lot, east and west halves alike, in fee simple by deed with full covenants releasing the homestead, and properly acknowledged, to certain persons who subsequently conveyed to one Black. In two weeks after Craddock and his wife thus conveyed the premises, Craddock with his family removed from them and ceased to occupy them afterwards.

In this state of things, A.D. 1866, Curran claiming title through the judicial sale to Spear brought suit against Black for the west half of the lot; Black defending himself under the title, if any, acquired under the deed from Craddock and wife to his vendors.

The court below, relying, as was said here by counsel, on *McDonald* v. *Crandall* and *Coe* v. *Smith*, decisions in the Supreme Court of Illinois,* and considering that the sheriff could levy on and sell and convey a part of the homestead lot, while in occupancy of the judgment debtor, and that the deed would take effect if the debtor and his family abandoned the homestead, adjudged that the plaintiff was entitled to the property claimed by him, that is to say the western half of the lot, in fee simple, and gave judgment accordingly. That judgment was now here for review.

Mr. Lyman Trumbull (*a brief of Messrs. Stuart, Edwards, and Brown being filed on the same side*) *for the plaintiff in error:*

Assuming that the facts show the occupation of the entire lot as a homestead, does the plaintiff show any title to the

* 43 Illinois, 231, and 47 Id. 225.

premises? To recover, he must show a valid execution, a regular levy, and an authorized sale. Now, here none of the requisitions of the law were complied with. Assuming the lien to exist and the premises to exceed in value the sum of $1000, how is this lien to be enforced? The act provides in detail the manner, time, and circumstances under which levy and sale can be made. These provisions are mandatory, prerequisite to the right to sell. They are, by the decision of the Supreme Court, *prohibitory* of a sale in any other way.*

But by the decisions of the Supreme Court of Illinois, which are the rule in this matter for the Federal court, a judgment and execution do not create a lien against the homestead of the judgment debtor, and the owner may sell or mortgage it free from the lien of the judgment. This is emphatically declared in *Green* v. *Marks*,† a leading case on this matter, and the doctrine of that case has been affirmed by the Supreme Court of the State in a series of decisions.‡ As a rule of property it has existed for ten years. Titles to many valuable tracts and lots of land have been acquired on the faith of this construction. The title of the grantors of plaintiff in error was so obtained in 1863. The judgment in this case unsettles these titles and prescribes a different rule. We submit that, both on principle and the authorities of every State having homestead laws, the doctrine asserted by the court below (that without complying with any of the terms of the homestead law, and in a mode not pointed out by the law, the sheriff can divide the homestead lot, levy on part, sell and convey it, while in the occupancy of the judgment debtor, and that the deed so made will convey title to take effect when the occupation by the debtor of the lot ceases) is in effect a judicial repeal of the law.

The authority to sell is derived confessedly but from the statute. What is it that is exempt from sale? Not some ideal homestead-right estate, leaving another imaginary reversionary interest which can be subjected to the debts of

* Bliss *v.* Clark, 39 Illinois, 596–7.

† 25 Id. 221.

‡ Bliss *v.* Clark, 39 Id. 590; Ives *v.* Mills, 37 Id. 76; Hume *v.* Gossett, 43 Id. 297; Pardee *v.* Lindley, 31 Id. 187.

the occupant. The exemption from levy and forced sale, is of "*the lot of ground and buildings.*" The *thing* out of which, about, and in which, all the different kinds of estate arise, cannot be levied on or sold except in the mode provided. If the *lot* is exempt from levy and sale every conceivable estate in and to said lot must also be exempt. It is no answer to say that the exemption is only to the value of $1000, for the reason that the provisions are by the statute made to apply only where, in the opinion of the creditor, the premises exceed in value $1000: then, and then only, can he demand through the sheriff a jury to ascertain the value and divisibility of the premises, and upon notice to the judgment debtor, after the expiration of 60 days, may he sell. By the proviso to the 5th section, no sale can be made unless more than $1000 shall be bid. The carefully defined provisions to protect the judgment debtor in his homestead right in a case where, in the opinion of the creditor, the value of the lot exceeds $1000, the court below has decided are not necessary in the only possible case in which they could have any application.

By making these provisions in all cases essential no one can be injured. If the premises are only worth $1000, then nothing can be done. If the creditor at any time conceives them to be worth more he can instantly secure his claim by proceeding in accordance with the statute. If he chooses to remain inactive until the judgment debtor conveys, the loss is the result of his negligence.

As to the cases of *McDonald* v. *Crandall* and *Coe* v. *Smith*, relied on by the court below, it is enough to remark that in the first case the court expressly refer with approval to *Green* v. *Marks*, cited and relied on *supra* by us, and that the opinion in the latter simply refers to the former case as controlling it.

These were cases of voluntary conveyances to grantees of the person claiming the homestead right. The case now before the court involves a sale *in invitum*. This distinction would of itself be sufficient to demonstrate the inapplicability of these decisions.

But the court in these cases did by no means decide that a deed failing to release the homestead was, or could be, by and of itself, a valid conveyance of the title by virtue of which the grantee might maintain ejectment against the grantor, or his grantees occupying the premises under conveyances from him. They decide only that the irregular deed and the *surrender* of the premises to the *grantee* of that deed constituted an abandonment of the homestead to *that grantee*, so as to estop the claim of the grantor and all claiming through him. It was the concurrence of the voluntary deed and voluntary surrender that operated the destruction of the right.

In the case now before the court the possession was surrendered to the grantees of the deed under which plaintiff in error claims, and he was in possession thereunder when this suit was commenced.

[The learned counsel then went into an examination of decisions in New York, Iowa, Wisconsin, New Hampshire, and Minnesota, to show that the law as conceived by them was the law in every State where exemptions similar to those in Illinois existed.]

Mr. Jackson Grimshaw, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The rights of the parties to this suit depend upon the construction to be given the homestead laws of Illinois. These laws exempt from forced sale on execution the lot of ground and the buildings thereon occupied as a residence and owned by the debtor, being a householder and having a family, to the value of one thousand dollars. And the owner of the homestead, if a married man, is not at liberty to alienate it except with the consent of the wife, and there must be an express release and waiver of the exemption on the part of both to render the conveyance operative. A mode is provided for dividing the property, if divisible, in case its value exceeds one thousand dollars, and of selling it, if indivisible, and applying the proceeds in a particular manner.

As Spear did not pursue these modes of obtaining satisfaction of his judgment, although the homestead property was sufficient to pay his demand and set off to the debtor what he was entitled to under the law, the inquiry arises whether the proceedings which he did take operated to pass the title after the homestead was abandoned.

It is conceded that this inquiry must be answered if possible by the decisions of the Supreme Court of Illinois on the subject, for these decisions constitute a rule of property by which we are to be governed. Although the exact point in dispute has not been adjudicated by that court, yet certain general principles have been announced which in their application to this case we think relieve it of difficulty. The embarrassment encountered in the administration of this law has been chiefly owing to the fact that the exemption was confined to real estate of a limited value. If the exemption had extended to the entire lot of ground occupied as a homestead without regard to its value, it is easy to see that many troublesome questions which have arisen would have been avoided.

In order to reach a proper conclusion in this case, it is necessary to understand what is the nature of the homestead right. It cannot in an absolute sense be said to be an estate in the land; the law creates none and leaves the fee as it was before, but in substance declares that the right of occupancy shall not be disturbed while the homestead character exists. While this continues, the judgment creditor cannot lay his hands on the property, nor the husband sell it without the consent of his wife, and not then without an express release on the part of both, of the benefits of the law. The purpose of the legislature was to secure a homestead for the family, and the disposition of the property either by judicial sale or voluntary conveyance, was left unaffected except so far as was necessary to accomplish this object. As long as the property retained its peculiar character, it was within the protection of the law, but the exemption from sale under execution or by deed (except with homestead waiver) could

be lost by abandonment or surrender; that is to say, by acts *in pais*.

The Supreme Court of Illinois have recognized and applied these principles in several recent cases, where the effects of voluntary conveyances by the owner of the homestead were the subject of consideration.

In *McDonald* v. *Crandall*,* it was held that where a conveyance is made not waiving the homestead, it passed the fee, but its operation was suspended until the grantor abandoned the premises or surrendered possession, and that the homestead when occupied by the debtor as such, is not subject to the lien of a judgment. But the case decides that where the homestead exceeds one thousand dollars in value, a judgment becomes a lien and may be enforced against the overplus, and that the Homestead Act has not created a new estate, but simply an exemption.

In *Coe* v. *Smith*,† the facts of the case were these: The owner having a homestead right in the lot, made in 1858 a mortgage without waiver of the homestead, and then in 1860 made another mortgage with waiver; afterwards, in 1861, he abandoned the premises. The court held that the first mortgage was the prior lien.

In *Hewitt* v. *Templeton*,‡ it was decided that upon the abandonment of the homestead by the grantor, the grantee in a deed in which the homestead right has not been waived is entitled to immediate possession, the homestead right being annihilated. The court in commenting on the decision in *McDonald* v. *Crandall*, which they say governs this case, uses this language: "We there held, although a judgment was no lien upon a homestead, where the premises were worth less than $1000, and a lien upon the surplus where they were worth more than that sum, yet, where the owner conveys the same by an absolute deed or mortgage legally executed, the fee in the premises conveyed, *no matter what their value*, passes to the grantee, subject only to the right of occupancy on the part of the grantor in case the

* 43 Illinois, 231. † 47 Id. 225. ‡ 48 Id. 367.

homestead has not been relinquished, and when such occupancy terminates, the homestead right is annihilated, it not being an estate in the premises which can be transferred as against a former conveyance that has passed the fee."

If a conveyance by the occupier of the homestead without the release of his right as required by the law has the effect to pass the title, regardless of the value of the premises conveyed, and can be enforced so soon as the occupation of the homestead ceases, it is difficult to see why the conveyance by the officer of the law, instead of the debtor, should not have the same effect.

And if, as between two voluntary grantees, the first takes the land discharged of the homestead after its abandonment, although the second conveyance contains a release of the homestead and the first does not, why should not the same rule obtain when the property was sold on judicial process, before the debtor conveyed it? The junior grantee takes nothing, because there was no estate to pass, it having been transferred by the first conveyance. On the same theory, there was no estate to convey after the sheriff had sold the land. The only difference between a conveyance made by the judgment debtor who has a homestead, and by the sheriff under a sale or execution against his land is, one is the act of the party, the other of the law—one a voluntary, the other an involuntary conveyance. It is certain that the owner of a tract of land of more than $1000 in value, on which there is a judgment, cannot sell it freed from the judgment, and although the homestead as such cannot be sold under execution, nor is a judgment a lien on the homestead as such, but as the land can be sold by the owner subject to the homestead, so a judgment is a lien on the land subject to the homestead, and the land or fee can be sold under execution subject to the homestead, and the purchaser, as in the case of a deed by the debtor without the waiver, has the absolute title when the homestead right ceases.

If these views of the law on this subject are correct, and we think they are fairly deducible from the decisions in Illi-

nois, they are conclusive upon the rights of the parties to this suit.

On the hypothesis that there was no judgment against Craddock, it is clear that if he had conveyed the lot or any part of it in 1858 (the date of the judgment against him), without the waiver of the homestead, and then in October, 1863, conveyed it with the waiver (as he did), and then left the premises (as he did), the deed of 1858 would bind the land.

It follows equally, that the deed of 1863 with the clause of the waiver, did not convey the absolute title to the west half of the lot, because there was a deed made by the law under a judgment of 1858, and which operated (just as a deed made by Craddock himself would have operated) upon the west half as soon as it ceased to be a homestead—that is by abandonment. And this is true while conceding that on neither hypothesis, that is deed without the waiver and sale under the judgment, could Craddock's homestead right be disturbed—his occupation of the lot.

JUDGMENT AFFIRMED.

DOLTON *v.* CAIN.

1. Under the limitation laws of Illinois which declare in substance "that whoever has resided on a tract of land for seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity deducible of record from the State or the United States, can plead the possession in bar of the suit," it is not necessary that the entire title of the defendant be evidenced by acts of record. If the source or foundation of the title is of record it is available to every person claiming a legal title who can connect himself with it, by such evidence as applies to the nature of the right set up.
2. If a party to a contract does all that it can be reasonably expected that he will do, he will be considered in equity as having performed his part of the contract so far as to come within the limitation laws above mentioned; as *ex gr.*, if a party bound to pay money to an agent of his creditor resident beyond seas, offer to pay it to one who was the agent of that creditor, and who declines to receive it only because he had heard ru-

mors of the principal's death, and had always been and still is ready to pay it to any one having authority to call for it.

3. Where A. in A.D. 1823 conveys to B., in trust for C., *habendum* "to the said party of the second part his heirs and assigns," and B. dies in 1845, and C. conveys in 1848, equity would find a way to protect C.'s grantees against a deed made by B.'s heirs in 1864; supposing such a deed made without undue influence, a supposition hard to make.

4. Where a power of attorney is made by husband and wife, French people resident in France, to sell lands in Illinois,—the power, a long French instrument with the usual verbiage of the *style de notaire*, speaking of the lands as lands which "*Mr.* and *Madame*," &c., own there—there being evidence that the husband owned land there, but none that the husband and wife did, the presumption is that the joinder of the wife was made to alienate some supposed right of dower, and not to describe lands owned by the wife and husband jointly, instead of by the husband alone; this at least in favor of a *bonâ fide* purchaser, long in possession.

5. A mistake in the baptismal name of an obligor to a bond executed by his attorney duly authorized to execute a bond in his right name, does not vitiate the bond, the error being shown to be purely accidental.

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

Certain statutes of limitation in Illinois,* declare in substance that whoever has resided on a tract of land for a term of seven successive years, prior to the commencement of an action of ejectment, "having a *connected title* in law or *equity* deducible of record from the State or the United States," can plead the possession in bar of suit to dispossess him.

These provisions of limitation being in force, Dolton sued Cain, A.D. 1865, in ejectment, to recover a piece of land in the State just named.

The plaintiff showed as title,

1st. A patent, A.D. 1818, from the United States to one Stephenson for the land.

2d. A deed, A.D. 1820, from Stephenson to one McGuire.

3d. A deed, A.D. 1823, from McGuire "to Auguste Thiriat, in trust for René Marie Ferdinand Jacquemart" (a resident of France), the *habendum* clause being thus:

"To have and to hold the said premises with the appurte-

* Revised Statutes of 1845, § 8, chapter 24; Id. §§ 8 and 11, chapter 66.

nances unto the said party of the second part, and his heirs and assigns forever."

4th. The death of Thiriat in 1845, and of Jacquemart in 1848; no more particular dates being shown.

5th. Conveyance, A.D. 1864, by the heirs of both Thiriat and Jacquemart, to Dolton (the plaintiff).

Title in Jacquemart having been, as above stated, shown by the plaintiff, the defendant relied on:

1st. August 10th, 1847, a power of attorney, "each one for themselves," from *René Marie* Ferdinand Jacquemart and *wife*, to F. R. Tillon and W. L. Cutting, with power of substitution, authorizing them to sell any lands in Illinois "which *Mr. and Madame Jacquemart* at present own; and in which *the said constituents* have interests, of any kind soever to be protected," and "to sign the contracts of sale in the respective names of the constituents."

2d. September 20th, 1847. A substitution by Tillon and Cutting of one Cockle, to their power to sell, &c.

3d. Proof that on the 29th July, 1848, Cockle as attorney for Jacquemart and wife, sold the land to Cain, the defendant, for $300; of which $100 was to be paid down, and the residue secured by three notes, one for $68, at one year, and two for $66 at two and three years respectively; that the $100 was paid and the three notes given; that contemporaneous with the sale, he, Cockle, professing to act as attorney of *Jean* Ferdinand Jacquemart (the name of *Jean* instead of *René Marie*, having as Cockle himself testified, been signed "by inadvertence and mistake," and "the intention having been to execute the instrument in Jacquemart's true name,") executed and gave to Cain a bond for $600, reciting the sale and the terms of it, and conditioned that if Cain paid the notes on the days specified for their payment, and Jacquemart should upon such full payment of the purchase-money execute and deliver to Cain a warranty deed with the usual covenants, then the bond should be void; that the sale was reported within a month to Tillon and Cutting, who approved it; that the first and second notes were paid as they came

due, and with the $100 cash were devoted by Cockle to the paying of taxes on other lands of Jacquemart; that Cain offered payment of the third note at its maturity, but that Cockle refused to receive it, replying to Cain's offer to pay it, that it was rumored that Jacquemart was dead; that Cain had always been ready and willing to pay the note which from the cause mentioned was remaining unpaid, but that he did not know who was entitled to receive the money.

4th. Proof that the defendant took possession of the land very soon after his purchase, and had occupied it continuously by himself or his tenants from that time till the time of the suit brought (A.D. 1865), and for seventeen years had paid taxes on it.

On the facts thus proved, the court below decided that the possession of Cain was protected by the limitation laws of Illinois, already in substance stated, and gave judgment accordingly. From this judgment the plaintiff sued out the present writ of error. The sole question in the case was, whether the defendant, Cain, was within the protection of these laws.

Mr. B. C. Cook, for the plaintiff in error:

Cain had no connected title deducible of record, either in law or equity, to the premises in question. The title must be connected; it must be deducible of record. Cain in fact had no *title* in equity at all; though he may have had *interest* in equity. No title in equity could have arisen until he had paid all his notes, for not till then could he have come into chancery and demanded a conveyance. He held, in short, but that inchoate interest which might or might not ripen into an equitable title. Reference by the court to decisions of the Supreme Court of Illinois,* will show that no other view can be taken consistently with them.

Further. All the claim that Jacquemart had to the land arose from McGuire's deed to Thiriat. That deed conveys

* Steele *v.* Magie, 48 Illinois, 397; Stow *v.* Steel, 45 Id. 328; Nicoll *v.* Ogden, 29 Id. 377.

to Thiriat, in trust for Jacquemart indeed, but with a *habendum* whose effect was obviously to give the estate to Thiriat alone.*

Then these lands, if Jacquemart's at all, were Jacquemart's alone. His wife did not have any ownership in them. The bond was executed by *him* alone if by anybody. But the power of attorney does not authorize the sale of the lands of either Mr. or Madame Jacquemart alone, but only the lands owned by them jointly.†

Finally, *René Marie* is quite a different name from *Jean.*

Mr. Jackson Grimshaw, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The limitation laws of Illinois relied on by the defendant, in substance, declare that whoever has resided on a tract of land for a period of seven successive years prior to the commencement of an action of ejectment, having a connected title in law or equity deducible of record from the State or the United States, can plead the possession in bar of the suit.

It is objected that the entire title of the defendant is not evidenced by acts of record, but this is not necessary. If the source or foundation of the title is of record it is available to every person claiming a legal or equitable interest under it who can connect himself with it by such evidence as applies to the nature of the right set up.‡

Is the right set up by Cain, then, within the purview of the statute?

It is conceded to be, if the bond was executed under a valid power of attorney, coupled with full payment of the purchase-money, and the obligor had the legal title to the land. This concession was necessary, because it is too plain for controversy that a union of these elements would constitute a complete equitable title, which a court of chancery, on the

* Brown *v.* Combs, 5 Dutcher, 36.

† Dodge *v.* Hopkins, 14 Wisconsin, 630.

‡ Collins *v.* Smith, 18 Illinois, 163; Poage's Heirs *v.* Chinn's Heirs, 4 Dana, 4.

proper application, would perfect into a legal title. But there are other principles by which an equitable title can be tested, and, in their application to this case, relieve it of all difficulty. If a party has done all that could reasonably be expected of him to perform his part of the agreement, it will be considered, in equity, as having been done. Cain is within this condition. He purchased the land from Cockle, paid him all he agreed to pay, except the sum of $66, and this he was ready and willing to pay, but Cockle would not receive it, on the plea that it was rumored his principal was dead. Was not this offer equivalent to payment? What more, under the circumstances of this case, would a court of equity require? It would be a harsh rule to say that the purchaser should lose his land because he did not institute inquiry, in France, to ascertain whether the rumor of Jacquemart's death was well founded or not. There was no revocation of the power, and Cockle was the proper person to receive the money, unless Jacquemart were dead; and there is nothing in the record to show that Cain ever received any information on the subject, except what was contained in the reply of Cockle when he offered to pay him the money. Naturally a man in the predicament of Cain would rest in security, until advised by Cockle that he could safely pay the money to him, or until some one having authority called upon him for payment. This was never done; and, after sixteen years' residence on the land, he is called upon to surrender it because he did not employ unusual means to ascertain the proper parties to whom the small balance due on the land should be paid. If there were no limitation law in Illinois applicable to this case, the action of ejectment would, on proper application, have been enjoined until Cain could, through a court of equity, have perfected his title so as to make it available as a legal defence in a court of law. If, then, Cain had such a title as a court of equity would recognize and convert, by its decree, into a legal title, it must be considered a title in equity within the meaning of the statute. Indeed, it is difficult to conceive what the law does mean by a title in equity if this be not

one. It must be something less than a legal title, else these words in the statute can have no effect. The law was designed to protect both kinds of title alike, and, unless equal influence is extended to both, there is a practical repeal of a portion of the statute. In no proper sense can it be said that Cain broke his agreement. It is true he did not formally tender the money to Cockle, but this would have been a useless act, as Cockle told him, on his application to pay, that he could not receive the money. Besides, he had good right to suppose, from what had previously occurred, that the offer to pay Cockle was as valid as the offer to pay Jacquemart.

Why, then, has not Cain, having shown a record foundation, brought himself within the scope of the statute?

It is urged, as an additional reason against this, that Jacquemart did not own the legal title, because one of the *mesne* conveyances made in 1823 was to Thiriat in trust for Jacquemart. This is true, but Thiriat died in 1845, and Jacquemart, the beneficial owner of the land, assumed to have the right to sell it in July, 1848, when he executed his letter of attorney to Tillon and Cutting, with power of substitution. Nothing is heard from the heirs of Thiriat for a period of nineteen years from the death of their ancestor, when, in 1864, they convey, as do also the heirs of Jacquemart, the tract of land in controversy to the plaintiff. After such a lapse of time, in the absence of any proof on the subject, it is difficult to resist the conclusion, that some undue influence must have been used to procure these conveyances; but, be this as it may, the title of Cain is not less an equitable one on account of them, and, if so, the statute will not allow his possession, rightfully obtained and continued the requisite length of time, to be disturbed. Without discussing the effect of the deed of Thiriat's heirs, in its application to this case, it is enough to say that a court of equity, looking through forms to the substance of things, would find a way to protect Cain's purchase.

It is urged, as an additional reason why this defence cannot prevail, that the bond is in the name of Jacquemart

alone, while the power was to convey the joint property of husband and wife. There would be some force in this position, if the original deed to Thiriat had been in trust for the wife as well as the husband; but, as this was not the case, the joinder of the wife could only have been intended to alienate any supposed right of dower in the event that she survived her husband. She had no present title to the land, either legal or equitable; and, although Cockle was empowered to use her name, as well as her husband's, in any instrument of sale he might execute, the failure to do so cannot, in any event, operate to invalidate the bond for a deed which he gave to Cain.

It is hardly necessary to notice the objection, that Jacquemart's name is incorrectly given in the contract of sale. Cockle testifies that this was a mistake, and it is the business of a court of equity to see that Cain is not harmed by it.

On the whole case we are of the opinion that the defendant is within the protection of the limitation laws of Illinois, which he invoked for his defence, and which he had a right to do for that purpose, although the title used to accomplish this object could not be employed by a plaintiff in an action of ejectment, who can only recover when he has the paramount legal title.

In conclusion, it is proper to state that we have examined the decisions of the Supreme Court of Illinois, to which we have been referred as affecting the question at issue, and do not find anything decided which militates against the views we have presented.

JUDGMENT AFFIRMED.

CROSS v. UNITED STATES.

The government had leased from A. a warehouse for ten years, the rent payable by instalments. A. assigned his lease to B. and died. B. sued the government in the Court of Claims for certain instalments of the rent which became due after the assignment. The Court of Claims dismissed the claim solely on the technical ground that the assignment of

the lease was not so drawn as to vest B. with a legal title to the accruing rents. Congress afterwards passed a joint resolution reciting that B. had "heretofore" filed his petition, &c., on account of rents alleged to be "*due*," and that the court had dismissed the "*said*" petition on the sole ground of an alleged technical defect, and remanding "the *said* cause" to the Court of Claims for a *further* hearing, upon the testimony already taken "and such *further testimony as either party might take*," and ordering that if, on such further hearing, it should appear that B. was in justice and equity entitled to the rents due on the lease the court should render judgment in his favor: *Provided* that no money should be paid him from the treasury until after he had given indemnity against any demand which might be set up by the heirs of A. (the original lessor) "*under or by virtue of the said lease or contract.*"

Held that B. could sue in the Court of Claims for all the rent that became due under the lease; and that the fact that, after the remand, he had filed his second petition for but the same rents for which he had filed his first, did not so exhaust the power of the court under the joint resolution as that he could not file a third one for additional rents; even though they were rents that were due when he filed his second petition and such as he might have included in a claim in it.

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

Daniel Saffarans, in 1851, according to the forms of law, leased to the United States for a term of ten years, at a certain monthly rent, a warehouse in San Francisco. Alexander Cross advanced the money to complete the building, and was compelled for his own protection to purchase the property and the contract of lease. The lease was assigned to him and the warehouse occupied by the government for a term of three years, when the Secretary of the Treasury of that day, availing himself of an apparent legal informality in the assignment of the lease, against the written protest of Cross, rescinded the contract.

On the 15th of November, 1856, Cross petitioned the Court of Claims for relief, but failed to obtain it on the ground that the assignment of the lease was defective and insufficient to vest in him a legal title to the accruing rents. This adverse decision, in conformity with the law at that time, was reported to Congress, and while the proceeding was pending there, Congress, on the 2d July, 1864, passed the following joint resolution for his relief:

"Whereas Alexander Cross *heretofore* filed his petition in the

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Court of Claims of the United States, praying relief on account of certain rents alleged to be *due* from the United States to him as assignee of one Daniel Saffarans, by virtue of a certain alleged contract of lease between the said Saffarans (who is now deceased) and the United States; and whereas the said Court of Claims, on the 24th of January, 1859, rendered a decision adverse to the prayer of the *said* petition, on the sole ground of an alleged technical defect in the assignment of said lease from the said Saffarans to the said petitioner: Now, therefore,

"*Be it resolved*, &c., That the *said cause* be remanded to said Court of Claims for a *further* hearing, upon the testimony heretofore filed therein, *and such further testimony as either party may take;* and if, upon the further hearing of said cause, it shall appear that the said petitioner is the *equitable owner of said lease, and in justice and equity entitled to the rents (if any) due thereon from the United States, the said court shall be authorized to render judgment therefor* in his favor, notwithstanding any technical defect in the assignment of said lease: Provided that no money shall be paid out of the treasury upon any judgment which may be rendered in favor of the petitioner in said cause, until he shall have filed with the Secretary of the Treasury a bond, with ample security, in such sum as will fully indemnify the United States against any demand which *may* be set up and established by or on behalf of the heirs or representatives of the said Daniel Saffarans, deceased, *under or by virtue of said contract or lease.*"

Cross, accordingly, after the passage of the resolution, by a supplemental petition, asked the Court of Claims to rehear the cause and give him judgment for the instalments of rent claimed in his original petition, embracing the terms of time between the 14th day of August, 1853, and the 14th day of November, 1856. This was done. Two years afterwards he brought another action, to recover the instalments of rent (amounting to $69,515) which were not included in the first suit.

The court below held that this second suit could not be maintained because the power and authority conferred upon it by the joint resolution had been exhausted when it reheard the cause and rendered judgment. From that judgment it was that the present appeal was taken.

Argument for the United States.

The only question in this case related, of course, to the proper construction of the already-quoted joint resolution of Congress of July 2d, 1864.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, in support of the ruling below:

The joint resolution only applied to the case of the first petition of the appellant in the Court of Claims. This is shown by the preamble: "*Whereas*, Alexander Cross, *heretofore* filed his *petition* in the Court of Claims of the United States, praying relief on account of certain rents alleged to be due from the United States to him;" and "*Whereas*, as the said Court of Claims rendered its decision adverse to the prayer of *said petition*;" and therefore, "*Be it resolved*, &c., That the *said cause* be remanded to said Court of Claims for a *further* hearing, upon the testimony heretofore filed therein, and such further testimony as either party may take and file pursuant to the rules of said court."

This language would seem to refer to the cause of action covered by the first petition, and to none other; and as the Court of Claims could not give relief except so far as it was specially authorized by this act of Congress, its powers must be strictly confined within the language and limits of that act.

But if the resolution is broad enough to cover any claim which the appellant had against the United States under the lease from Saffarans, then the former judgment is a bar to any future recovery by him for the same cause of action. The resolution certainly did not contemplate more than one action, and when the appellant filed his supplemental petition, the rents for which he now sues were due and might have been included by him in that suit. As he did not elect to do so, but brought a suit for a portion only of his claim, he has lost by his laches any right which he might have had under the resolution to recover the amount of the rents which he had negligently omitted to include in his petition.

J. J. Combs, contra, for the claimant.

Opinion of the court.

Mr. Justice DAVIS delivered the opinion of the court.

To uphold the ruling made by the Court of Claims would be, we think, to take a narrow view of the legislative intention in this case and to give substantial effect to the technical defences which have distinguished this litigation. There is no defence now on the merits, nor was there when the case went to Congress. It went there, not because the United States was not bound by the covenants of the lease, but for the reason that, in the opinion of the Court of Claims, Cross had not the legal right to enforce the obligation. Saffarans had undertaken to assign the lease to Cross, and no question was made as to his ownership until the Secretary of the Treasury attempted to rescind the contract. Then it was discovered that the assignment lacked legal formality, and the government availed itself of this defence, and this only, in the Court of Claims to defeat the action. In this state of case Congress was called upon to act.

The technical defect in the mode of assignment was the only obstacle encountered by Cross in the prosecution of his claim, yet while it remained it was effectual to prevent a recovery. To remove it and allow a trial on the merits required the assent of Congress, and this was given. That the waiver by Congress of the right of the United States to make this defence was not limited to any particular suit, but was extended to the entire controversy respecting the lease, seems clear enough from the language of the resolution itself. The Court of Claims was told if it found Cross to be the equitable owner of the lease, and in justice and equity entitled to the rents (if any) due thereon from the United States, to render judgment in his favor, notwithstanding any technical defect in the assignment of the lease. And to leave no room for doubt on the subject the court was directed further, to take bond from Cross to indemnify the government "against any demand which may be set up and established by or on behalf of the heirs or representatives of Saffarans under or by virtue of said contract or lease." Why the extent of this requirement if the waiver was only applicable to the rents in controversy in the proceeding then

pending before Congress? We cannot suppose, without an express declaration to that effect, that Congress intended to legislate in a manner that would enable a creditor of the government to obtain only a *part* of his claim when the *whole* of it was deemed by the court that tried the case to be meritorious.

It is true the lease was at an end when Congress acted and the court reheard the cause, and Cross could by proper amendment to his petition have embraced also that portion of his demand for which he now sues; and that would have been the proper course for him to have pursued, but he was not compelled to take it. In covenant for non-payment of rent, payable at different times, a new action lies as often as the respective sums become due and payable. As this suit is for instalments of rent not due when the first suit was instituted, and as they were not included in it in any stage of the proceeding, the plea of former recovery has no application.

On the finding of facts by the court below judgment should have been rendered for the claimant for $69,515.

It is, therefore, ordered that the judgment be reversed and the cause remanded to the Court of Claims, with directions to enter

JUDGMENT FOR THAT SUM.

DIRST *v.* MORRIS.

1. A plaintiff in ejectment, claiming under a deed made on a sale in a foreclosure of a mortgage, may properly put in evidence the record of the proceedings in foreclosure even though the defendant claim by a deed absolute made by the mortgagor, prior to giving the mortgage under which the foreclosure took place. Showing title from a party previously seized, the plaintiff has a right to exhibit it subject to such decision with regard to its effect as might become necessary after all the evidence is in.
2. Even more obviously has he a right to introduce it as evidence in chief, and when the prior deed absolute under which the defendant claims has not yet been offered in evidence; for in such a stage of the proceeding, the proceedings in foreclosure give apparently a valid title.

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3. Under the act of Congress of March 3d, 1865, authorizing the trial of facts by the Circuit Courts, and enacting that the findings of the court upon them shall have the same effect as the verdict of a jury, this court sitting as a court of error cannot pass, as it does in equity appeals, upon the weight or sufficiency of evidence. If the court chooses to find generally for one side or the other, instead of making a special finding of the facts, the losing party has no redress on error except for the wrongful admission or rejection of evidence.

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

Russell being the owner of a large number of lots of land in different counties in Illinois, conveyed one in May, 1837, to Josiah Breese. This deed was not recorded until the year 1864.

In December, 1837, Russell being a debtor to the United States mortgaged the same lot with all the several others that he owned to the then Solicitor of the Treasury, to secure this debt, and the mortgage was promptly put on record. There was no evidence that the existence of the deed to Breese was known to the agents of the government *at the time when this mortgage was taken by it.*

On the 1st of September, 1841, the United States filed a bill to foreclose the mortgage. The bill was in ordinary form against Russell, but it contained a clause alleging that Francis Peyton, Gordon Hubbard, *Josiah Breese*, H. S. Fuller, Augustus Garrett, Frederick Fraylor, and several others named, "commissioners of school lands, have or pretend to have some interest or claim upon the above described premises as judgment creditors or otherwise;" and process was accordingly prayed against them.

A summons with subpœna issued accordingly, the record saying—

"Which said subpœna went into the hands of the marshal to be executed, and was returned by him into the said clerk's office, *executed upon all of the defendants by delivering to each of them true copies thereof.*"

The marshal's return, however, on the summons itself, which it was shown by the fee-bill on file in the case was

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the only summons issued, while making return that certain of the defendants named had been served, stated that Breese and the rest had not been found in his district.

An order taking the bill *pro confesso* against the defendants was subsequently entered, reciting "that the said defendants have been duly served with process and have failed to appear."

Final decree having been entered, and sale made, the lands were bought in by the United States, whose title by means of a deed from the Solicitor of the Treasury, in whose name the title had been made, became subsequently vested in W. W. Corcoran, who conveyed to W. B. Morris.

The title of Breese under the deed of 1837 of Russell to him became, on the other hand, vested in one Dirst, and he in 1864 having taken possession of the land, which till then had been unoccupied, Morris brought ejectment against him.

The case was tried by the court, under the act of Congress of March 2d, 1865,* authorizing the Circuit Courts on written stipulation of the parties to try issues of fact without the intervention of a jury, and enacting that "the *findings of the court upon the facts shall have the same effect as the verdict of a jury.*"

On this trial before the court the plaintiff, having first put in the mortgage to the government, offered in evidence the record of the foreclosure suit, to which the defendant objected, on the ground (amongst others) that Breese had not been served with process in the cause. To prove this he referred to the record itself, and also proved by parol that Breese was not in Chicago in 1841, but was in New York; and further produced the original subpœnas and files in the cause. As already stated, the papers showed that Breese had been made a party to the bill, and that his name had been included in the *subpœna;* and the record recited that the *subpœna* was returned by the marshal into the clerk's office executed upon all the defendants; but the return of the *subpœna* did not show any service on Breese. Nevertheless

* 12 Stat. at Large, 501.

the court admitted the record in evidence, and the defendant excepted.

The plaintiff also offered in evidence the deed from the Solicitor of the Treasury (representing the government) to Corcoran, the plaintiff's grantor. The defendant objected to it on the ground that it did not appear thus far in the proceedings, that the United States had any title to the premises in controversy, except as mortgagee, and that as the deed did not purport to assign or convey to the grantee any part of the mortgage debt, and, as the defendant maintained that it did not appear that the mortgage had been foreclosed as against Breese, the owner of the equity of redemption,—therefore, that the said deed did not pass to the grantee any legal title or estate to the premises. The court, however, received the deed, and the defendant excepted.

The defendant, on his part, produced Breese's deed and *mesne* conveyances to himself, and evidence to show that under this title, in 1864, he had taken possession of the property, which, till then, was unoccupied. He now insisted that his right was paramount to that of the plaintiff. But the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor. This ruling of the court at the close of the trial was alleged by the defendant as an additional error.

Mr. S. W. Fuller, for the plaintiffs in error:

1. Breese being the owner and holder of the equity of redemption in the mortgaged premises, no effectual foreclosure of the mortgage could be made without his being made a party defendant to the foreclosure suit, brought into court, and subjected to its jurisdiction. This is familiar law.

2. Taking the record in the foreclosure suit and the parol testimony, it affirmatively appears that Breese was not served with process or otherwise brought into court in that suit. It is not pretended that he entered an appearance.

Of course, every presumption should be indulged to up-

hold the validity of judicial proceedings; and they will be upheld where the records are consistent with themselves, and where the recitals or presumptions contained in one part of the record are not rebutted by positive proof in other parts. But they are so rebutted here. The summons shows explicitly that it was not served upon Breese; the whole record, taken together, shows that but one summons was issued. There is no pretence of his appearance having been entered. The proof outside the record shows that he could not have been served. If the summons was not preserved in the record with the return of the officer, showing who were and who were not served, then the recital of service in the decree would be *primâ facie* evidence that all the defendants were served, as was held by this court in *Comstock* v. *Crawford*,* and in *Secrist* v. *Green*.† But this is not either of those cases. It is the case of *Sibley* v. *Waffle*,‡ where, notwithstanding the recital that "*due service*" had been made upon all the defendants, it appeared, by reference to the notice of publication, that the notice had *not* been published for the length of time required by law, and so the Court of Appeals decided that no jurisdiction was acquired, and that the recital did not aid the matter. The doctrine of that case is declared in many other cases.§ Its correctness is obvious.

Most of the cases on the whole subject are collected and classified, with excellent discrimination, in the seventh edition of Smith's Leading Cases.‖ We select and cite only those which involve the precise point raised upon this record, that is to say, that while in the absence of the summons and return from a record, a recital in the judgment or decree, of service of process upon the parties, or that they entered

* 3 Wallace, 403. † Ib. 751. ‡ 16 New York, 189.

§ Tunis *v.* Withrow, 10 Iowa, 308; Harris *v.* Hardeman et al., 14 Howard, 338; Lessee of Walden *v.* Craig's Heirs et al., 14 Peters, 152; Bodurtha and another *v.* Goodrich, 3 Gray, 508; Bloom et al. *v.* Burdick, 1 Hill, 130; Clark *v.* Thompson, 47 Illinois, 27; Pardon *v.* Dwire et al., 23 Illinois, 572; Comstock *v.* Crawford, 3 Wallace, 396.

‖ Vol. 1, part 2, pp. 1009 to 1025.

their appearance, is sufficient *primâ facie* evidence of that fact, yet when the original summons and return are contained in the record, the latter shall prevail, and the recitals go for nothing.

Setting out with this as a settled and obvious principle, the recital in the order of court taking the bill *pro confesso*, that *the defendants* had been "duly served," must be construed as including only the defendants who appeared by the officer's return to have been served; the only construction consistent with law, the record, and justice.

3. The deed from the United States to Corcoran was improperly admitted for the reasons assigned at the trial.

The rule on the subject is probably not uniform in the State courts, but it is believed to be settled in *this* court and for all the Federal circuits by *Hutchins* v. *King*.* It is there said:

"The mortgagee cannot by conveyance transfer any interest in the premises without a transfer of the debt secured; his interest is not subject to attachment or seizure on execution; he cannot remove the buildings on the premises, nor the fixtures attached; nor can he subject the premises to any uses but such as may furnish the means for the payment of the debt secured, without impairing the value of the estate."

4. As to the equities, though Corcoran paid his money to the United States for the deed which he received, and also paid the taxes on the land in controversy until 1864, yet, on the other hand, Dirst paid *his* money and took possession of the premises in 1864 (the same being then and having always been vacant and unoccupied), under the chain of title derived from Breese, the first grantee of Russell, believing that Breese and his grantees had the better title. His title was a paramount title.

On the whole case the judgment should have been for the defendant. How the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by

* 1 Wallace, 58.

the defendant, and found the issues generally in the plaintiff's favor, it is difficult for us on the evidence to see. This court, we submit, must reverse that judgment.

Messrs. Carlisle and McPherson (*a brief of Mr. Thomas Dent being filed on the same side*) *contra:*

Mr. Justice BRADLEY delivered the opinion of the court.

We think that there was no error in admitting in evidence the record of the foreclosure suit, whether Breese was served with the *subpœna* or not. If he was not served, and could show that fact, he was not bound by the decree. But the decree and sale formed a link in the plaintiff's chain of title from Russell, and, at this stage of the cause the deed from Russell to Breese had not been given in evidence. So far as yet appeared, the evidence was not only admissible, but effective to transfer the title. But it was admissible in any view, for it tended to show title from a party formerly seized, and the plaintiff had a right to exhibit it, subject to such decision with regard to its effect as might become necessary after all the evidence was in.

The same remarks apply to the admission of the deed from the Solicitor of the Treasury to the plaintiff's grantor.

The only other alleged error necessary to be noticed is the ruling of the court at the close of the trial.

The particular reason why, or ground on which the court decided that the plaintiff was entitled to recover, notwithstanding the possession taken by the defendant, and found the issues generally in the plaintiff's favor, is not specified. The court was exercising the functions of both court and jury, and whether, as matter of fact, it regarded the proof sufficient to show that Breese had been served with process in the foreclosure suit, or whether, as matter of law, it regarded that fact as not material, or what other view of the case it may have taken, does not appear, and therefore no error can be asserted in the decision. This court, sitting as a court of error, cannot pass, as it does in equity appeals, upon the weight or sufficiency of the evidence; and there

was no special finding of the facts. Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law, which authorizes the waiver of a jury, allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon such findings as upon a special verdict. But, as the law stands, if a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence.

However, as there was no proof that the government agents, when the mortgage was given, had any notice of Breese's unrecorded deed, and as the mortgage in such case would have the superior efficacy, and would entitle the mortgagee or his assigns to possession of the land on non-payment of the money at maturity, we do not see on what possible ground the defendant could have claimed to succeed.

No error appearing on the record, the judgment of the court below is

AFFIRMED.

NOTE.

At the same time with the preceding case was heard another from the same Circuit Court, and similar to it in all respects, with, however, one additional feature. It was the case of

COLLINS *v.* RIGGS.

To redeem property which has been sold under a mortgage (as is alleged irregularly) it is not sufficient to tender the amount of the sale. The whole mortgage-money must be tendered, or, if suit be brought, be paid into court.

IN this case, Riggs had brought ejectment in the court below against Collins to recover a lot, one of the several ones mentioned in the preceding case as having been mortgaged by Rus-

Argument for the plaintiff in error.

sell to the United States, and bought by Corcoran from the United States after the foreclosure by the government of their mortgage and the purchase in by them of all the several lots included in it. Riggs was the grantee of Corcoran.

The lot in controversy in this case, like that in controversy in the preceding case, had been conveyed previously to the mortgage, by a deed not put on record, to Breese.

On the trial, the defendant made the same objections to Riggs's title, that in the preceding case he had made to Morris's; to wit, that Breese, as grantee of Russell, of the lot, prior to the date of the mortgage to the United States, and so owner of the equity of redemption, had not been brought into the foreclosure suit; and assuming this to be true the defendant inferred and assumed that the mortgage was still, therefore, in existence. He then offered to prove that during the pendency of the present suit in ejectment he had tendered to Riggs the amount for which this *particular lot now in controversy had been struck off* at the marshal's sale, together with the taxes, interest, and costs; informing the plaintiff at the time of this tender that he, the defendant, was willing to treat him, the plaintiff, as the equitable assignee of *so much* of the mortgage as had been paid at the sale for the land in controversy, and that he wished to redeem the said land, and that he, the defendant, made the tender for that purpose; which tender the plaintiff declined to receive; the defendant offering to prove, further, that the said sum of money was then paid into court as a tender to redeem the land in controversy from the mortgage.

The court below decided, simply, that the evidence as presented was not competent or sufficient to constitute a defence to the action, but upon what ground this decision was made did not appear.

Mr. B. C. Cook, for the plaintiff in error (iterating and enforcing, as to the other parts of the case, the arguments of Mr. Fuller, already presented in the report of the preceding case) argued upon this new point that Breese not having been brought in, and the mortgage being so still in existence, Corcoran was but an assignee of part of *it*, and Riggs *his* assignee, nothing more; that the defendant could, therefore, properly tender payment of it; that the only question was as to amount; that as to this, Riggs's right in the mortgage was to secure only such a pro-

portion of the whole as the value of this tract represented, which value or amount was shown by the marshal's sale; that this sum, with costs, taxes, and interest, had been tendered and was now in court.

Messrs. Carlisle and McPherson (*a brief of Mr. Thomas Dent being filed on the same side*) *argued contra*, that the defendant, by his tender, substantially confessed that he could not resist the mortgage, but that his willingness to liquidate it *pro tanto*, by showing a tender of a sum of money to the plaintiff some time after the commencement of the suit, was no valid tender, that the amount was insufficient, and that the whole mortgage-money should be tendered. Independently of this, that such an attempt to avoid an action of ejectment was unheard of; that after condition broken, the mortgagor's rights were purely equitable, and that he could obtain relief only in chancery.

Mr. Justice BRADLEY delivered the opinion of the court.

It is clear that the criterion by which the amount tendered was gauged was incorrect. To redeem property which has been sold under a mortgage for less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase-money and pay the former the balance of his debt.

JUDGMENT AFFIRMED.

UNITED STATES *v.* POWELL.

1. On a distiller's bond, given under the 7th section of the Internal Revenue Act of July 20th, 1868 (15 Stat. at Large, 128), conditioned that the obligors "shall in all respects comply with all the provisions of law in relation to the duties and business of distillers," the condition is prospective as well as present, and embraces such provisions of law relating

to the duties and business of distillers as may be in force during the term for which the bond is given, whether enacted before or after its execution.

2. The "distillery warehouses," which distillers are required by the 15th section of the same act to provide, situated on their distillery premises, are "bonded warehouses," within the meaning of the joint resolution of Congress of March 29th, 1869, which declares that the proprietors of all "internal revenue bonded warehouses" shall reimburse to the United States the expenses and salary of all storekeepers put by it in charge of them.
3. These expenses properly include *per diem* wages paid to storekeepers for taking charge of them on Sundays.

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

A statute of July 20th, 1868,* requires that every person intending to engage in the business of a distiller shall give a bond with sureties, conditioned that the principals in the bond

"Shall faithfully comply with all the provisions of law in relation to the duties and business of distillers."

The statute also enacts:

"SECTION 15. That every distiller shall provide at his own expense a warehouse, to be situated on and to constitute a part of his distillery premises, to be used only for the storage of distilled spirits of his *own* manufacture, . . . and such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, is hereby declared to be *a bonded warehouse of the United States, to be known as a distillery warehouse*, and shall be under the direction and control of the collector of the district, and in charge of an internal revenue storekeeper assigned thereto by the Commissioner of Internal Revenue."

"SECTION 52. Every storekeeper shall have *charge* of the warehouse to which he may be assigned, under the direction of the collector controlling the same, which warehouse shall be in the joint custody of such storekeeper and the proprietor thereof and *kept securely locked, and shall at no time be unlocked and opened or remain open unless in the presence of such storekeeper* or other

* 15 Stat. at Large, 127, § 7.

person who may be designated to act for him as hereinafter provided. And no articles shall be received in or delivered from such warehouse except on an order or permit addressed to the storekeeper and signed by the collector having control of the warehouse."

With this statute in force, two persons, Powell and Hildebrand, on the 1st December, 1868, gave a bond, with two other persons as sureties, conditioned in the already-quoted language of the statute "faithfully to comply with *all* the provisions of law in relation to the business of distillers," and entered at once on the business of distilling. They constructed warehouses for the storage of spirits of their own manufacture; of which storekeepers assigned by the Commissioner of the Internal Revenue, and to whom the government paid $4 wages *per diem*, took charge; taking such charge during Sundays as well as during other days of the week.

Subsequently to the date of the bond above mentioned, of 1st December, 1868; that is to say, on the 29th of March, 1869, Congress passed a joint resolution,* thus:

"The proprietors of all *internal revenue bonded warehouses* shall reimburse the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses."

Subsequently, again, to the date of this joint resolution, that is to say, on the 29th of April following, the same distillers, with the former sureties, gave a second bond, conditioned in the same words as the first and in pursuance of the same statute with it—constructing warehouses, &c., as before, which were taken possession of by internal revenue storekeepers, &c.—all exactly as before.

The government having paid all these storekeepers, demanded of the distillers reimbursement for payments made for their services after the 29th of March, 1869, when the joint resolution of Congress was passed, including reimbursement for services rendered on Sundays. The distillers denied their obligation to pay for services on any day, under either bond, because:

* 16 Stat. at Large, 52.

1st. The storekeepers had been selected, appointed, and put in charge by the government and not by them.

2d. The storehouses were not "bonded warehouses," in contemplation of law, but were known as "distillery warehouses," being attached to their distillery and constituting part of their distillery premises.

They denied, additionally, their obligation to reimburse the government for payments made to men for working on Sundays.

The government hereupon sued both principal and sureties on both bonds, when the matters above stated were set up by way of plea; the sureties pleading in addition that they were sureties only, and as to the bond of December, 1868 (the bond first given), that at the date thereof the government by law was bound to pay the storekeepers, and averring that the subsequently-passed joint resolution of 29th of March, 1869, if applicable to distillery warehouses at all, could not increase the responsibility of them, the said sureties.

The court below was of opinion that all these pleas, except that one which alleged that the distillery warehouses were not "bonded warehouses," were good, and charged the jury accordingly. From the judgment which followed, the United States brought the case here on error.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error:

1. The condition that the principals "shall faithfully comply with all the provisions of law in relation to the duties and business of distillers," is to be understood as embracing such provisions of law as may be in force during the period for which the bond is given, whether enacted before or after the execution of the bond. There is nothing in the language employed that restrains the condition to statutes in force when the bond is executed; the only limitation seems to be that the provisions of law, with which the principals are faithfully to comply, must relate to the duties and business of distillers. The undertaking is prospective and contem-

plates a continuing liability for the observance of the requirements of all provisions of that character which are or may be passed. In *King* v. *Nichols*,* an action upon a sheriff's bond, in Ohio, under a statute requiring sheriffs to give bond, with sureties, "conditioned for the faithful discharge of their respective duties," it was held that this language was broad enough to embrace any duty that may have existed at the date of the bond, or that might have been imposed upon the officer by law during the term for which it was given.

2. That the condition of the second bond applies to provisions of law concerning the duties and business of distillers enacted subsequently to the date of that act, but prior to the execution of the bond, can admit of no doubt.†

3. The joint resolution of March 29th, 1869, requiring proprietors of all internal revenue bonded warehouses to reimburse the United States the expenses and salary of all storekeepers in charge of such warehouses, clearly extends to distillers. The latter were bound to provide distillery warehouses in carrying on their business as distillers, and these warehouses are by the internal revenue laws declared to be "bonded warehouses."

From the nature of the duties of storekeepers for distillery warehouses, as prescribed by the act of July 20th, 1868—duties which embrace among other things the custody of the warehouse—the duties must be continuous throughout the entire term, Sundays included, as long as the storekeeper remains in office. Sunday is indeed obviously the day when his vigilance may be most required.

No counsel appeared for the defendants in error.

Mr. Justice CLIFFORD delivered the opinion of the court.

Persons intending to engage in the business of a distiller are required to give notice in writing to the assessor of the

* 16 Ohio State, 83.

† Farr *v.* Hollis, 9 Barnewall & Cresswell, 315; State *v.* Bradshaw, 10 Iredell, 229.

district, stating their names and places of residence and the place or places where the business is to be carried on, and before proceeding with the business they are required to make and execute a bond in the form prescribed by the commissioner, with at least two sureties to be approved by the assessor of the district, conditioned that the principal shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, and that he will pay all penalties incurred or fines imposed on him for a violation of any of the said provisions.*

Pursuant to that requirement the two defendants first named in the declaration made and executed the two bonds therein described, conditioned in the very words of the seventh section of the act containing the requirement, as appears by the record.

Distillers are also required by the fifteenth section of the act to provide at their own expense a warehouse, situated on and to constitute a part of their distillery premises, to be used only for the storage of distilled spirits of their own manufacture; and the provision is that such warehouse, when approved by the commissioner, on report of the collector, shall be deemed to be a bonded warehouse of the United States and be known as a distillery warehouse, and that it shall be under the direction and control of the collector of the district and in charge of an internal revenue storekeeper assigned thereto by the commissioner.

Provision is also made by the joint resolution of the twenty-ninth of March, 1869, that the proprietors of all internal revenue bonded warehouses shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses, and that the same shall be paid into the treasury and accounted for like other public moneys.†

Most of the material facts are either admitted or not controverted by the pleadings. It is conceded as follows: (1.) That the principal defendants engaged in the business of a

* 15 Stat. at Large, 127.

† 16 Id. 52.

distiller for the periods mentioned in the declaration. (2.) That they constructed warehouses for the storage of distilled spirits of their own manufacture. (3.) That the warehouses were in charge of internal revenue storekeepers assigned thereto by the commissioner. (4.) That the plaintiffs paid the *per diem* wages of the storekeepers, and that they demanded of the defendants to be reimbursed the amount so paid for that service, and that the defendants refused to pay as requested, and that the bonds described in the declaration were duly executed.

Payment being refused, the plaintiffs brought an action of debt to recover the amount. Service having been made the defendants appeared and pleaded as follows: (1.) Performance. (2.) That they were not bound to pay the wages of the storekeepers in charge of their distillery warehouse; that the storekeeper was an officer appointed and selected by the plaintiffs, and that he was placed by them in the distillery warehouse of the defendants, and that they, the plaintiffs, were bound to pay his *per diem* wages. (3.) That the warehouse attached to their distillery is known as a distillery warehouse and not as a bonded warehouse, as it constitutes a part of their distillery premises, and that the defendants are not bound to pay the wages of the storekeeper. (4.) That the plaintiffs have no right to be reimbursed for the wages they paid to the storekeeper for service rendered or work done on Sunday or the Lord's day. (5.) Superadded is also the separate plea of the sureties — that the plaintiffs at the time the first bond was executed were bound to pay the storekeeper in charge of the warehouse, and that the subsequent act, even if applicable to distillery warehouses, cannot change or alter their liability as sureties, nor can it increase their responsibility.

1. Performance certainly is not proved as matter of fact, as it is not pretended that the defendants have reimbursed the plaintiffs for any part of the amount which the latter paid to the storekeepers for their *per diem* wages while they were in charge of the defendants' distillery warehouses, which is all that need be remarked in respect to that defence.

2. Undoubtedly the storekeeper is an officer appointed and selected by the plaintiffs, but the question whether the defendants are bound to reimburse the plaintiffs the amount paid for their *per diem* wages while in charge of their distillery warehouses is a question of law depending upon the construction of the joint resolution to which reference has been made. Argument to show that the question must be answered in the affirmative, if the joint resolution is applicable to the case, is hardly necessary, as the language is explicit that the proprietors of all internal revenue bonded warehouses shall reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses.

3. Attempt is made to show that a distillery warehouse is not a bonded warehouse within the meaning of the joint resolution, but the proposition cannot be maintained, as the act of Congress provides that such a warehouse, when approved by the commissioner, on report of the collector, shall be deemed a bonded warehouse of the United States; and it matters not that the act provides that it shall be known as a distillery warehouse, as the requirement of the act is that it shall be under the direction and control of the collector of the district, and be in charge of an internal revenue storekeeper assigned thereto by the commissioner. Beyond all doubt, therefore, the internal revenue bonded warehouse referred to in the joint resolution includes the bonded warehouse known as the distillery warehouse described in the fifteenth section of the act imposing taxes on distilled spirits.*

4. Suppose that it is so, still it is contended by the defendants that they are not bound by the first bond to reimburse the plaintiffs for the amount paid to the storekeeper for that service, because the bond was made and executed before the passage of the joint resolution.

It must be admitted that any substantial addition by law to the duties of the obligor of a bond, after the execution

* 15 Stat. at Large, 130.

of the instrument, materially enlarging his liabilities, will not impose any additional responsibility upon his sureties, unless the words of the bond, by a fair and reasonable construction, bring such subsequently imposed duties within its provisions.* Conceding that rule to be correct it becomes necessary to examine the recitals and condition of the bond first described in the declaration, as the question must depend very largely upon the construction of the language there employed. By the recital of the bond it appears that the principals therein named intended, on and after that date, to be engaged in the business of distillers within the fifth collection district of the State, and the condition of the bond is that they shall *in all respects* faithfully comply with *all* the provisions of law in relation to the duties and business of distillers, and that they shall pay all penalties incurred or fines imposed on them for a violation of any of the said provisions. Stronger language to signify an intention to stipulate that the principals in the bond should comply with duties subsequently imposed by law in relation to the business of a distiller could not well be employed, as the language of the bond is that they shall faithfully comply with all the provisions of law in relation to the duties and business of distillers, knowing as all the obligors did that Congress might at any time enact new provisions imposing new duties or vary those already imposed.† Both parties, it must be assumed, knew that changes might be made in that behalf at any time, and the defendants must have understood that it never could have been intended that a new bond should be required with every modification made in relation to the duties and business in which the principals in the bond were about to engage. Where a person was elected sheriff and executed a bond to the county conditioned that he would well and faithfully in all things discharge the duties of the office during his continuance in the same by virtue of his said election, the Supreme Court of

* Farr *v.* Hollis, 9 Barnewall & Creswell, 332.

† Bartlette *v.* Governor, 2 Bibb, 586; Minor *v.* Mechanics' Bank, 1 Peters, 73.

Ohio held that the language of the bond was broad enough, not only to embrace any duty imposed at the date of the bond but any also that might be imposed upon the officer by law during the term for which the bond was given.* Bonds in such cases, as well as in cases like the one before the court, are required to secure the faithful discharge of the duties ordinarily imposed upon the principal obligor, without reference to the time when the law was passed imposing the duty, and where, as in this case, the language of the bond is sufficiently comprehensive to embrace duties subsequently imposed, of a character corresponding with those required at the date of the bond, the construction which gives a prospective as well as a retrospective operation to the condition of the bond may well be adopted as both reasonable and just to all concerned.†

Exceptional cases may doubtless arise, as where the condition of the bond is, in terms, or by a fair and reasonable construction, limited to existing duties, or where the appointment is a temporary one, to expire at the end of the next session of the Senate. Different rules are applied in the case of a temporary appointment, as the commission is for a different tenure, and unless there is something in the act under which the first commission issued showing that it contemplated a permanent and continuing responsibility under laws subsequently passed, the rule is that the liability of sureties must be strictly confined to the duties created by the acts passed antecedent to the date of the bond.‡

Given, as the second bond was, subsequent to the passage of the joint resolution, the defence that the bond is not embraced in that provision is entirely without merit, and is accordingly overruled.

5. Reimbursement for services rendered or work done by the storekeepers, or for money paid for their *per diem* wages

* King et al. *v.* Nichols et al., 16 Ohio State, 82; United States *v.* Bradley, 10 Peters, 343; Cameron *v.* Campbell, 3 Hawks, 285.

† White *v.* Fox, 22 Maine, 341; United States *v.* Hudson, 10 Wallace, 406; United States *v.* Tingey, 5 Peters, 127.

‡ United States *v.* Kirkpatrick, 9 Wheaton, 730.

on Sunday or the Lord's day, it is insisted cannot be lawfully claimed because the law, it is said, did not contemplate their employment on that day.

Storekeepers, of the kind, may be appointed by the Secretary of the Treasury, in such numbers as may be necessary, with such compensation, not exceeding five dollars per day, as shall be determined by the commissioner. They are required to take an oath faithfully to perform the duties of their office, and to give a bond to be approved by the commissioner for the faithful discharge of their duties, and they are to have charge of the warehouses to which they may be respectively assigned, under the direction of the collector controlling the same, which warehouse, it is provided, shall be in the joint custody of such storekeeper and the proprietor thereof; and the provision is that the warehouses shall be kept securely locked, and shall at no time be unlocked or opened, or remain open, unless in the presence of such storekeeper or other person who may be designated to act for him by the collector in case of absence from sickness or from any other cause.* Safe custody of the articles deposited in the warehouse is one of the primary duties of the storekeeper, and it is clear that he is required to perform that duty on Sunday as well as on every ordinary working day of the week, as such custody is a work of necessity, and, therefore, is not unlawful, even in jurisdictions where worldly labor or business on the Lord's day is forbidden by law.†

6. Sufficient has already been remarked to show that the defence set up in the separate plea filed by the sureties cannot be maintained, as the language employed in the conditions of the respective bonds is comprehensive enough to bring the case within the duty imposed upon the proprietors of internal revenue bonded warehouses by the joint resolution which requires such proprietors to reimburse the United States for the expenses and salary paid to such storekeepers or other officers in charge of such warehouses.

* 13 Stat. at Large, 146.

† Powhatan Steamboat Co. *v.* Appomattox Railroad Co., 24 Howard, 255.

Statement of the case.

Diametrically opposite views were entertained by the presiding justice in the Circuit Court, and he accordingly instructed the jury that neither the distillers nor their sureties were liable to the plaintiffs under the first bond. (2.) That the reimbursement to the plaintiffs by the distillers of the salaries of storekeepers was not one of the duties of the distillers for which the second bond was given.* (3.) That the plaintiffs could not recover the amount paid to the storekeepers for services performed by them on Sundays, as the law did not contemplate their employment on that day.

Under those instructions the jury returned their verdict for the defendants, and the plaintiffs excepted and removed the cause in this court. Having determined that the instructions were erroneous, it only remains to remark that the judgment must be

REVERSED, and the cause remanded with directions to issue a

NEW VENIRE.

PHŒNIX INSURANCE COMPANY *v.* HAMILTON.

1. Insurance may be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners; especially when the property insured (grain) is held by the parties insured on commission only, and in the policy is described "as held by them in trust or on commission, or sold and not delivered"
2. In case of an insurance thus effected, where no representations are made with regard to the persons who compose the firm, there is no misrepresentation on that subject which avoids the policy.
3. And where the firm has no actual care or custody of the property insured (grain), but so far as regards its preservation from fire, it is entirely in the control of the other parties, and is so understood to be by the company making the insurance; the omission to inform the insurance company of an agreement of dissolution previously made cannot be considered a concealment which will avoid the policy.

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

Hamilton and Cook were partners in the grain commis-

* White *v.* Fox, 22 Maine, 341; State *v.* Bradshaw, 10 Iredell, 232.

Statement of the case.

sion business, at Toledo, Ohio, and kept their consignments of grain in store in an elevator at that place belonging to the Michigan Southern Railroad Company, whose servants had the entire charge and care of it. Hamilton retired from the firm in July, 1867, but no notice of the dissolution was given, and by common agreement Cook was allowed to carry on the business in the partnership name until the end of the year. During this term insurance to the amount of $10,000 was effected with the Phœnix Insurance Company of Brooklyn, through their agent, in the name of the firm, Hamilton & Cook, against loss or damage by fire on the "grain in store, their own, or held by them in trust or on commission, or sold and not delivered," this being the usual method of taking insurance among commission merchants in Toledo. A loss occurred on the 21st of December, whilst the policy was running; and the insurance company declining to pay it, Hamilton & Cook sued them. The defence set up was:

1st. Want of insurable interest in Hamilton; and,

2d. Misrepresentation and concealment with regard to the interest.

The plaintiffs, on the trial, waived any claim for grain belonging to themselves individually, and asked a verdict but for the value of the grain which was received on commission; asking to recover this amount for the use and benefit of the owners.

At the request of the plaintiffs' counsel, the court charged that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy; and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regarded its preservation from fire, it was entirely in the control of the railroad company, and so understood by the company's agent when the policy was effected, the omission to inform the defendant of the agreement of dissolution could not be considered a concealment which would avoid the policy. Verdict and judgment

went accordingly for the plaintiffs, and the case now came here on exceptions to the charge of the court.

Mr. A. C. Bradley, for the insurance company, plaintiff in error:

1. Cook, alone, at the date of the policy and of the fire, *held* the grain in question in trust or on commission. He alone was the bailee, and alone had an insurable interest. Hamilton had no custody, was no bailee, and had no insurable interest. No action, therefore, can be maintained; not a joint action, because the interest was sole, nor a sole action, because the policy was joint.

It is true, indeed, that a nominal partner is sometimes regarded as a real one. But he is only so regarded adversely and to subject him to the obligations of a partner. And this is but right. When a partner retires from a firm, still keeping his name before the public, he can mean nothing but to give to the firm a credit which it does not deserve. Here, Hamilton, whose name doubtless made the firm attractive, withdraws; leaving his name in order that business might be drawn to Cook. This was a deception. Such an act may subject a person to the liabilities of a partner; but surely should not give him a partner's benefits and advantages.

2. The policy was void for fraud. Hamilton and Cook *had* been partners under their joint names, and the firm name continued to be used by each of them from the time of the dissolution till the time of insurance, and afterwards. Every such use of that name was a representation that both persons still composed that firm. Such representation was untrue and of a material matter. Had Cook been alone held out to the world less insurance would have been needed. It was obviously Hamilton's name which made the firm attractive and brought business to it. Indeed, but for the *prestige* which Hamilton's name gave the firm, it does not appear that Cook would have had any business or needed any insurance. Then, again, if Hamilton, in addition to the name, had felt the care and exercised the natural

vigilance of a partner, he might have prevented the destruction of the building. At all events, every untruth uttered with an intent to deceive others for the benefit of the party uttering it, or the benefit of his friends, is a fraud on all parties deceived. Here the company's agent issued the policy believing both Hamilton and Cook to be partners. They so represented themselves; herein committing a fraud on the company. That fraud vitiates the policy.

Mr. P. Phillips (*a brief of Messrs. Waites, Bissell, and Gorill being filed*), *contra.*

Mr. Justice BRADLEY delivered the opinion of the court.

The principal question is whether insurance can be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners.

Hamilton was a nominal partner, held out to the world as a member of the firm by his own consent, and affected with every liability of a partner—to consignors, creditors, and all persons dealing with the concern. The plaintiffs contended that this was a sufficient interest to support the policy, at least, in a commission business where insurance was effected for the benefit of the real owners of the goods. It is objected that a nominal partner is only held such, adversely, for the purpose of subjecting him to liability as a partner, and not for the purpose of giving him the benefits and advantages of a partner. But whilst this is generally true, the interest of a nominal partner in the liabilities of the firm is such as should entitle him, in the absence of any attempt to defraud, to join with the other members of the firm in effecting insurance on the property of the concern. As Chief Justice Jones remarked in *De Forest* v. *Fulton Insurance Co.*,* "It does not always require either the legal title or beneficial interest in the property to entitle a party otherwise connected with it to effect a valid insurance upon it. A carrier may insure goods he contracts to convey, yet he has neither the

* 1 Hall, 110.

legal title nor the beneficial interest in them, but he is responsible for their loss."

But the case of a nominal partnership carried on for the benefit of one or more members of the firm seems to be still stronger. For it may be said that the legal interest in the business is in the firm, whilst the beneficial interest is in the member or members for whose use it is carried on. In the case before us, as to all the world except themselves, the legal interest of the business was in the firm of Hamilton & Cook, the beneficial interest in Cook alone. And as it is well settled that a trustee or agent may insure the property held in that capacity for the benefit of all concerned, there seems to be no valid reason why persons constituting a nominal partnership should not be competent to effect insurance as well as transact the other business in the partnership name. In this case the intimate connection of Hamilton with the business, and the fact that as between him and the consignors of the grain insured, the railroad company with whom it was stored, and all other persons dealing with it, he was actually a partner, and incurred all the responsibility and risk attaching to that relation, constituted, in our judgment, a sufficient basis of interest for effecting insurance in the name of the firm. The doctrine, established by a number of cases, that nominal partners are proper plaintiffs, as well as proper defendants, in actions by and against the firm, lends support to this view.*

The case before us is an especially strong one, from the fact that the policy was effected mainly for the benefit of the owners of grain held by Hamilton & Cook on commission. The action was prosecuted solely for their benefit. The plaintiffs, on the trial, expressly waived any claim for grain belonging to themselves, individually, and asked a verdict only for the value of the grain which was received on commission, claiming to recover this amount for the use and

* See Parsons on Partnership, 134; Story on Partnership, §§ 241, 242; 1 Smith's Leading Cases, 1190.

benefit of the owners. The liberality with which policies of this character, issued to trustees and agents for the benefit of parties really interested, are sustained by the courts, is stated and illustrated in the case of *The Insurance Company* v. *Chase*,* decided by this court in December Term, 1866. As looking in the same direction, we may refer to the cases in New York which decide that a sale by a retiring partner to his copartners of his interest in the firm, is not a breach of the condition that the policy shall be void if the property is conveyed without the consent of the insurance company.†

The other ground of defence was, that there was misrepresentation and concealment, as to the interest, which vitiated the policy. It is laid down by this court in *The Columbian Ins. Co.* v. *Lawrence*,‡ that an applicant for insurance is bound to fair dealing with the underwriters, and, in his representations, should omit nothing which it is material for them to know; nothing which would probably influence the mind of the underwriter in forming or declining the contract. This doctrine is repeated in several subsequent cases, and is undoubtedly the well-established law. But its application will depend upon the circumstances of each case. Generally speaking it is undoubtedly true that any misrepresentation with regard to the ownership of the property insured will suffice to vitiate the policy. But policies are constantly applied for and granted on general stocks of goods, held in trust or on consignment for numerous and unknown parties. In such cases it is not expected, nor would it be possible, that the insurers should be informed as to the ownership. They are content to insure for the benefit of whom it may concern. Of course, an omission to disclose the ownership in such cases cannot be regarded as an improper concealment. In some cases it is important to the insurers to know who is interested in the property, in order that they may form a judgment as to the probable

* 5 Wallace, 509.

† See Hoffman *v.* Ætna Insurance Company, 32 New York, 405, and cases there reviewed.

‡ 2 Peters, 49.

care which will be bestowed in its custody and preservation. In other cases this knowledge may be a matter of little importance. In the case before us the grain insured was in the sole custody and care of the railroad company, and the insurers were little concerned, as, in fact, their agent made no inquiry, who were the owners or interested therein; and no representation was made on the subject, farther than to make the application in the name of Hamilton & Cook, and to ask for a general insurance on the grain in the elevator, whether their own, or held by them in trust, or on commission, &c. Under the circumstances of the case we do not see that anything material for the insurers to know, or that would have had a bearing on taking the risk or fixing the premium, was concealed or withheld. On this subject the court, at the request of the plaintiffs' counsel, charged the jury that if no representations were made with regard to the individuals who composed the firm of Hamilton & Cook, there was no misrepresentation which could avoid the policy, and that if Hamilton & Cook had no actual care or custody of the grain, but that so far as regards its preservation from fire, it was entirely in the control of the railroad company, and so understood by the defendant's agent when the policy was effected, the omission to notify the defendant of the agreement of dissolution could not be considered a concealment which would avoid the policy. Under the circumstances of the case, we do not think there was any error in this charge.

JUDGMENT AFFIRMED.

Mr. Justice CLIFFORD dissented.

GORHAM COMPANY *v.* WHITE.

1. The acts of Congress which authorize the grant of a patent for designs contemplate not so much utility as appearance; and the thing invented or produced for which a patent is given is that which gives a peculiar or distinctive appearance to the manufacture or article to which it is applied.
2. It is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense, and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design.
3. It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same,—if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other,—the one first patented is infringed by the other.

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

The Patent Act of August 29th, 1842,* enacts:

"That any citizen or citizens, &c., who by his, her, or their own industry, genius, efforts, and expense may have invented or produced any *new and original design for a manufacture, whether of metal* or other material or materials, or any new and original design for the printing of woollen, silk, cotton, or other fabrics, or any new and original design for a bust, statue, or *bas relief*, or composition in *alto or basso relievo*, or any new and original impression or ornament, or to be placed on any article of manufacture, the same being formed in marble or other material, or any new and useful pattern, or print, or picture to be either worked into or worked on, or printed, or painted, or cast, or otherwise fixed on any article of manufacture, or *any new and original shape or configuration of any article of manufacture* not known or used by others before his, her, or their invention or production thereof, and prior to the time of his, her, or their application for a patent therefor, and who shall desire to obtain an exclusive property or right therein to make, use, and sell, and vend the same or copies of the same to others, by them to

* 5 Stat at Large, 543.

be made, used, and sold, may make application in writing to the Commissioner of Patents expressing such desire, and the commissioner on due proceedings had may grant a patent therefor. The duration of said patent shall be seven years."

A subsequent act,* that of March 2d, 1861, re-enacts in substance the same things apparently, and makes some changes in the term of duration of the patent.

With these statutes in force, Gorham & Co., in July, 1861, obtained a patent for a new design for the handles of tablespoons and forks, which under the name of the "cottage pattern" became extremely popular; the most successful plain pattern, indeed, that had been in the market for many years.† The pattern is represented, further on, in the left-hand design on page 521. Gorham & Co. subsequently transferred their patent to the Gorham Manufacturing Company.

In the year 1867 one White obtained a patent for a design which he alleged to be original with *him* for the same things; the handles, namely, of forks and spoons; and in 1868 a patent for still another design. Both of his designs are shown on the page already mentioned, alongside of the cottage pattern and to its right hand on the page.

Manufacturing and selling quantities of spoons and forks of these last two patterns, White interfered largely with the interests of the Gorham Manufacturing Company, and that company accordingly filed a bill in the court below to enjoin his making and selling spoons and forks under either of his patents. The validity of the patent held by the Gorham Company was not denied, nor was it controverted that the defendant had sold spoons and forks which had upon them designs bearing some resemblance to the design described in the patent held by the company. But it was contended

* 12 Stat. at Large, 248.

† It was testified that the money value of the patent was "immense;" at least $50,000; a very small percentage, as it appeared, of new patterns introduced into the market succeeding; 1 in 40 said one silversmith; not 1 in 20 said another; 1 in 10 to 1 in 50 said a third; 1 in 18 or 20 said a fourth, and it costing from $3000 to $4000 even to those in the trade, to make the necessary dies to introduce any new pattern.

that none of the designs on these articles thus sold were substantially the same as the design covered by the patent held by the company, and that they were independent of anything secured by that patent. The sole question, therefore, was one of fact. Had there been an infringement? Were the designs used by the defendant substantially the same as that owned by the complainants?

Much testimony upon the question of infringement was taken; the complainant producing witnesses sworn to by Mr. Tiffany, of the well-known firm of jewellers and silversmiths in New York, as representative men "in the trade under consideration, unexceptionable in every respect."

Mr. Cook, of the firm of Tiffany & Co., said:

"I should say that the patterns are substantially like one another. I think that an ordinary purchaser would be likely to take one for the other."

E. W. Sperry, a manufacturer of forks and spoons for thirty-seven years:

"I should say that the pattern of White of 1867 was certainly calculated to deceive any one but an expert. Any person seeing one of the Gorham spoons or forks at one end of the table, and one of White's at the other end, could not tell the difference between them; not one man in fifty."

Martin Smith, of Detroit, a merchant jeweller, dealing for ten years in silver spoons and forks:

"In my judgment, if the White pattern were placed in a store different from that in which they had before seen the cottage pattern, seven out of ten customers who buy silverware, would consider it the same pattern."

Theodore Starr, of the Brooklyn firm of Starr & Marcus, merchant jewellers, eight years in business:

"The essential features I consider the same. The resemblance is such as would mislead ordinary purchasers."

H. H. Hayden, of New York, engaged for several years in manufacturing and selling metal goods:

"The two designs are substantially alike. In my opinion

they would mislead, and would be considered one and the same pattern by the trade; by the trade, I mean customers as well as manufacturers."

Alfred Brabrook, agent of Reed & Barton, manufacturers at Taunton, Massachusetts, of Britannia metal and German silver plated ware:

"In many cases the resemblance would mislead ordinary purchasers."

J. T. Bailey, head of the house of Bailey & Co., large dealers in jewelry and silver at Philadelphia:

"I don't think that an ordinary observer would notice any difference *on a casual observation.* But, to a person skilled in this business, of course there are some small differences. I mean to say, that should an ordinary observer come into my store and take up the two spoons, he would not notice any difference in them, unless desired to examine them critically."

H. D. Morse, of the house of Crosby, Morse & Foss, jewellers and venders of silver in Boston, and whose department had been to a good extent designing:

"They are substantially the same thing so far as appearance goes; substantially alike in regard to general effect, with a slight difference in outline. An ordinary observer would see no difference between them."

James A. Hayden, the selling agent of Holmes, Booth & Haydens, manufacturers of spoons in New York:

"The similarity is so strong that it would not be detected without an examination more careful than is usually made by purchasers of such goods."

Mr. C. L. Tiffany, head of the house of Tiffany & Co., aged 55, and dealing in forks and spoons for more than twenty-five years:

"I have no hesitation in saying they are substantially alike. I think the resemblance would mislead ordinary purchasers; and being asked I certainly might myself be misled by it, if not beforehand told of the difference and my attention particularly called to it."

Statement of the case.

Edward C. Moore, a member of the firm of Tiffany & Co., a designer:

"There *is a substantial difference between the patterns*, but the design of all is so nearly alike that ordinary purchasers would be led to mistake the one for the other. It seems to me that is what the pattern of White is made for."

Newell Mason, carrying on jewelry business in Chicago and Milwaukee for twenty years at least:

"The patterns *are substantially different*, but ordinary purchasers, seeing them apart, would mistake one for the other. If the cottage pattern had acquired popularity in the market, White's would derive advantage from that fact."

John Gleave, a die-sinker:

"Ordinary purchasers would be misled by the similarity between the cottage pattern and White's of 1867, *but not on a second comparison.* If an ordinary purchaser had not a sample of the cottage pattern before him, he would be apt to consider White's of 1867 to be the same with it."

James Whitehouse, a designer in the employ of Tiffany & Co.:

"From my knowledge and experience in the business, I do not regard the designs of White as original, and think that they were suggested by the design of Gorham & Co."

Morse, another of Tiffany & Co.'s designers:

"From my experience as a designer I should think that the designer of White's must have intended to imitate the effect in spirit of the previous design, and yet make a difference. If spoons and forks made after the cottage pattern had obtained a reputation and position in the trade, spoons and forks of White's pattern would find sale by reason of the popularity of the forks and spoons just mentioned. I should think they would be sold for the same thing."

Mr. *Henry* B. Renwick, aged 52, residing in New York, whose principal occupation was the examination of machinery, inventions, and patents, and who during the last sixteen or seventeen years had frequently been examined as

expert in the courts of the United States for various circuits:

"I have examined the spoons and forks made by White, and I have no doubt that they are in all respects substantially identical with the Gorham design. Respecting the design secured by White's patent of 1868, I have some little doubt, owing to the increased concavity of outline in the broad part or head of the handle; but still think the better opinion is that it is within the description and drawing of the Gorham patent.

"By the expressions 'substantially' like, I mean such an identity as would deceive me when going as a purchaser to ask for one spoon, if I should be shown another which was slightly different in minute points either of contour or ornamentation. In the present instance, if I had been shown the cottage patterns, at one end of a counter, and afterwards had been shown White's pattern of 1867, at the other end of the same counter, I should have taken both sets of exhibits to have been of the same design, and I did, in fact, take them so to be until I laid them side by side and compared them minutely.

"I do not think that every change either in contour or in ornamentation makes a substantial difference in the design. For instance, take one of Rogers's statuettes of soldiers,* and I do not think the design would be substantially changed so as to evade his patent by substituting a rifle for a musket, or by taking the bayonet off the musket, supposing one existed in the design, or by changing boots for shoes, or *vice versâ*. Or in the case of one of his soldiers drinking, by substituting a round tub for a square trough, or a glass for a tin cup. In a design for a carpet I should think the design was substantially preserved if the main features of the figure were unaltered, and the minor portion were changed by such changes as the substitution of a ring of flowers for a ring of stars, or quatrefoil for a trefoil ornament, and other such changes. In the present instance, the contours of the plaintiff's articles and the articles manufactured by the defendant are not only substantially but almost identically the same. The Gorham articles and the articles manufactured by White all have a threaded or reeded pattern

* These were small casts, very popular at the time, from models by Mr. John Rogers, of military figures and scenes during the late rebellion.—REP.

round the edges, all have a slight knob or boss at the point where there are small shoulders marking the dividing line between the stem and head of the handle, and all have knobbed ornaments near the extreme end of the handle and adjacent to the pointed projection which, in all of them, forms that end. There are, no doubt, minor differences; for instance, the Gorham spoon has two threads along the shank where the defendant's have only one, but that one is of nearly equal width with the two and gives the same effect. In the Gorham the knobbed ornament at the shoulders is connected with the outer thread, while in White's it is connected with the inner thread; but these knobbed ornaments in both are in the same place and have the same general effect; it requiring a very minute examination and actual comparison of the spoons side by side, as I am now making, to perceive and describe the distinction. In the Gorham spoons the knobbed ornaments on the inner reed are at the head of the spoon turned upwards and outwards. In White's they are turned downwards and inwards, and the reed is flattened out, but the substantial shape or contour at the end of the spoon, and the ornamentation thereof, by raised ornaments, partly connected and partly unconnected with the threading, is substantially the same in both. Now, I conceive the Gorham patent to be for a design, one element of which is the contour or shape of the handle, and the other the ornamentation thereof. The shapes of all the exhibits, as I have before stated, except that made under White's patent of 1868, are identical, and regarding it, as I have already stated, I think the better opinion is that it is within the line of substantial identity. It might deceive me, I think, in going from one store to another, but not if shown me in the same shop where I had just examined one of the Gorham spoons. With regard to the ornamentation, the substantial characteristics of the design described in the patent are that there shall be a threaded pattern around the edges of the handle, with a small knobbed ornamentation at the shoulders, as before stated; and also at the head of the handle, where it is finished by a pointed projection. I have already said that I find these substantial characteristics in White's spoons, and as I hold the views with regard to substantial identity and design which I have endeavored to express, I therefore state, as before, that the manufactures of White's are, without doubt, in my mind, substantially identical with the Gorham design, and that the better

opinion is that the design in White's patent of 1868 is in the same category, although altered in degree of concavity at the head of the handle, as I have before stated."

On the part of the defendant an equal number of witnesses were produced, including Henry Ball, the senior member of the well-known firm of Ball, Black & Co., New York City, a silversmith and jeweller, who had been in this business since 1832, and numerous other persons, die-sinkers, engravers, editors of scientific publications, persons engaged in the inspection of designs, solicitors of patents, &c. All these testified, one after the other, and pretty nearly in the same words, that the designs were "substantially different;" one witness that they were "substantially different, both in shape and design." Mr. *Edward* S. Renwick, especially, an expert, whose reputation for competency is well known, swore positively that the designs represented by all of the White's manufactures were substantially different from the Gorham design, and stated in detail the items of difference; as thus:

"In the Gorham design the stem of the handle, between the shoulders and the bowl, has a second thread upon it, which is parallel with and inside of the boundary thread. No such second thread is found in White's."

He pointed out fifteen differences of this mechanical kind between the Gorham design and White's, patented in 1867, and sixteen differences between the Gorham design and that of White patented in 1868.

The court below considered that there was no infringement. It said:

"The question to be determined is, whether the designs of the White patents are or are not substantially the same as the design of the plaintiffs' patent. Each design may properly be considered as composed of two elements, the outline which the handle presents to the eye when its broader face is looked at, and the ornamentation on such face. If the plaintiffs' design be compared with the White design of 1867, a general resemblance is found between such outlines in the two designs. In other

words, if the ornamentation on the handle in the plaintiffs' design formed no part of such design, and such design were confined to the form of the outline before mentioned, it would be difficult to say that the plaintiffs' design and the White design of 1867 were not substantially identical. But the moment the ornamentations on the faces of the two handles come to be considered, striking differences appear between the plaintiffs' design and the White design. In the former, the outer thread is broken at the end of the handle, at the shoulders, and at the junction of the handle with the bowl; while, in the latter, such thread is continuous around the entire handle, from the junction of the stem with the bowl or fork back to the same point, it having there the form of a Gothic arch. In the former, the outer thread is, at the shoulders, turned inward to form rosettes, which present the appearance of two parts twisted together; while, in the latter, the outer thread is continuous. In the former, there is, on the stem of the handle, on each side, extending from the shoulders to the bowl or fork, an inner thread parallel with and inside of the outer thread; while, in the latter, there is no such inner thread. In the former, the inner threads on the enlarged end of the handle turn outward from each other towards the end of the handle, so as to form diverging scrolls; while, in the latter, such inner threads, as they approach the end of the handle, turn inwards and form re-entering scrolls. In the former, the scrolls of the inner threads form, at the end of the handle, a part of the outline boundary of the handle; while, in the latter, such scrolls are entirely inside of such outline boundary. In the former, the end of the handle is formed by a tip inserted between the two diverging scrolls into which the inner threads are formed; while, in the latter, the continuous outer thread forms such extreme end. In the latter, a figure in the form of a shield is inserted between the scrolls into which the inner threads are formed and the outer thread; while, in the former, no such figure is found, and no place exists where it could be inserted. In the latter, there is, on each side, a third and short thread, extending from the said scroll to the widest part of the handle; while no such thread is found in the former. In the former, the inner thread on the enlarged end of the handle abuts, at the shoulder next the stem, against the scroll or rosette into which the outer thread is there formed, and looks as if it were a continuation of the outer thread on the stem passed

under the said scroll; while, in the latter, the inner thread on the enlarged end of the handle is, at the shoulders, turned into a scroll or rosette, and has no appearance of being a continuation of the outer thread in the stem. In the former, the inner threads on the stem unite in a swell or boss near the bowl or fork; while no such swell or boss is found in the latter. It is also to be noted, that, in the former the outline at the end of the enlarged end of the handle has the form of a portion of a trefoil; while, in the latter, it has the form of a Gothic arch; and that, in the former, the surface of the enlarged end between the threads is swelled between the shoulders, and such swell is gradually flattened towards the widest part of the handle, so that the swell at such part is substantially different in appearance from the swell at the shoulders; while, in the latter, the swell is substantially the same from the shoulders to the broadest part of the enlarged end.

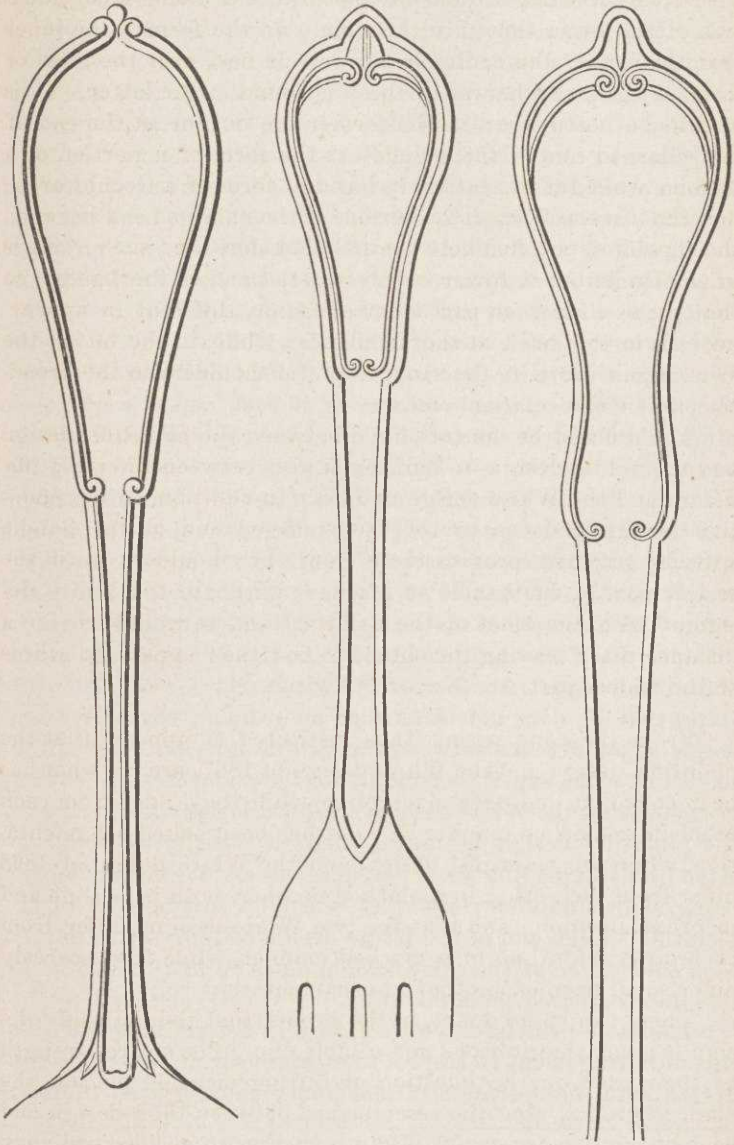
"The differences thus observed between the plaintiffs' design and the White design of 1867, exist also between the plaintiffs' design and the White design of 1868. In addition, in the plaintiffs' design, the contour of the enlarged end of the handle spreads outward progressively from the shoulders until the widest part of the handle is reached; while, in the White design of 1868, the sides of the enlarged end turn inward for a distance after leaving the shoulder and then spread outwards to the widest part.

"From the comparisons thus instituted, it appears that the plaintiffs' design and the White design of 1867, are, in what has been called outline, very much alike, while they differ from each other in a marked manner in what has been called ornamentation, while the plaintiffs' design and the White design of 1868 differ from each other in a marked manner, both in outline and in ornamentation; and that the two White designs differ from each other in outline in a marked manner, while they scarcely differ at all from each other in ornamentation.

"There can be no doubt, in the proofs, that the plaintiffs' design is a very meritorious and salable one. The entire strength of their case, on the question of infringement, is put on the claimed ground, that the resemblance between their design and each of the two designs of White is such as to mislead ordinary purchasers and casual observers, and to induce them to mistake

Diagrams.

GORHAM CO. WHITE, 1867. WHITE, 1868.



the one design for the other. It is argued that the merit of a design appeals solely to the eye, and that if the eye of an ordinary observer cannot distinguish between two designs, they must in law be substantially alike. In the present case, it is asserted that the eye of the ordinary observer is and will be deceived when looking at a handle of the plaintiffs' design and a handle of either of the designs of White, because, in addition to the resemblance in contours, the handles have all of them a threaded pattern around the edges, and small knobbed ornamentations at the shoulders, and small knobbed ornamentations near the end, and a pointed projection at the end, and that the general effect on the eye of the ordinary observer is not and will not be modified by the differences which have been pointed out.

"It is impossible to assent to the view, that the test in regard to a patent for a design is the eye of an ordinary observer. The first question that would arise, if such a test were to be admitted, would be, as to what is meant by 'an ordinary observer,' and how he is to exercise his observation One of the witnesses for the plaintiffs* testifies that the plaintiffs' design and the White design of 1867 are sufficiently alike to mislead ordinary purchasers as to their identity, but not on a second examination; and that if an ordinary purchaser did not have before him a sample of the plaintiffs' design, he would be apt to consider the White design of 1867 to be the same pattern as the plaintiffs' design. Another of the witnesses† for the plaintiffs states that he does not think that an ordinary observer would notice any difference between the two designs on a casual observation. The expert‡ examined for the plaintiffs testifies that, in saying that the White designs are substantially identical with the plaintiffs' design, he means such an identity as would deceive him when going as a purchaser to ask for one spoon and being shown another; and that when he saw articles of the plaintiffs' design and of the White design of 1867, separately, he took them to be of the same design, until he laid them side by side and compared them minutely.

"The same principles which govern in determining the question of infringement in respect to a patent for an invention connected with the operation of machinery, must govern in deter-

* John Gleave, *supra*, p. 515. † J. T. Bailey, *supra*, p. 514.

‡ Henry B. Renwick, *supra*, p. 516.

mining the question of infringement in respect to a patent for a design. A design for a configuration of an article of manufacture is embraced within the statute as a patentable design, as well as a design for an ornament to be placed on an article of manufacture. The object of the former may solely be increased utility, while the object of the latter may solely be increased gratification to a cultivated taste addressed through the eye. It would be as reasonable to say that equal utility should be the test of infringement in the first case, as to say that equal appreciation by the eye should be the test of infringement in the latter case. There must be a uniform test, and that test can only be, as in the case of a patent in respect to machinery, substantial identity, not in view of the observation of a person whose observation is worthless, because it is casual, heedless, and unintelligent, and who sees one of the articles in question at one time and place and the other of such articles at another time and place, but in view of the observation of a person versed in the business of designs in the particular trade in question—of a person engaged in the manufacture or sale of articles containing such designs—of a person accustomed to compare such designs one with another, and who sees and examines the articles containing them side by side. The question is not whether one design will be mistaken for another by a person who examines the two so carelessly as to be sure to be deceived, but whether the two designs can be said to be substantially the same when examined intelligently side by side. There must be such a comparison of the features which make up the two designs. As against an existing patented design, a patent for another design cannot be withheld because, to a casual observer, the general appearance of the latter design is so like that of the earlier one as to lead him, without proper attention, to mistake the one for the other. The same test must be applied on the question of infringement.

"Applying these principles to the evidence in this case, and comparing the designs of White with the plaintiffs' design, it is satisfactorily shown, by the clear weight of testimony, that the designs of White are not substantially the same as the plaintiffs' design. The strength of the testimony of the witnesses on the part of the plaintiffs themselves leads to this conclusion. The substance of the evidence of the most intelligent of them, persons in the trade, is merely to the effect that the White designs

are not substantially the same as the plaintiffs' design, but were intended to appear to be the same to an ordinary purchaser, and will so appear to him, but that a person in the trade will not be deceived, by the resemblance, into purchasing an article of the one design for an article of the other.

"A patent for a design, like a patent for an improvement in machinery, must be for the means of producing a certain result or appearance, and not for the result or appearance itself. The plaintiffs' patent is for their described means of producing a certain appearance in the completed handle. Even if the same appearance is produced by another design, if the means used in such other design to produce the appearance are substantially different from the means used in the prior-patented design to produce such appearance, the later design is not an infringement of the patented one. It is quite clear, on a consideration of the points of difference before enumerated, between the plaintiffs' design and the designs of White, that each of the latter is substantially different from the former in the means it employs to produce the appearance it presents. Such is the undoubted weight of the evidence, and such is the judgment of the court."

The Circuit Court accordingly decreed a dismissal of the bill, and from that decree the Gorham Company brought the case here, where, after an elaborate and interesting argument by *Messrs. C. M. Keller and C. F. Blake, for the appellants, and Messrs. G. Gifford and W. C. Witter, contra,*—

Mr. Justice STRONG delivered the opinion of the court.

The sole question is one of fact. Has there been an infringement? Are the designs used by the defendant substantially the same as that owned by the complainants? To answer these questions correctly, it is indispensable to understand what constitutes identity of design, and what amounts to infringement?

The acts of Congress which authorize the grant of patents for designs were plainly intended to give encouragement to the decorative arts. They contemplate not so much utility as appearance, and that, not an abstract impression, or picture, but an aspect given to those objects mentioned in the

acts. It is a new and original design for a manufacture, whether of metal or other material; a new and original design for a bust, statue, *bas relief*, or composition in *alto* or *basso relievo;* a new or original impression or ornament to be placed on any article of manufacture; a new and original design for the printing of woollen, silk, cotton, or other fabrics; a new and useful pattern, print, or picture, to be either worked into, or on, any article of manufacture; or a new and original shape or configuration of any article of manufacture—it is one or all of these that the law has in view. And the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture, or article to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public. It therefore proposes to secure for a limited time to the ingenious producer of those appearances the advantages flowing from them. Manifestly the mode in which those appearances are produced has very little, if anything, to do with giving increased salableness to the article. It is the appearance itself which attracts attention and calls out favor or dislike. It is the appearance itself, therefore, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense. The appearance may be the result of peculiarity of configuration, or of ornament alone, or of both conjointly, but, in whatever way produced, it is the new thing, or product, which the patent law regards. To speak of the invention as a combination or process, or to treat it as such, is to overlook its peculiarities. As the acts of Congress embrace only designs applied, or to be applied, they must refer to finished products of invention rather than to the process of finishing them, or to the agencies by which they are developed. A patent for a product is a distinct thing from a patent for the elements entering into it, or for the ingredients of which it is composed, or for the com-

bination that causes it. We do not say that in determining whether two designs are substantially the same, differences in the lines, the configuration, or the modes by which the aspects they exhibit are not to be considered; but we think the controlling consideration is the resultant effect. Such was the opinion of Lord Chancellor Hatherly in *McCrea* v. *Holdsworth.** That was a suit to restrain an infringement of a design for ornamenting a woven fabric. The defence was a denial that the design used by the defendants was the same as that to which the plaintiff was entitled. The ornament on both was, in part, a star, but on one it was turned in an opposite direction from that in the other; yet the effect of the ornament was the same to the eye. The Lord Chancellor held the important inquiry was whether there was any difference in the effect of the designs, not whether there were differences in the details of ornament. "If," said he, "the designs are used in exactly the same manner, and have the same effect, or nearly the same effect, then, of course, the shifting, or turning round of a star, as in this particular case, cannot be allowed to protect the defendants from the consequences of the piracy." This seems most reasonable, for, as we have said, it is the effect upon the eye which adds value to articles of trade or commerce. So in *Holdsworth* v. *McCrea,*† Lord Westbury said, "Now, in the case of those things in which the merit of the invention lies in the drawing, or in forms that can be copied, the appeal is to the eye, and the eye alone is the judge of the identity of the two things. Whether, therefore, there be piracy or not is referred to an unerring judge, namely, the eye, which takes the one figure and the other figure, and ascertains whether they are or are not the same." This was said in a case where there was nothing but a drawing of the design.

We are now prepared to inquire what is the true test of identity of design. Plainly, it must be sameness of appearance, and mere difference of lines in the drawing or

* 6 Chancery Appeal Cases, Law Reports, 418.

† 2 Appeal Cases, House of Lords, 388.

sketch, a greater or smaller number of lines, or slight variances in configuration, if sufficient to change the effect upon the eye, will not destroy the substantial identity. An engraving which has many lines may present to the eye the same picture, and to the mind the same idea or conception as another with much fewer lines. The design, however, would be the same. So a pattern for a carpet, or a print may be made up of wreaths of flowers arranged in a particular manner. Another carpet may have similar wreaths, arranged in a like manner, so that none but very acute observers could detect a difference. Yet in the wreaths upon one there may be fewer flowers, and the wreaths may be placed at wider distances from each other. Surely in such a case the designs are alike. The same conception was in the mind of the designer, and to that conception he gave expression.

If, then, identity of appearance, or (as expressed in *McCrea* v. *Holdsworth*) sameness of effect upon the eye, is the main test of substantial identity of design, the only remaining question upon this part of the case is, whether it is essential that the appearance should be the same to the eye of an expert. The court below was of opinion that the test of a patent for a design is not the eye of an ordinary observer. The learned judge thought there could be no infringement unless there was "substantial identity" "in view of the observation of a person versed in designs in the particular trade in question—of a person engaged in the manufacture or sale of articles containing such designs—of a person accustomed to compare such designs one with another, and who sees and examines the articles containing them side by side." There must, he thought, be a comparison of the features which make up the two designs. With this we cannot concur. Such a test would destroy all the protection which the act of Congress intended to give. There never could be piracy of a patented design, for human ingenuity has never yet produced a design, in all its details, exactly like another, so like, that an expert could not distinguish them. No counterfeit bank note is so identical in appear-

ance with the true that an experienced artist cannot discern a difference. It is said an engraver distinguishes impressions made by the same plate. Experts, therefore, are not the persons to be deceived. Much less than that which would be substantial identity in their eyes would be undistinguishable in the eyes of men generally, of observers of ordinary acuteness, bringing to the examination of the article upon which the design has been placed that degree of observation which men of ordinary intelligence give. It is persons of the latter class who are the principal purchasers of the articles to which designs have given novel appearances, and if they are misled, and induced to purchase what is not the article they supposed it to be, if, for example, they are led to purchase forks or spoons, deceived by an apparent resemblance into the belief that they bear the "cottage" design, and, therefore, are the production of the holders of the Gorham, Thurber, and Dexter patent, when in fact they are not, the patentees are injured, and that advantage of a market which the patent was granted to secure is destroyed. The purpose of the law must be effected if possible; but, plainly, it cannot be if, while the general appearance of the design is preserved, minor differences of detail in the manner in which the appearance is produced, observable by experts, but not noticed by ordinary observers, by those who buy and use, are sufficient to relieve an imitating design from condemnation as an infringement.

We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other.

Applying this rule to the facts of the present case, there is very little difficulty in coming to a satisfactory conclusion. The Gorham design, and the two designs sold by the defendant, which were patented to White, one in 1867, and the other in 1868, are alike the result of peculiarities of outline, or configuration, and of ornamentation. These make

up whatever is distinctive in appearance, and of these, the outline or configuration is most impressive to the eye. Comparing the figure or outline of the plaintiffs' design with that of the White design of 1867, it is apparent there is no substantial difference. This is in the main conceded. Even the minor differences are so minute as to escape observation unless observation is stimulated by a suspicion that there may be diversity. And there are the same resemblances between the plaintiffs' design and the White design of 1868, and, with a single addition, the minor differences are the same. That additional one consists in this: At the upper part of the handle, immediately above the point where the broader part widens from the stem with a rounded shoulder, while the external lines of both designs are first concave, and then gradually become convex, the degree of concavity is greater in the White design. How much effect this variance has must be determined by the evidence. In all the designs, the ornament is, in part, a rounded moulding or bead along the edge with scrolls at the shoulders and near the top. There are, however, some diversities in this ornament, which are discoverable when attention is called to them. In the plaintiffs' the bead is interrupted at the shoulders and at the tip by the scrolls, while in both the designs of White it is continued unbroken around the scrolls. In the plaintiffs' the scrolls turn inward at the shoulders and outward at the tip. In the White design they turn inward both at the shoulders and at the upper end. But there are the same number of scrolls in all the designs, and they are similarly located, all having the appearance of rosettes. In all the external bead is formed by a depressed line running near the edge of the handle, but in the plaintiffs' there is an inner line, making a second very thin bead, nearly parallel to the external bead common to them all. In the White designs this inner line is wanting on the stem of the handle, though not on the broad part, but as the single line is wider it presents much the same appearance as it would present if divided into two. There are other small differences which it is needless to specify.

What we have mentioned are the most prominent. No doubt to the eye of an expert they are all real. Still, though variances in the ornament are discoverable, the question remains, is the effect of the whole design substantially the same? Is the adornment in the White design used instrumentally to produce an appearance, a distinct device, or does it work the same result in the same way, and is it, therefore, a colorable evasion of the prior patent, amounting at most to a mere equivalent? In regard to this we have little doubt, in view of the evidence. Both the White designs we think are proved to be infringements of the Gorham patent. A large number of witnesses, familiar with designs, and most of them engaged in the trade, testify that, in their opinion, there is no substantial difference in the three designs, and that ordinary purchasers would be likely to mistake the White designs for the "cottage" (viz., that of the plaintiffs). This opinion is repeated in many forms of expression, as, that they are the same pattern; that the essential features are the same; that seven out of ten customers who buy silverware would consider them the same; that manufacturers as well as customers would consider them the same; that the trade generally would so consider them; that, though there are differences, they would not be noticed without a critical examination; that they are one and the same pattern, &c., &c. This is the testimony of men who, if there were a substantial difference in the appearance, or in the effect, would most readily appreciate it. Some think the White designs were intended to imitate the other, and they all agree that they are so nearly identical that ordinary purchasers of silverware would mistake one for the other. On the other hand a large number of witnesses have testified on behalf of the defendant that the designs are substantially unlike, but when they attempt to define the dissimilarity they specify only the minor differences in the ornamentation, of which we have heretofore spoken. Not one of them denies that the appearance of the designs is substantially the same, or asserts that the effect upon the eye of an observer is different, or that ordinary purchasers, or

even persons in the trade, would not be led by their similarity to mistake one for another. Their idea of what constitutes identity of design seems to be that it is the possibility of being struck from the same die, which, of course, cannot be if there exists the slightest variation in a single line. They give little importance to configuration, and none to general aspect. Such evidence is not an answer to the complainants' case. It leaves undisputed the facts that whatever differences there may be between the plaintiffs' design and those of the defendant in details of ornament, they are still the same in general appearance and effect, so much alike that in the market and with purchasers they would pass for the same thing—so much alike that even persons in the trade would be in danger of being deceived.

Unless, therefore, the patent is to receive such a construction that the act of Congress will afford no protection to a designer against imitations of his invention, we must hold that the sale by the defendant of spoons and forks bearing the designs patented to White in 1867 and 1868 is an infringement of the complainants' rights.

DECREE REVERSED and the cause remitted with instructions to enter a decree in ACCORDANCE WITH THIS OPINION.

Justices MILLER, FIELD, and BRADLEY dissented.

MORGAN *v.* UNITED STATES.

Where the owners of a vessel let her to the government in time of war,—they officering and manning her and agreeing to keep her in repair, and fit for the service in which she was engaged—and they to take the marine risks, but the government the war risks—*Held*, that a stranding of the vessel incurred by her attempt to cross a bar, in charge of a government pilot, upon an order of the quartermaster of the government when the wind was high and the water low—the quartermaster having seen the vessel strike on a previous attempt to cross, and he giving the present, a second, order with a full knowledge of the danger of crossing, and

against the judgment of both the master and pilot, because the exigencies of the service in his judgment required the attempt to be made—was to be regarded as a marine risk and not a war risk, and that the owners and not the government should bear the loss.

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

Morgan let, on the 1st of March, 1865, a vessel to the United States by a charter-party, by whose terms the owners were to keep the vessel tight, stanch, manned, victualled, and apparelled, and fit for merchant service; and the United States were to pay $182.25 *per diem*.

The United States were to employ the vessel and pay the *per diem* "until the vessel is returned to the said Morgan, in Philadelphia, in the same order as when received, ordinary wear and tear, damage by the elements, collision at sea or in port, bursting of boilers, and breakage of machinery excepted." The charter was to continue in use as long as the War Department required the vessel. The owners were to bear the marine risk, the United States the war risk.

Under the charter-party the vessel was, in July, 1865, at Brazos St. Iago, Texas, and was, by the quartermaster there, ordered to receive on board certain troops and stores, and to proceed as soon as this was done to New Orleans, Louisiana.

The bar at the mouth of the harbor of Brazos is difficult and dangerous, and when the vessel was ready to proceed on the voyage the wind was high and the water on the bar low. The quartermaster, being informed of the difficulty, ordered a tugboat to aid in taking the vessel over the bar, and in tow of this tugboat and in charge of a pilot in the service of the United States the vessel proceeded to the bar and attempted to cross, but struck, and the hawser of the tow having parted, the vessel swung round inside the bar and returned to the landing. In this attempt she received injuries which, if time could have been allowed, could have been repaired in two days, and at a cost of $500 or $600.

The quartermaster again ordered the vessel to proceed to sea. This order was given with a full knowledge of the

danger of crossing the bar, and against the judgment of both the master of the vessel and the pilot; but the *exigencies of the service*, in the judgment of the quartermaster, required the attempt to be made.

The master, under this order of the quartermaster, again attempted to cross the bar in tow of the steamtug, and under charge of the government pilot, as before, but struck heavily and was finally dragged over the bar by the tug, aided by her own steam-power. In this attempt she sustained such damage that she was compelled to use her steam-pump to save her from sinking, and the troops and stores being discharged, she was towed to New Orleans by a government transport.

The repair of the damages so sustained in crossing the bar cost $6890, of which the government paid $4283, and refused to pay any further part thereof.

The said vessel was laid up and detained in making the said repairs in all forty-five and a half days, for which time the *per diem* allowance stipulated in the charter-party at $182.25, amounted to $8292.37, of which the government paid $2281.06, as wages and board of the master and crew who were employed in aiding in the repairs of the vessel; and refused to pay any further amount on account of the said *per diem*. Thereupon Morgan filed a petition in the Court of Claims for the whole amount claimed and unpaid. That court dismissed the petition.

Messrs. N. Chipman, Carlisle, and McPherson, for the claimants:

The injury was caused by a war risk; the imminent danger of the country at that moment and the urgent necessity of sending troops forward to New Orleans without delay. The quartermaster had "a full knowledge of the danger of crossing the bar." He knew he was going into the jaws of destruction; but "the exigencies of the service"—those same exigencies which compel men to walk up to the cannon's mouth—compelled him to give the desperate order. The order was obeyed and the catastrophe followed. What was

all this but the risks of war, "war risks?" Such risks the United States were to bear.

Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

These claimants cannot recover, on the ground that the injuries to their vessel were occasioned by the tortious act of the quartermaster at Brazos in compelling their master, against his better judgment, to proceed to sea; nor would their condition be improved if the vessel had been actually impressed into the service of the United States, for in neither case would the Court of Claims have jurisdiction.* Congress has wisely reserved to itself the right to give or withhold relief where the claim is founded on the wrongful proceedings of an officer of the government.

The case, therefore, rests wholly on the contract of affreightment, and the inquiry is, which of the parties to it must bear the loss caused by the stranding of the claimants' vessel on the bar at the mouth of the harbor of Brazos.

The stipulations in the contract applicable to this subject leave no room for doubt how the question should be answered. The United States, being in a state of war, found it necessary to hire the injured vessel for the purpose of transporting troops and munitions of war to different ports and places, and entered into a contract with her owners to carry this purpose into effect. The vessel was to be officered and manned by the owners, who agreed at all times to keep her in repair and fit for the service in which she was engaged. In no sense were the United States the owners of the vessel, for they had nothing to do with her management, and only reserved to themselves the right to say how she should be loaded and where she should go. In the condition of things then existing it became necessary to make provision for two classes of perils. This was done; the

* Reed *v.* United States, 11 Wallace, 591; United States *v.* Kimbal, 13 Id. 636.

Statement of the case.

United States assuming the war risk, while the owners of the boat agreed to bear the marine risk. If, therefore, the stranding of the boat in going over the bar was owing to a peril of the sea, her owners, and not the government, must bear the loss. That the high wind and low stage of water were the efficient agents in producing this disaster are too plain for controversy. They were the proximate causes of it, and in obedience to the rule "*causa proxima non remota spectatur*" we cannot proceed further in order to find out whether the fact of war did not create the exigency which compelled the employment of the vessel. If it did, it was known to the owners when the charter-party was formed, who, with this knowledge, became their own insurers against the usual sea risks, and must abide the consequences of their stipulation.

There is a certain degree of hardship in this case growing out of the peremptory order of the quartermaster to proceed to sea, but this is outside of the contract, and, if worthy of being considered at all, must be addressed to another department of the government.

JUDGMENT AFFIRMED.

UNITED STATES *v.* JUSTICE.

Where a contractor with the United States and the United States disagree as to what is justly due to the contractor, and the question is referred to a commission constituted by proper authority to audit such claims as that of the contractor's, and the commission finds a certain sum as justly due, and the contractor receives that sum, he cannot sustain a claim in the Court of Claims for a further sum, even though he have given no receipt in full.

APPEAL from the Court of Claims; the case, as found by it, being thus:

On the 12th of August, 1861, Philip S. Justice, by a letter to Lieutenant Treadwell, first lieutenant of ordnance, proposed to supply the Ordnance Department with 4000 rifled

muskets, "*similar in style and finish to the sample deposited*" with the said lieutenant, at $20 each.

On the next day Lieutenant Treadwell, inclosing Justice's proposition, wrote to General Ripley, then chief of ordnance, at Washington, as follows:

"I inclose a proposition from Mr. Justice to furnish rifle muskets, calibre .69. I have examined a sample of the musket, and *it is a good serviceable arm*, .69 calibre, clasp bayonet, long-range sight, original percussion barrel, and well finished."

On August 16th, 1861, General Ripley replied to Lieutenant Treadwell, saying:

"You are authorized to accept Mr. Justice's proposition."

And on August 17th, 1861, Lieutenant Treadwell wrote to Justice as follows:

"I am authorized by the Ordnance Department to accept your proposal of August 12th, to furnish for the United States 4000 rifled muskets, calibre $\frac{69}{100}$ of an inch, *equal in all respects to the sample deposited with me*, at $20."

In execution of the contract, Justice delivered from time to time, 2174 rifled muskets, all of which were inspected by subordinate officers appointed by Lieutenant Treadwell, and received under his official certificate that they had been duly inspected and approved. "These arms" thus furnished, "were not," as the Court of Claims found, "in all respects, similar to the sample arm, but on an average not inferior to it; which was far from being a standard or first-class arm of the United States. It was not equal to the Springfield rifle. And the Justice arms were far from being a first-class arm."

Before the 19th of March, 1862, *all* the muskets, with the exception of 472, had been received and approved; and had also been paid for by the United States at the contract price of $20 each. These 472 were delivered on the said 19th of March; on which day Lieutenant Treadwell acknowledged their receipt, and issued to Justice a final voucher showing that there was due to him for these and some other arms, the sum of $19,171.25.

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The muskets thus furnished by Justice were given to three regiments of Pennsylvania volunteers in the field, who were accordingly armed with them. Some time afterwards the Ordnance Department receiving serious complaints from these regiments, alleging that the arms were unserviceable, ordered reinspections of the arms in the hands of these troops, as well as of those remaining yet in store. The reinspection of the arms in the hands of each of these regiments was made by Lieutenant Harris, of the Ordnance, Colonel Doubleday, of the Artillery, and Assistant Inspector-General Buford. It showed that many of the guns were made up of parts of condemned muskets; that the stocks were of soft, unseasoned wood, and were defective in construction; that most of the barrels abounded in flaws; that many locks were defective, that the sights had been merely soldered on, and came off with the gentlest handling; that the bayonets bent "like lead," and came off, and that so many of the guns burst that the men were afraid to use them; and that as a whole, the arms in the hands of the troops were "a worthless lot of arms, unfit for service and dangerous to those who used them."

Of the arms yet in store, the inspection was made by Lieutenant Treadwell in person. He reported to General Ripley, March 28th, 1862, certifying to the ability and integrity of the armorers who had conducted the original inspection, and saying:

"My instructions to them were to inspect the arms, and reject all that, in their opinion, were not good and serviceable, and in all respects fit for use in the field. I think that these instructions were complied with. The arms were offered to me at a time when the demand for arms was most imperative, and it was deemed desirable to accept them, to meet, in part, the pressing demand. Comparing the arms with those of our own manufacture, none would pass inspection, and it was not supposed that they should be subjected to any such standard; but that all that were passed on inspection would prove good and serviceable, was believed. Examining two boxes of these arms in store, I do not find them to have the radical defects com-

plained of, nor can I account for the very different report of their inspection at camp, and that made to me by my inspectors. I find the sights are soldered on, but on tapping twenty of them with a hammer sufficiently hard to dent them, none were found to come off, or even started."

On the 20th of March, 1862, the Chief of Ordnance informed the Secretary of War that he deemed it his duty to withhold payment of the above voucher for $19,171.25, given by Lieutenant Treadwell to Justice, until the matter could be investigated. He submitted to the secretary all the papers on the subject, and suggested that the matter be referred to the two gentlemen (Messrs. Joseph Holt and Robert Dale Owen) who had been authorized by the secretary to audit and adjust all claims and contracts in respect to ordnance, arms, and ammunition. This recommendation was approved by the Secretary of War, who referred the voucher of March 19th, together with all the papers and reports received from the Ordnance Office, to this committee, who were then sitting in Washington. The committee proceeded to investigate the character and quality of the arms. Justice was in Washington during its session, appeared before it, and was persistent and energetic in presenting his claim. He offered no evidence, but presented several written arguments.

The first report of the committee, who declared that they "considered it proved that Mr. Justice had not fulfilled his obligation to furnish a serviceable arm to the government," was condemnatory of *all* the guns, as "not suitable in workmanship or material for the public service." Fourteen days after it was made, Justice succeeded in convincing the commissioners that in thus condemning *all* the guns they had fallen incontestably into error. He also protested that as his arms were accepted after inspection by government authority, the government could not rightfully decline to pay for all so accepted. A second report corrected the error which Justice had pointed out, and found that the "complaints of inferiority" related chiefly to 2174 rifled muskets. Accordingly the committee decided, in their second report,

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that the payments theretofore made to Justice be considered as "on account," and that $15 per gun only be allowed for the 2174 rifled muskets, instead of $20, the contract price.

[In their first report they had decided that $15 was an ample equivalent for *all* the arms.]

The Second Auditor was now instructed by the Chief of Ordnance to settle Justice's account on the voucher of March 19th for $19,171.25, on "the basis of this decision;" and he accordingly stated an account between Justice and the United States, in which he charged the contractor as with an overpayment of $5 each for *all the rifled muskets already paid for at the contract price of* $20, and deducted $5 from the contract price of each of the muskets embraced in the voucher of March 19th. As the whole number of these arms was, as has been seen, 2174, the amount deducted from the face of that voucher was thus $10,870, leaving on the face of the account $8301.25 as the balance due.

On the 8th of December, 1862, Justice received from the Treasurer of the United States certificates of indebtedness amounting to $6000, and a treasury draft for $2301.25, amounting in all to $8301.25; the receipt of which he acknowledged in a letter to the Treasurer of the United States, thus:

"SIR: Have received your letter of draft, together with the following certificates of indebtedness, payable to blank, viz.:

No. 36,332 to No. '337, *i. e.*, 6 of $1000, . . .	$6000 00
Draft for balance remitted, ...	2301 25
Amounting to, ...	$8301 25

"Issued on war warrant No. 3405 for that amount in favor of Philip S. Justice.

"Scale No. 12,051.

"Yours, &c.,

"P. S. JUSTICE.

"F. E. SPINNER,
"Treasurer of the United States."

No other receipt was ever given by Justice for the amount, or any portion of the amount, of the above voucher of March 19th. The amount thus received left a balance of that

voucher amounting to $10,870 unpaid; and to recover this balance, Justice, on the 16th of October, 1867 (nearly five years, it will be seen, after receiving it), brought suit in the Court of Claims.

The Court of Claims found for the claimant the $10,870 claimed, and the United States appealed.

Mr. G. H. Williams, Attorney-General, and Mr. W. McMichael, Assistant Attorney-General, for the United States:

The arms were not according to contract. They were not serviceable, nor did they equal the sample furnished by the contractor; the Court of Claims having found, as a fact, that "these arms, furnished by claimant, were not in all respects similar to the sample arm." This, although qualified by the subsequent language of the court, nevertheless goes to show a failure to comply with the condition of Lieutenant Treadwell's letter of August 17th, 1861, which provides that the muskets shall be "equal in all respects to the sample deposited with" him.

These arms were furnished directly by the claimant. The presumption is that he knew their defective character, and he cannot take advantage of a nominal inspection at the arsenal by subordinates, to screen himself from the consequences of the careful inspections of the responsible officers whose reports are above referred to. The obligation of his contract with the United States was, not that his arms should pass an inspection, but that they should be of a certain standard, and this obligation he failed to fulfil.

The result of the examination of Justice's claim by the commission, was a settlement by which he was allowed at the rate of $15 each for the defective arms.

Mr. Justice accepted the sum allowed, after having attended the meetings of the commission, and with full knowledge that it was intended as a final payment of his account; and by this action he was concluded from making any further claim on the United States. *United States* v. *Adams*,* *United States* v. *Child*,† *United States* v. *Clyde*,‡ rule the case.

* 7 Wallace, 463. † 12 Id. 232. ‡ 13 Id. 35.

Argument for the contractor.

Mr. J. Hubley Ashton, contra:

Only two questions can be made in this case:

I. Whether the claimant is barred from maintaining this action by reason of having received a part of the amount due upon the voucher of March 19th? And if not—

II. Whether, upon the facts found by the Court of Claims, the government has any legal defence to this suit for the contract price of the arms?

I. The facts of this case do not bring it within the decisions in the *Adams*, *Child*, and *Clyde* cases cited on the other side.

1. The claimant here had a valid and regular executory contract to furnish a number of arms of a certain description at a fixed price. It was made upon the exhibition of a sample, which proved satisfactory to the agents and experts of the government. The arms were to be inspected by those agents and experts according to that sample; and they were to be rejected if found unsatisfactory, and accepted if found satisfactory. Arms of the kind contracted for were delivered, and upon full inspection by the experts of the United States, were accepted and appropriated to the contract. Regular vouchers, officially executed by the inspecting officer, were issued to the contractor. All these vouchers, except one, were duly paid, and the transactions closed.

Complaints being afterwards made against the arms by the troops, the Ordnance Bureau stopped the payment of this voucher. The arms yet in store were reinspected by Lieutenant Treadwell, a trusted officer of the Ordnance Department, who made the contract; and he again certified to their character and quality as conformable to the contract. Then an investigation is undertaken by a board of civilians. Inspections directed by them also show the arms to be on an average equal to the sample. They first make a report, condemning all the claimant's arms as unserviceable, and suggesting a deduction from the whole contract price of the entire lot, and then, nearly a month after, they take this back, and find that only about half of the arms had been

the subject of complaint. This report, on its face, is founded on a misconception of the contract of the claimant, viz.: that it was to furnish what they call a "serviceable" arm, when he expressly stipulated to supply an arm equal to the sample. When the claimant exposes the error of the first report, he protests against any repudiation of the contract on the part of the government. Afterwards he receives, in due course of business, from the Treasury Department, a draft for $2301.25 and certificates of indebtedness for $6000, and, in a letter to the United States Treasurer, he *acknowledges the receipt of this draft and these certificates, amounting in all to* $8301.25. He gives no other receipt or acquittance. He is not required to take the treasury draft and the certificates of indebtedness, or the amount payable on them, in full satisfaction of the whole claim, and he never acknowledged that amount to be in full satisfaction of the whole claim. No such condition is imposed or fulfilled. Plainly, then, the doctrine of the *Adams*, the *Child*, and the *Clyde* cases do not apply.

In the *Child* case, Miller, J., by words carefully chosen and expressive, rests the decision upon the effect of the *receipt in full*, required by the government before payment, and executed by the claimant contemporaneously with the payment of the amount allowed. Bradley, J., in the *Clyde* case does the same.

2. But there are other legal differences between this case and the preceding cases, which render the decisions in the latter inapplicable to the former.

The nature and character of the demand here involved were different from those asserted in the cases cited. The present demand here was for an ascertained and liquidated, and an undisputed amount. It was liquidated by the legal voucher of the proper officer, acknowledging the fact of the contract, the receipt of the arms, their character as in compliance with the contract, the price payable, and the sum due It was liquidated in the full and absolute sense of the rule of the common law, that the payment of a smaller sum *cannot* be an accord and satisfaction of a larger debt which is fixed

and liquidated. By that rule, such a debt as this cannot be discharged by the payment of a less sum, even though it be acknowledged to be received in full satisfaction. This is well settled by the old and authoritative case of *Cumber* v. *Wane*, reported by Strange,* to be found with notes in 1 Smith's Leading Cases.† *A fortiori*, it cannot be discharged by the receipt of a less sum, which is *not* agreed to be taken in full satisfaction.

Neither in the *Adams*, nor the *Child*, nor *Clyde* case was the claim liquidated in any absolute sense. In the *Child* case, Miller, J., speaks of the claim as "an unliquidated and controverted demand." And in the *Clyde* case the amount was not liquidated until the account was stated by the quartermaster at the reduced rate of the Quartermaster-General.

But this was also an undisputed claim. Undisputed in a legal sense.

The theory of the government would appear to have been, that a better or different contract ought to have been made than was made, or that the claimant ought to have furnished better arms than the inspectors were willing and bound to accept, or than the agreement provided for.

The proceedings of the accounting officers, made by instructions from the Chief of Ordnance, cannot be presumed to have been known to the claimant. But if they could be, the character and amount of the deduction from the face of the voucher preclude the idea that he took, or meant to take, the reduced amount in satisfaction of this debt. By the manner of stating this account in the auditor's office, the government proposed to enforce *restitution* of over $8000 already in the pocket of the claimant, for arms not embraced at all in this voucher. A reduction was made of the price, not only of 472 muskets in this voucher, but of over 800 *other* muskets long since paid for; and the supposed overpayment on account of these latter was deducted from the amount certified to be payable in the last voucher. Justice could not, in receiving this parcel of the amount due, have

* 1 Strange, 426.

† Part 1, p. 556.

meant to acquiesce in this arbitrary action in respect to his debt, and intended to abide by it. For what was the proceeding, but the assertion by the government of a claim against this party for damages for an alleged breach of warranty, the adjudication of that claim in its own favor, and the execution of that judgment out of the money due the claimant in its own hands?

The appearance of the claimant before the Ordnance Board cannot prejudice his right to recover.

The board took cognizance of the matter upon the action of the War Department. The claimant protested before it that, as his arms were accepted after inspection by government authority, the United States could not rightfully decline to pay for all so accepted. In other words, he denied there, as he had the right to do, that there was power anywhere to release the government from the obligation of its contract with him; though he was, at the same time, not unwilling to aid the board or the War Department in any proper investigation of the facts of the case.

The board fell into two errors in regard to facts connected with the transaction. One (in regard to the number of arms complained of) was corrected; the other (in regard to the actual terms of the contract) remained uncorrected, apparently, on the face of their report to the Ordnance Bureau.

Their report was rendered to that bureau. The claimant received nothing from them; was not required to receive anything or to assent to anything; and did not assent to anything.

He cannot, of course, be affected by the action of the accounting officers, under orders of the Ordnance Bureau.

II. Have the United States, independently of the theory of satisfaction, any legal defence to this claim?

1. There is no dispute in regard to the fact and terms of the contract, or that it was made by competent authority of the Ordnance Department. Nor will it be denied that where a party offers to furnish articles like guns to the government, whose officers are experts, subject to the inspection of those officers by a sample delivered and examined at the time,

and, after acceptance of the offer, the guns are delivered and inspected, approved and received in good faith, the government is concluded by the determination of its official inspectors and advisers, and cannot withhold payment of the agreed price on the ground that the guns were not suitable to the public service. It has a right to reject and refuse to pay for all arms disapproved in good faith by its inspectors, as not conformable to the sample. But it is bound to pay for all actually approved and accepted in good faith by these agents. As the contractor cannot complain of the decision of the inspectors, rejecting his arms for want of conformity to the sample, so the government cannot repudiate the action of these inspectors in receiving the arms, as, in their judgment, equal to the sample.

Even if the reports of the inspection of the arms in the hands of the regiments in the field were competent legal evidence of their condition, they would be entitled to little or no consideration; for, independently of the abuse to which all arms in the hands of raw troops at that period were necessarily subjected, it is well known that the volunteers of that day all desired to be armed with muskets manufactured by the government; and that this did, in point of fact, lead to unfair treatment of other arms.

The idea of fraud or collusion between Justice and the inspectors in this case is not and cannot be pretended.

Yet, further, there was no express warranty by Justice of the quality of the sample arm deposited with Lieutenant Treadwell. That officer thought the sample arm a serviceable one, but Justice never warranted it as such. The government might have chosen to require a warranty, but failing to do so the rule of *caveat emptor* must govern. The case shows, however, affirmatively, that Lieutenant Treadwell and the other trusted inspectors of the government regarded the sample as a good, serviceable arm; and fully believed that as all the arms received were equal to the sample, they were likewise suitable and serviceable weapons.

2. Nor has the Court of Claims found that any of the arms were *not* "good, serviceable arms, fit in all respects for

use in the field." The court has found that the sample arm "was not equal to the Springfield rifle," and that "the Justice arms were far from being a first-class arm." But that might well be, and yet the arms might nevertheless have been good and serviceable. Indeed, Lieutenant Treadwell states that while they were inferior to the Springfield arm, and could not have passed inspection if subjected to *that* standard, he believed they would prove "good and serviceable."

3. But, lastly, the Court of Claims has found, affirmatively, that these arms, while not in all respects similar to the sample arm, were, on an average, not inferior (*i. e.*, were equal in quality) to the sample.

If this finding can be interpreted as meaning (which we doubt) that some of the guns were not equal to the sample, as it does not show how many were so inferior to the sample, nor how much less they were worth than the contract price, the finding can be of no avail to the United States in maintaining this defence. The finding is, therefore, for all the judicial purposes of this case, equivalent to an ascertainment that all the guns were equal in quality to the sample arm.

Mr. Justice DAVIS delivered the opinion of the court.

It is impossible to escape the conclusion, after reading the evidence which the Court of Claims incorporates with its finding of facts in this case, that the arms obtained by the government from Justice were unserviceable and even unsafe for the troops to handle, whether they were equal to the sample arm furnished by him or not. It is true they had been accepted by Lieutenant Treadwell, with whom the contract of purchase was made, after inspection by subordinates appointed by him, but when difficulty arose in relation to them he said, in justification of his conduct, and to show his interpretation of the contract, that he had instructed these inspecting officers to reject all the arms that, in their opinion, were not good and in all respects fit for use in the field. That the duty with which these officers was charged

was, to say the least, negligently performed is evident from the result of the subsequent inspection which was ordered. This inspection was in response to serious complaints from three regiments of Pennsylvania volunteers which had been armed with the muskets in controversy. The arms of each regiment were inspected by a separate commissioned officer of experience, and all united in condemning them as worthless, and, indeed, dangerous to those using them.

In this state of case, the Chief of the Ordnance Bureau informed the Secretary of War that he deemed it his duty to withhold payment of one of the vouchers given for these arms until the matter could be further investigated, and recommended reference of the entire subject to the commission then sitting in Washington, which had been constituted by the proper authority "to audit and adjust all contracts, orders, and claims on the War Department in respect to ordnance, arms, and ammunition." In accordance with this recommendation the case was referred to this commission, which, after full investigation, and a patient hearing given to Justice, reported that he had not fulfilled his obligation to furnish "a serviceable arm" to the government, and fixed a basis on which the account should be settled. This basis of settlement was adopted, and in accordance with it the Secretary of the Treasury, on the 8th of December, 1862, pursuant to a requisition of the War Department, drew his warrant on the Treasurer of the United States in favor of Justice for the amount found due by the accounting officers, which was transmitted to him, and receipt of it acknowledged by letter. After waiting until the five years' limitation to actions of this kind had nearly expired, he brings this suit to recover the balance of the claim, according to the original contract price, and the question is, can he maintain it?

In the nature of things, during such a war as we have just passed through, contracts would in many instances be made by some of the numerous subordinates intrusted with that duty, in disregard of the rights of the government, or if properly made, would be so unfaithfully executed that the

public service would suffer unless their further execution were arrested. Although every just government is desirous of making full compensation to its creditors in all cases of fair dealing, it cannot afford to recognize this rule where an imposition has been practiced upon it. Of necessity it acts through agents, and cannot, therefore, assure its own protection as natural persons in dealing with each other. What, then, was the proper course for the government to pursue in relation to these disputed claims? To pay them, in the existing condition of the country, would set a bad example and lead to the most ruinous consequences, and to withhold payment altogether until Congress or the Court of Claims should act, would be, in case the claim should prove to be meritorious, a hardship. Common fairness required that some mode should be adopted for the speedy adjustment of these differences between the creditor and the government, and what better mode for the accomplishment of this object than the appointment of a commission of intelligent and disinterested persons to hear the respective parties and to settle the allowance to be made? We know by the history of the times, that several commissions for this purpose were appointed during the war, and the record discloses the fact that when this controversy arose there was one sitting in this city, constituted by the Secretary of War under the authority of the President, to audit and adjust claims of like character. It is fair to presume, in the absence of anything in the record to the contrary, that the creation of this commission was a necessity produced by the number and magnitude of the claims presented to the Ordnance Bureau which the head of it deemed unjust, and was, therefore, unwilling to pay. This commission, like all others with similar authority, possessed no judicial power, nor did it attempt to exercise any. It could not compel a claimant to appear before it and submit to its action, nor would its decision, in case there were no adversary party, have any conclusive effect. If, on the contrary, the party whose claim was disputed went before it, participated in its proceedings, and took the sum found to be due him without protest, he can-

not afterwards be heard to say that he did not accept this in full satisfaction of his demand. This voluntary submission and reception of the money is an acceptance on the part of the claimant of the mode tendered him by the government for the settlement of his disputed claim, and precludes him from any further litigation.

It is always in the power of parties to compromise their differences. One way of doing this is by arbitrators, mutually chosen, but from such submission neither party is at liberty to withdraw after the award is made. The condition of the government creditor is better than this, for if dissatisfied with the allowance made him by the commission, he can refuse to receive it, or can accompany his receipt of it, if he chooses to take it, with a proper protest. This protest is necessary to inform the government that the compromise is rejected, and that this rejection leaves the claimant free to litigate the matter in dispute before the Court of Claims. If with this knowledge and under these circumstances the money is paid, there can be no just cause of complaint on either side, and the status of the parties is not affected by anything which transpired before the commission.

These views dispose of this case. If it be conceded that the guns obtained from Justice were equal to the sample furnished, still it is manifest they were not a serviceable arm, and were besides unsafe, and that the government withheld the payment of the voucher because the contract, in the opinion of the Ordnance Bureau, was unfaithfully executed. The contract, with the accompanying papers, were referred to the ordnance commission. Justice appeared before it to contest the position of the government, and, although he offered no evidence, argued his case in writing. And as if to leave no doubt of his intention to abide the result, he succeeded, two weeks after the commission had reported on the matter to the Chief of Ordnance, in getting an error against him corrected. And when this was done, and the account stated in conformity with this correction, he receives the amount allowed him without an intimation of dissatisfaction. It is difficult to suppose that at this time

Statement of the case.

he had any other purpose than to acquiesce in the decision which was made. If his purpose were different, why the long delay in instituting suit? It is hard to believe that the course subsequently taken was not the result of an afterthought.

The recent cases in this court of the *United States* v. *Adams* and the *United States* v. *Child* are like this in principle, although they contain some elements not applicable here.

JUDGMENT REVERSED and the cause remanded to the Court of Claims, with instructions to DISMISS THE PETITION.

UNITED STATES *v.* HUNT.

In construing the third section of the act of March 3d, 1865, increasing the commutation price of officers' subsistence, by fixing it at fifty cents per ration, "provided that said increase shall not apply to the commutation price of the rations of any officer above the *rank* of *brevet* brigadier-general"—a brigadier-general is to be regarded as above the rank specified.

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

The third section of the act of March 3d, 1865,* enacts:

"That from and after the first day of March, 1865, and during the continuance of the present rebellion, the commutation price of officers' subsistence shall be fifty cents per ration: *Provided*, That said increase shall not apply to the commutation price of the rations of any officer above the *rank* of *brevet* brigadier-general, or of any officer entitled to commutation for fuel or quarters."

Under this enactment, Hunt, a brigadier-general of volunteers, filed a petition in the Court of Claims claiming commutation pay. The United States demurred; thus admitting, of course, that the petitioner was a brigadier-general during

* 13 Stat. at Large, 497.

the recent civil war, and was not entitled to commutation for fuel and quarters. He was then entitled to the increased commutation for subsistence if his rank of brigadier was not above the rank of brevet brigadier. The question was, was it such?

The Court of Claims gave judgment in favor of the petitioner, and the United States appealed, assigning as error that a brigadier-general is above the rank of a brevet brigadier-general, and therefore not entitled to the benefit of this provision.

Mr. T. J. D. Fuller, in support of the ruling below:

The solution of the question turns upon the word "rank," as used in the proviso, and the equality of rank of a brigadier with a brigadier *by brevet.* The Court of Claims held that the rank of each is the same, and consequently that the one is not above or below the other. Its construction of the act was that the proviso should be read as though the word "*brevet*" were not there.

Now we submit that in *rank* there is no difference between a brevet brigadier, or, more accurately speaking, a brigadier-general *by brevet* and a brigadier-general without a brevet; that the one may command the other, by virtue of the priority of the date of their respective commissions when thrown together, under circumstances contemplated by the usage of the service and the Articles of War. What is rank in the army? The grades of rank in the army, as known and recognized by law at the present time, are—

1. General.
2. Lieutenant-general.
3. Major-general.
4. Brigadier-general.
5. Colonel.
6. Lieutenant-colonel.
7. Major.
8. Captain.
9. Lieutenants—first and second.

The law knows no intermediate rank, or grade of rank,

between the enumerated grades or ranks. There is but one rank of brigadier-generals. There are not two ranks of brigadier-generals, the one inferior or the other superior; but one grade, one rank. There are two kinds of rank *in tenure*, but nevertheless equal. "Rank" by brevet is rank in the army generally, as contradistinguished from rank in some one of the divisions of the army. Campbell's Dictionary of Military Science defines "*brevet*" to be "a rank in the army higher than the regimental commission held by an officer. In garrison and brigade duties it confers precedence according to seniority."

Mr. C. H. Hill, Assistant Attorney-General, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Our duty in construing acts of Congress is to give the meaning to words which Congress obviously intended. It may be that in the strict sense of the military term the rank of brigadier and brevet brigadier is the same, but it is well known that practically they are by no means identical, and that the position of the former is, in many respects, better than that of the latter. Brevet rank is conferred, in theory at least, for special and meritorious services by commission from the President, under authority of an act of Congress. It does not entitle the holder to corresponding pay or command, except under special circumstances defined by law. When an officer holding rank by brevet receives a regular commission of the same grade, he is said to be promoted and to become a full officer of that rank. These circumstances make it evident that there is a difference of military position between an officer by brevet and an officer by regular commission, and that the one is less eligible than the other. And Congress seems to have referred to this distinction of position rather than to technical rank in the provision under consideration. If they did not, why employ the word brevet at all? Why use the term brevet brigadier when it was so easy to say brigadier, and thus avoid all ambiguity? We think that Congress had in view the distinc-

tion between brevet rank and regular rank, to which we have referred, and regarded the latter as above the former. The practice of the Department of War, as we understand, and of the accounting officers, has been in accordance with this view, and seems to us correct.

JUDGMENT REVERSED.

TURNER *v.* SMITH.

1. Under the act of 6th February, 1863 (12 Stat. at Large, 640), "to amend an act entitled 'An Act for the Collection of Direct Taxes in Insurrectionary Districts, &c., approved June 7th, 1862,'" which said amendatory act was intended to be a *substitute* for the seventh section of the said previous act of June 7th, 1862 (Ib. 422), the commissioners of taxes, though "*authorized*" to bid off property to the United States "at a sum *not exceeding* two-thirds of its assessed value," are not bound so to bid it up so as to make it bring in all cases that much.
2. Under these acts the tax commissioners are not bound to hunt up the real owners. The tax laid is a direct tax on the land and on all the estates, interests, and claims connected with or growing out of it.
3. A rent charge is accordingly cut off and destroyed by a sale of the land.

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

Hannon being owner in fee simple and free from lien of a house and lot in Alexandria, granted out of it by an old-fashioned formal ground-rent deed, with clause of right of re-entry, &c., in 1819, a rent charge of $224 to Moore, with right of distress, re-entry, &c. In 1821 Hannon died insolvent, and the rent not being paid, Moore "took possession" of the house again, though in what mode or whether with any of the requisites of a common law re-entry did not appear.

In 1825 being still in possession he conveyed the rent charge, describing it in form, to one Irwin, and Irwin in 1854 conveyed it *with the lot on which it was charged* to R. M. and J. M. Smith; Irwin and Smith, each respectively, being

in possession of the house and lot, after they became owners of the rent, as Moore had, himself, been after Hannon's death; and each paying the taxes assessed against the house and lot while he held it.

In May, 1861, on the outbreak of the rebellion, Smith abandoned his residence and went within the rebel lines.

On the 5th of August of that year,* Congress passed an act laying a "direct tax of $20,000,000 annually upon the United States," and apportioning the same in a manner which it set forth, among the several States. The act provided particularly for assessing and collecting of the tax, directing that it should be collected from persons at their dwellings, in the first instance; and if not paid should be obtained by distress and sale of personal property; and if persons could not be found, and there was no personal property, then "by public sale of so much of the said property as shall be necessary to satisfy the taxes due thereon, together with an addition of 20 per cent." The act then provided for giving a deed, *but did not in any part declare what should be the effect of the sale or deed, or that it should divest liens of any kind.*

The act authorized each State to assume, assess, collect, and pay its quota of the tax; and the loyal States did do this. In the rebel States nothing could be done.

On the 7th of June, 1862,† Congress passed another act, entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts," &c. The act enacted:

"SECTION 1. That when, in any State, . . . by reason of insurrection or rebellion, the civil authority of the government of the United States is obstructed so that the provisions of the act approved August 5th, 1861 [the act last above mentioned], cannot be peaceably executed, the said direct taxes by the said act apportioned among the several States, &c., shall be apportioned and charged in each, upon all the lands or lots of ground situate therein respectively . . . as the said lands or lots of ground were enumerated and valued under the last assessment and valuation

* 12 Stat. at Large, 294. † Ib. 423.

thereof, made under the authority of said State . . . previous to the 1st day of January, 1861; and each and every parcel of the said lands, according to the said valuation, is hereby declared to be . . . charged with the payment of so much of the whole tax laid and apportioned by said act upon the State, &c., wherein the same is respectively situate, as shall bear the same direct proportion to the whole amount of the direct tax apportioned to said State, &c., as the value of said parcels of land shall respectively bear to the whole valuation of the real estate in said State, according to the said assessment and valuation made under the authority of the same. And, in addition thereto, a penalty of 50 per cent. of said tax shall be charged thereon.

"SECTION 2. That on or before the 1st day of July next, the President by his proclamation shall declare in what States and parts of States said insurrection exists, and thereupon the said several lots or parcels of land shall become charged respectively with their respective portions of said direct tax, and the same, together with the penalty, shall be a lien thereon without any other or further proceeding whatever.

"SECTION 3. That it shall be lawful for the owner or owners of said lots or parcels of lands within sixty days after the tax commissioners herein named shall have fixed the amount, to pay the tax thus charged, &c.

"SECTION 4. That the title of, in, and to each and every piece or parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States; and *upon the sale hereinafter provided for, shall vest in the United States or in the purchasers at such sale, in fee simple, free and discharged from all prior liens, incumbrances, right, title, and claim whatsoever.*

"SECTION 5. That the President of the United States, by and with the advice and consent of the Senate, may appoint a board of three tax commissioners, &c.

"SECTION 7. That the said board of commissioners shall be required, in case the taxes charged on the said lots shall not be paid, . . . to cause the same to be advertised for sale; and at the time and place of sale to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty, and costs, and 10 per cent. per annum interest on said tax, pursuant to said notice; [*and the said commissioners shall at said sale strike off the same severally to the United States, at that sum,*

unless some person shall bid the same or a larger sum,] who shall upon paying the purchase-money . . . be entitled to receive from such commissioners their certificate of sale; which said certificate shall be received in all courts and places as *primâ facie* evidence of the regularity and validity of such sale, and of the title of said purchaser under the same: *Provided*, that the owner of said lots of ground, *or any loyal person of the United States having any valid lien upon or interest in the same*, may at any time within sixty days after said sale appear before the said board of tax commissioners . . . and . . . upon paying the amount of said tax and penalty, with interest, &c., together with the expenses of sale and subsequent proceedings, *may redeem* said lots of land from said sale."

On the 6th of February, 1863,* Congress passed a short "act to amend" this act above so largely quoted, and entitled "An Act for the Collection of Direct Taxes in Insurrectionary Districts," &c. The new act says that the old act shall be amended so as to read as follows in section 7:

"That the said board of commissioners shall be *required*, . . . at the time and place of sale, to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty, and costs, and 10 per centum per annum interest on said tax, pursuant to notice, [in all cases where the owner of said lots or parcels of ground shall not, on or before the day of sale, appear in person before the board of commissioners and pay the amount of said tax, with 10 per centum interest thereon, with costs of advertising the same, or request the same to be struck off to a purchaser for a less sum than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be *authorized*, at said sale, to bid off the same for the United States at a sum *not exceeding two-thirds of the assessed value thereof*, unless some person shall bid a larger sum."]

The part in [ ] of the new section is a change, it will be seen, upon the part of the old one (*supra*, pp. 555–6) in similar [ ].

In a subsequent part of it, this substituted section 7, makes, like the old one, a right of redemption of the land

* 12 Stat. at Large, 640.

sold (within sixty days), "to any loyal person of the United States having any valid lien upon or interest in the same;" with a provision for persons under disabilities, &c.

With these statutes on the statute-book, and the property in Alexandria, mentioned at the beginning of this statement, being assessed on the land-book of Virginia, on the 1st of March, 1864, at $3500, the tax commissioners of the United States (not themselves bidding at all) sold it, in professed pursuance of the acts of Congress, for $1750 (less than two-thirds, $2333, of its assessed value) to one Turner, describing it as a house on Royal Street, between King and Prince Streets at Alexandria, in the State of Virginia, "*said to have belonged to R. M. and J. M. Smith*," and charged to them on the land-book of the State aforesaid for the year 1860.

The rebellion being suppressed the Smiths—*never having offered as "holders of a valid lien" or otherwise to redeem*—brought suit in proper form against Turner to recover certain arrears of the ground-rent. Turner claimed title to the lot free of rent under the sale for taxes, made by authority of the several acts of Congress, already mentioned, for imposing and collecting a direct tax. The decision of the court where the suit was brought was *against* the title thus set up, that is to say, it was in favor of the Smiths, and their rent, and this decision being affirmed in the highest court of the State,* the case was here for review.

Mr. F. L. Smith, for Turner, plaintiff in error:

The length of time in which Moore and those who succeeded him were in possession, that is to say, the lapse of time from 1821 (when Hannon died and Moore resumed possession of his house) to 1864, when this sale was made, is sufficient to raise a presumption of either a re-entry in 1821 with all the requisite forms of the common law, or of a re-lease then or afterwards by Hannon's heirs. After such

* 18 Grattan, 835.

a term as forty-two years, almost any presumption necessary to sustain a party in possession will be made. By such a re-entry or release, a merger took place,* and there ceased to be two separate estates in the one property. The house and lot, free of ground-rent, thus became Smith's; and being regularly sold to Turner, he was owner of it discharged of all incumbrance.

This would all be so on principles of common law, but the fourth section of the act of June 7th, 1862, gives a disincumbered estate to the purchaser, even if the owner of the fee held it incumbered to its entire value. The estate may indeed be defeated by the holder of any valid lien, being a loyal person, if he redeem in the mode specified in the acts. But no such redemption is pretended. In any aspect, therefore, the judgment should be reversed.

Mr. C. W. Wattles, contra:

1. The case showed only that the *owner* of the rent charge took possession of the premises. A re-entry with common-law formalities cannot from this be inferred, nor a release from the heirs of the owner of the ground. The only inference is an act of trespass by the owner of the rent and a violation by him of the rights of his tenant. And this inference is made a certainty by Moore's conveyance of the rent *eo nomine* in 1825 to Irwin, as a thing then existing.

No time will run against a rent charge, so as to divest title or extinguish it. The limitation applies only to the recovery of rent in arrears by distress or action. The estate itself remains for all time unless merged or extinguished. The principle is elementary. The case then is that—

1st. Of a title to the land in Hannon's heirs, in fee simple (subject to the rent), at the time of the tax sale; a corporeal hereditament; and,

2d. Of a fee simple title to the rent charge in the Smiths; an incorporeal hereditament.

Hence there were two separate and distinct estates; one

* Chester *v.* Willes, 1 Ambler, 246.

of them, the land, was sold for the tax; the other, the rent, remained intact.

It would, indeed, be a forced construction to say that an incorporeal hereditament is a lien, incumbrance upon, or a right, title, or claim to land, in the sense contemplated by the act, for the rent may have been held by a citizen most devoted to the cause of the United States, and residing in a State not in insurrection; who could have no notice of a contemplated sale of his property, either directly or by the terms of the act, as it does not provide for a tax upon such species of property.

2. The land was sold for less than two-thirds of its value. This made the sale void. The act of 1863 requires the tax commissioners to bid off the land to the United States "at a sum not exceeding two-thirds of the assessed value." They did no such thing. The assessed value was $3500. Two-thirds of that sum is $2333.33. They sold it for $1750. Literally construed, indeed, the language "*authorized* to bid off" may be but permissive, and not mandatory. But it is a general rule of construction that where power is conferred by statute on public officers in language which, literally construed, is but permissive, the language will be construed as peremptory whenever the power is conferred for the benefit of the public or of individuals. And by no court has this doctrine been declared more emphatically than by this. Witness the case of *Supervisors* v. *United States*,* in which words so little mandatory in form as the words "*may, if deemed advisable*," were construed as imposing a positive and absolute duty; the court citing cases from old reports like Skinner and Salkeld; "leading cases on the subject," which it declares "have been followed in numerous English and American adjudications," to this day. In the present case the authority was conferred for the benefit of the government of the United States, representing the whole public; and the government had a right to claim its exercise by the commissioners as a duty imperative on them. Congress

* 4 Wallace, 435.

could not, by the act of 1863, have intended to leave the commissioners to say what lands should be bid off and what not; any more than it could have so intended by the act of 1862, in which, certainly, it did not so intend. It meant, in all cases, to take the land for the United States if it could be obtained on the terms specified in the act, and to deny authority to the commissioners to sell it to any other purchaser.

Mr. Justice MILLER delivered the opinion of the court.

Two propositions are relied on to defeat the title under the sale for taxes.

1. That the land was sold at the tax sale for less than two-thirds of its assessed value.

2. That the plaintiffs below, in whose favor the judgment was rendered, were the owners of a rent charge on the land, which was not extinguished by the sale for the unpaid taxes.

1. The first of these propositions is founded on the amendment to the seventh section of the act of June 7th, 1862, passed February 6th, 1863. The latter act undoubtedly was intended to be a substitute for the seventh section of the former, and to supersede it entirely. In a case of doubtful construction it is, therefore, important to consider what changes are made by the latter in regard to the matter now in controversy. By the original section the commissioners who were appointed for the collection of the tax were required, at the time and place of sale, to cause the lots and lands to be severally sold to the highest bidder for a sum not less than the tax, penalty, and costs, and 10 per centum per annum interest on said tax, pursuant to notice, and to strike off the same severally to the United States at that sum, unless some person should bid the same or a larger sum.

The amendment says that the commissioners shall be required, "at the time and place of sale, to cause the same to be severally sold to the highest bidder for a sum not less than the taxes, penalty, and costs, and 10 per centum per annum interest on said tax, pursuant to notice; in all cases

where the owners of said lots or parcels of ground shall not, on or before the day of sale, appear in person before the board of commissioners and pay the amount of said tax, with 10 per centum interest thereon, with costs of advertising the same, or request the same to be struck off to a purchaser for less than two-thirds of the assessed value of said several lots or parcels of ground, the said commissioners shall be authorized, at said sale, to bid off the same to the United States at a sum not exceeding two-thirds of the assessed value thereof, unless some person shall bid a larger sum."

The first act and the second are alike in the provision that the land shall be sold to the highest bidder for a sum not less than what is due on it for tax, interest, and cost. This, in both cases, refers to bids by others than the United States. In reference to bids made by the commissioners on behalf of the United States, there is a change. The first statute made it imperative that the commissioner should strike off the land to the United States at the amount of the tax, interest, and costs, unless others bid that or a larger sum; and it is a fair inference that the commissioners were not authorized to bid at all for the land, unless it be called a bid to strike it off to the government, when no one else would take it, for the tax, interest, and costs.

The second statute makes a material change in this part of the law. When the owner does not pay, or request the same to be struck off to a purchaser for a less sum than two-thirds of its value, the commissioners are authorized to bid off the same to the United States at a sum not exceeding two-thirds of such assessed value.

The intention in making this change seems to us to be to remove the restriction by which the United States must either take the land for the taxes, or let it go to whoever would pay the taxes, or any greater sum, if he was the highest bidder. After the amount due was offered the government was, by the first statute, no longer a competing bidder, and the owner was at the mercy of private bidders. Under the new statute the commissioner could become a

competitor after the amount of the tax was bid, with two limitations. First, he should not bid against a purchaser whom the owner, by request, preferred. And, secondly, he should not bid beyond two-thirds of the value.

Instead of being bound to bid that sum, he was *authorized* to bid any sum not *exceeding* that, and could not bid that if the purchaser requested that it might be struck off to a friend for less than that sum. If the language had been that he was authorized to bid it off at two-thirds, it would be a forced and unnatural construction of the section to hold that the words were imperative. The language which would express that idea would be that he was required to do it, or that he should not bid it off for a less sum. But here, while he is authorized to bid, that bid may be for any sum not exceeding two-thirds its value.

But the sale in this case comes within the first category. The United States did not bid at all. A private person bid a sum sufficient to pay the tax, interest, and cost, and the commissioner let him have it, and we see nothing in the statute which forbids it. Certainly we cannot infer because the United States authorized the commissioner in a defined contingency to bid off the land for a sum not *exceeding* two-thirds its value, that he was therefore bound in all cases to make it bring that *much*.

We think there was error in the Appellate Court of Virginia in holding the sale void because this was not done.

2. In the act of August 5th, 1861, apportioning the tax of $20,000,000 among the States, according to population, provision is made for its collection out of the lands within those States, if not paid by the States. Under the provisions of that act it might admit of some doubt whether the tax was in its essence a tax on the land, and on all the various estates into which the fee may have been divided, or was a tax on the owner of the land, and levied on the interest of the owner in it, and on no other subordinate or incorporeal interest. But no tax was ever collected, or any land sold under that act. The States which, in the war for the support of which this tax was levied, supported the General Gov-

ernment, assumed and paid the portion allotted to each. With regard to the States which were in insurrection, Congress passed a new law for the assessment and collection of their portion, under which the sale in this case was made. That act, the statute of 1862, to which we have already referred, directed the commissioners to whom the collection of the tax was intrusted, to take the last assessment of the value of the lands made in each State for State taxation as the basis on which the tax charged to that State by the act of 1861 should be apportioned among the several lots and parcels within that State, and a penalty of fifty per cent. was added in each case for non-payment. The President was directed to declare by his proclamation what States or parts of States were in insurrection, and "thereupon the said several lots or parcels of land became charged respectively with their respective portions of said direct tax, and the same, together with the penalty, became a lien thereon, without any further proceedings whatever." Section three gave a time in which this tax might be paid, and section four proceeds to say that "the title of, in, and to each and every parcel of land upon which said tax has not been paid as above provided, shall thereupon become forfeited to the United States, and upon the sale hereinafter provided for shall vest in the United States, or in the purchaser at such sale, in fee simple, free and discharged from *all liens*, incumbrances, right, title, and claim whatsoever."

There is nothing in the statute which requires the tax commissioners to hunt up the owner, or to make the tax out of personal property of his, or which may be found upon the land. It is clearly a direct tax on the land, and on all the estates, interests, and claims connected with or growing out of the land. All this was forfeited to the United States on non-payment of the taxes, and passed with the sale to the purchaser, subject alone to the right of redemption, which the law allowed. In that respect it was a defeasible title, but in all other respects perfect, complete, and entire. The language of the statute is explicit to this purport, and the policy and necessity of the government, which could not

look after the fugitive and hostile owners, required such a tax, and such a mode of collecting it.

We are of opinion, therefore, that the sale being a valid one the rent charge of the defendant in error was cut off and destroyed by it.

JUDGMENT REVERSED, and the cause remanded for further proceedings IN CONFORMITY TO THIS OPINION.

GREGG *v.* MOSS.

1. A judgment will not be reversed for the rejection of testimony, whether it was in strict principle admissible or not, where the rejection worked no harm to the party offering it.
2. Whether the evidence before a jury does or does not sustain the allegations in a case is a matter wholly within the province of the jury, and if they find in one way, this court cannot review their finding.
3. A. lent to B. & C. a certain sum of money, whether for themselves or for a firm of which all parties were members, was a matter not clear. The money was, however, in fact, put in the firm by B. & C. An agreement was subsequently made, by all the partners, reciting that some had advanced money beyond their shares, and agreeing that each should make a statement of what he *had* advanced, and that the accounts so rendered and agreed upon should remain capital stock, and *that* partner's stock in the partnership. On the trial evidence being given, on the one hand, tending to show that in a statement furnished by A. in professed pursuance of the agreement, he had not included this money lent to B. & C., and on the other that at the time of the agreement he had agreed that he *would* put it in, an instruction was held to be correct which told the jury, that if at the time of the agreement between the partners, A. had assented to treat this money as an advance and to fund it, B. & C. would not remain personally liable on the original loan, if it had in truth been made to them personally; and that the fact that A. did not include the amount in his *statement* of advances made was not material, provided, as already said, that at the time of the agreement he had in fact *agreed* to include it.

ERROR to the Circuit Court for the Northern District of Illinois; the case, as assumed by the court from a bill of ex-

ceptions covering thirty 8vo. pages, in long primer type, without any assignment of errors, having been thus:

Richard Gregg sued W. S. Moss, *in assumpsit*, on this instrument; Kellogg, the party signing it with Moss, having been wholly insolvent.

PEORIA, December 23d, 1856.

RICHARD GREGG, ESQUIRE.

DEAR SIR: Mr. Elder is here, and wants to take the funds with him to pay drafts due to-morrow. It is not right that he should be forced to pay this money for our accommodation. If you will send us two drafts at sixty days, $5000 each, we will return you the money before the expiration of the sixty days. It must be done, as we cannot get along any other way. Mr. E. wishes to leave in the cars.

Yours truly,

W. KELLOGG,
W. S. MOSS.

The defendant pleaded *non assumpsit*, &c.

On the trial no question was made but that the money asked for in the letter, or its equivalent, had been advanced by the plaintiff. But it seemed that there existed at that time in Peoria, where the transaction occurred, and where all the parties resided, a partnership formed, to build a railroad, styled Kellogg, Moss & Co., of which the plaintiff and defendant, and Kellogg and others were members, and that the money furnished by Gregg had been used for the benefit of this partnership, which had now spent its funds and failed in its enterprise. The defendant alleged that the money had been advanced by the plaintiff to the *partnership*, and on *its* credit, and not on the individual credit of Kellogg and Moss; and that if this were not so at the time, that the plaintiff afterwards (on the 1st of December, 1857) had agreed that this sum, with others advanced by him to the partnership, should become capital in the partnership business, and thus increase his share of the capital.

The plaintiff proved the signatures to the letter, and that the sum mentioned in it was received by Kellogg, partly in money and partly in drafts, which answered the purpose;

and, in the further progress of his case, offered to prove by a competent witness that only a few minutes after Kellogg had obtained the money, he told the witness that he had received the money from the plaintiff, and had "fixed Elder off," and that Elder had gone home. On objection by the defendant the court excluded the testimony, and the exclusion was the subject of the first bill of exceptions.

Testimony was given on both sides on the point above stated to have been the grounds on which the defendants chiefly put the case, to wit, that the $10,000 had been advanced, originally to the partnership, and on its credit; and if not, that by the agreement of 1st December, 1857, the plaintiff had agreed that it should become capital in it. It was not denied that all the partners of the firm of Kellogg & Co., had, on the 1st of December named, made an agreement reciting that some of the members had advanced money and funds beyond their shares in the partnership, and agreeing that "each and every member of the said firm should make a statement of . . . advancements made to said firm, together with 10 per cent. interest from the dates of them, which after the said 1st of December, 1857, should remain as the capital stock of the firm, and represent the capital stock of each individual member of the firm, and fix their interests therein respectively and *pro tanto*." But Gregg swore that he had never funded this debt; that he had made out the statement in accordance with the agreement of December 1st, 1857, and that this $10,000 was not included in that account. Other testimony, however, tended to prove that when the agreement of 1st December was made Gregg did *agree* to put in this $10,000, and that it was one condition on which other partners signed it.

The evidence being closed the court charged fully saying, among other things, to the jury:

"If the evidence satisfies you that the plaintiff, at the time the agreement of the 1st of December, 1857, was made, assented to treat this $10,000 as a part of his advances to the firm of Kellogg, Moss & Co., and to have the same funded, as contemplated in said agreement, such assent on his part is binding

upon him, and releases Kellogg & Moss from their promise to pay the said sum or see the same paid. It is a substitution of the liability of the new firm to ultimately reimburse this amount as a part of the capital put into the old firm by the plaintiff for the individual liability of Kellogg & Moss, to him. But it is for you to say, under the evidence, whether such assent or agreement to fund was, in fact, made or not. If made, the defence is made out.

"Nor is it material whether the plaintiff afterwards included this amount in his statement of advances to the old firm or not. It is enough that he agreed to do so. Granting that Kellogg & Moss were liable to make it good to him in December, 1857, still, if the plaintiff agreed that the sum for which they were so liable should be carried over to his capital stock with Kellogg, Moss & Co., then the agreement is binding on the plaintiff, because this sum had already clearly been put into the affairs of the firm, and either the plaintiff or Kellogg & Moss were entitled to have it charged up as part of the assets furnished and sunk in the past business of the firm."

Verdict and judgment having gone for the defendant the case was now brought here, where it was submitted on a printed brief of *Mr. O. Jackson, for the plaintiff in error; a like brief by Messrs. Harding and McCoy, for the defendant in error; a reply by Mr. Jackson, and an answer by Mr. Harding to the same.* The argument of the counsel of the plaintiff in error was directed to prove,—

1st. That there was error in the exclusion of the testimony to show what Kellogg had said a few minutes after obtaining the money; that this ruling was erroneous, because the plaintiff had a right to prove the admission of one of the joint promisors as to the receipt of the money, made at about the time of or immediately after the transaction took place; a position which the learned counsel sustained by an able argument; relying on *Lowle* v. *Boteler*,* *Bachman* v. *Killinger*,† *Cady* v. *Shepard*,‡ and other cases in Massachusetts and elsewhere, though he admitted that the rule was different in New York, and perhaps in some other States.

* 4 Harris & McHenry, 346.

† 55 Pennsylvania State, 416.

‡ 11 Pickering, 400.

2d. Because, as matter of fact, the testimony did not show with sufficient certainty either that the plaintiff had originally advanced the money to the partnership, or that he had subsequently, on the 1st of December, 1857, agreed to fund it.

3d. That the charge on this branch of the subject (and quoted *supra*) was erroneous.

Mr. Justice MILLER delivered the opinion of the court.

This cause has been submitted to us on printed arguments on each side, with replies and counter-replies, none of which contains any regular assignment of errors, as required by the twenty-first rule of this court. The record presents a bill of exceptions of thirty printed pages of testimony, which is certified to be all that was given on the trial, and the arguments address themselves to the entire merits on this evidence.

We have felt very much inclined to dismiss the writ of error or affirm the judgment without an attempt to look up the questions of law which might possibly be involved in the record, for the number of cases coming to this court in which the bill of exceptions embodies all the evidence offered, and counsel, tempted by this, argue before us the whole case as if the verdict concluded nothing, requires a decisive remedy.

As far as we are able to see there are but two questions of law raised by the record.

The first relates to the exclusion of a single item of evidence offered by the plaintiff, and the second to the charge of the court.

The plaintiff having proved the signatures to the letter of December 23d, 1856, and that the sum mentioned in it was received by Mr. Kellogg, offered in the further progress of his case to prove by a competent witness that only a few minutes after Kellogg had obtained the money he told the witness that he had received the money from the plaintiff, and had "fixed Elder off," and that Elder had gone home. The exclusion of this testimony is the occasion of the first bill of exception.

Opinion of the court.

We have a learned argument on the vexed question of the admissibility of the declarations of one partner, or joint obligor, against the other. But we are of opinion that the ruling of the court presents no error which should reverse the judgment, because its rejection worked no harm to the plaintiff. The execution of the paper was not denied, nor was it controverted, except by the general form of the pleading, that Kellogg had received the money. It had already been proved by several other witnesses and was at no time made a point in the case. The whole controversy before the jury turned on the question whether the money so received was advanced by Gregg on the credit of Kellogg and Moss alone, and if so, whether he had afterwards agreed to convert it into capital. The admission of Kellogg that he had received the money from Gregg gave no light on either of these questions. The judgment should not be reversed for the rejection of this testimony, whether it was in strict legal principle admissible or not.

The brief of the plaintiff proceeds to argue that the evidence before the jury does not sustain either of the allegations of advancing the money to the partnership, or the agreement of the plaintiff to convert it into capital of the partnership. With this we can have nothing to do. It was the province of the jury to determine whether either of these allegations was proved, for either of them was a valid defence to this action, and they have found in favor of defendant.

It is argued, however, that the instructions of the court on this branch of the subject were erroneous—to the prejudice of the plaintiff.

We have examined carefully the points of the charge objected to as well as the other parts of it, and, without elaborating the matter, we are of opinion that it puts this, the turning-point of the case, to the jury on fair grounds, and we can see no objection to the legal propositions stated by the court and excepted to by counsel.

JUDGMENT AFFIRMED.

Statement of the case.

PHILPOT *v.* GRUNINGER.

1. In the matter of a contract, a distinction sometimes exists between a *motive* which may induce entering into it and the actual consideration of the contract. *Ex. gr.*, A person, in virtue of some benefit passing to him, may be bound to give for it his promissory-note for a certain sum and payable at a certain time, and yet refuse to give the note. Now, if upon an expectation of some particular results in another transaction, into which expectation he is led by his creditor in the original transaction, he gives the note, the original benefit to him, and not the expectation, must be regarded as the consideration of the note.
2. A promise by one party being a good consideration for a promise by another, a jury will not, in a case where such mutual promises are shown, and no dependence exists between them, be held to have been misinstructed by a direction which makes a distinction between motive and consideration, such as taken in the paragraph above, even if the distinction be one not well founded. The instruction could do no harm.
3. A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C.
4. On an issue between a partnership and third parties as to the day when the partnership was formed, the mere articles of partnership are not evidence in favor of the partnership It must be shown by extrinsic evidence, that they were made on the day when they purport to have been made.

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

On the 19th of October, 1864, Gruninger, by articles of agreement, sold, or agreed to sell, to B. Philpot and H. Picket, residing at Titusville, Pennsylvania (who, with George Sherman, of Philadelphia, had been speculating in oil wells), a well "*on the Blood Farm*," near the town named; Philpot and Picket agreeing by the articles to pay Gruninger $3500 within thirty days. The money was not thus paid. Gruninger, after the sale, went to Massachusetts, but by the 24th of February, 1865, had returned to Titusville. On the day just mentioned Picket writes to him expressing satisfaction at his return, and acknowledging the receipt of a letter from him "some time since; an answer to which had been neglected on account of press of business until it had passed out of mind," and saying:

Statement of the case.

"I think we can fix up *that Blood Farm* matter satisfactorily, when you come up."

By the 21st of April, 1865, Philpot, Picket, and the Sherman already named had become interested as partners, under the name of Philpot, Sherman & Co., in the well on Blood Farm (if indeed Sherman had not been partner with the other two from the first) and in other oil wells; and on that day the partnership, under the firm name, along with several other projectors in oil (not, however, including Gruninger) entered into an agreement to form a joint stock company; Philpot, Sherman & Co. agreeing to put into the company certain wells, but not this one, which they had bought or agreed to buy, on the Blood Farm.

On the 6th of May, 1865, Gruninger also agreed to put in a certain well which *he* still owned; one on the Smith Farm; and on the same day, by deed, witnessed and acknowledged, "in consideration of the sum of $3000," which was acknowledged to have been to him "paid, and the receipt of which he acknowledged," conveyed to *Philpot, Sherman & Co.*, the already mentioned well on the Blood Farm. On that same day, but without reciting on account of what transaction, Philpot gave the firm note for $3000, payable to Gruninger on demand.

The joint stock company apparently fell through. Gruninger, at any rate, would not put in his well on Smith's Farm.

On the 5th July, *Picket*, one of the persons to whom Gruninger had agreed to sell the well on the Blood Farm, and a member of the now admitted firm of Philpot, Sherman & Co., writes to Gruninger, from Titusville, signing the firm name:

"We have learned that the note given you by our firm has been sent to Philadelphia for collection. All *I* can say is, we are, at present, unable to pay it. The change in times has so contracted our means as to make it doubtful if we are able to pay your note in cash at all. We will be glad to settle with you by letting you have some good property any time; but

money, at the present time, is out of the question with us. Let us hear from you soon."

And on the same day Philpot, in Philadelphia, writes to him from there:

"The note given by me to you has been presented by a collector for payment. We think this a strange proceeding under the circumstances the note was obtained, and a part having been paid. We have your name to a contract assigning us your interest in well on the Smith Farm, and we would recommend that you withdraw that note, and, as soon as convenient, meet us in Philadelphia, when a satisfactory adjustment of the whole can be arrived at. If you push that note, we shall assuredly demand that interest which we have you bound for, and proceed accordingly."

Gruninger replies, two days afterwards, by a single letter addressed to the firm:

"Yours of July 5th was received with one also of same date. You write me that the note given by you to me was presented to you by a collector for payment, and you think it a very strange proceeding. I myself can't see anything strange in it. You know that the note ought to have been paid this long time. I am in need of money, and must have it.

"I am sorry to see you mention in your letter about a contract I assigned to you, and you would 'recommend me to withdraw that note as soon as convenient,' &c.; and that if I push that note you shall demand the interest, which, you say, you have me bound for, and proceed accordingly. If you think *this* kind of talk goes with me, you better try it. I am sorry that you have wrote so. And the note I have given to collect must and shall be collected, if—. I am sorry to answer you in *this* way, but you commenced it."

No arrangement being made, Gruninger sued all three persons as partners on the note. Philpot and Picket pleaded jointly and Sherman separately and alone. The defence was, in substance, that the note was given by them to Gruninger in consideration of the *agreement* of Gruninger that he would become a member of the proposed oil company,

and put certain property in it, and also in consideration of the transfer to them of the well on the Blood Farm; and that he had failed and refused to perform his agreement, and that the well had no value.

Gruninger, on the other hand, asserted that it was given in consideration alone of the transactions of October 19th, 1864, and of an existing debt.

The controversy thus involved was, of course, what the consideration of the note really was.

On the trial the defendants offered in evidence articles of partnership dated 8th November, 1864, and between them, in order to show that the partnership between the three was not in existence when the articles of agreement of October 19th, 1864, were made; but they did not offer or propose to offer any other evidence of the same fact.

The court rejected the articles.

The plaintiff and defendants each gave evidence tending to show on the one side that the well on the Blood Farm was worth what it cost, on the other that it was worthless.

In charging, after adverting to the various letters already quoted, including that of July 5th, by Picket, in the firm's name, in which no objection is taken to the validity of the note, and the cause of its non-payment is stated to be that the firm was *then* unable to pay it *in money*, and after adverting to some other evidence the court said:

"If, in point of fact, the note was given in consideration of past transactions, of obligations already accrued or accruing, then, of course, the defence fails.

"If, on the other hand, the note was given in consideration of the agreement, on the day, 6th of May, made by Gruninger, to enter into the company; and also, in consideration of the transfer of the said well, and he did not enter into the company, but failed to comply with his agreement, and there was no value in the well, as stated in the plea, then the defence is made out."

The court, however, said further:

"But it is proper for you to consider whether or not *this* might have been the state of the case: that there were trans-

actions between the parties; that there was a claim on one side, and which may have arisen, or did arise, in consequence of these transactions. Now, was there a present, existing indebtedness from Philpot and Picket, or from Philpot, Sherman & Co., to Gruninger, and was the execution of this agreement by Gruninger, on the 6th of May, *simply a motive* for the giving of the note and not *the consideration* of the note? It *may* be that that was held out as an inducement to the defendants to give the note, as a motive for putting the debt in the shape of a note rather than let it remain in its then present form. If that were so, then the defence would fail, because that proceeds upon the ground, as I understand, that the actual consideration of the giving of the note, not the motive for putting the claim in that form, was the signing of this agreement of the 6th of May, and the transfer of the well on the Blood Farm.

"It may well happen that A. may owe a valid debt to B., and B. may say to A., 'If you will put the debt in the shape of a note I will do some act for you;' and then, when it is done, the promise to put the debt in that shape is not the consideration of the note, but the debt which is due from one to the other."

The jury found for the plaintiff, and judgment was given accordingly. On exceptions to the portion of the charge last above quoted, and to the rejection of the partnership articles, and on some other matters not necessary in any part to be reported, the case was now here.

Messrs. S. B. Gookins and J. H. Roberts, for the plaintiffs in error:

I. The jury were misled in view of the evidence in this case—

First. By the distinction made by the court between the *motive* or *inducement* for giving the note, and the *consideration* of the note; and,

Secondly. (If the distinction were a sound one) in applying it to the contingency of a present existing debt from Philpot and Picket *or* Philpot, Sherman & Co., whereas it should have been confined to a present existing indebtedness from Philpot, Sherman & Co.

As to the latter proposition—

Assuming that the jury might have fairly found that there was a debt of $3500 from Philpot and Picket only for the well purchased on the 19th of October, 1864, yet, as to Sherman, who did not owe the debt, what possible *motive* could he have for becoming liable to Gruninger for this debt? "The execution of this agreement by Gruninger," says the court. Then, if without that agreement *he* would not have been induced to put the debt in that shape, it follows that such agreement was, *as to him*, the consideration of the note.

As to Sherman, therefore, especially, this distinction between the motive or inducement and the consideration, if well founded in any case, was inapplicable to the facts in evidence, and was, therefore, well calculated to, and in fact did, mislead the jury.

Then, as to our first proposition, that the distinction made by the court, in view of the evidence in this case, between the *consideration* of the note and the *motive* or *inducement* operating to cause defendants to give it, misled the jury.

There was obviously controversy between Gruninger and defendants just previous to and at the time this note was given, as to the sale of the well on the Blood Farm. Concede that the evidence is insufficient to show that it was worthless, and that on the whole the defendants were lawfully indebted to Gruninger $3500 for it, but in good faith thought otherwise and refused payment or would only consent to pay or execute the note in question, provided Gruninger would agree to go into and put his property into the proposed new company.

Now, says the court to the jury:

"It may well happen that A. may owe a valid debt to B., and B. may say to A., 'If you will put the debt in the shape of a note I will do some act for you;' and then, when it is so done, the promise to put the debt *in that shape* is not the consideration of that note, but the debt which is due from one to the other."

This was put by way of illustration, to show the distinc-

tion between the consideration and the motive or inducement. If this distinction is known to the books, it can only apply to such a case as this put by the court, where A. owes a *valid* debt to B. and does not dispute it, but it could never apply to a case where, although A. owed a valid debt to B., he believed otherwise and denied it, and B. in order to induce A. to give him an acknowledgment of it in the shape of a promissory note, promises on his part to do some other thing. In such case, while the valid debt may be in part the consideration of the note, it is not the whole consideration, and to allow B. to repudiate his promise and sue and recover *on that note* would be to encourage fraud.

II. We submit also that the court erred in excluding from the consideration of the jury the articles of copartnership between Philpot, Sherman, and Picket.

Mr. O. K. Hutchings, contra.

Mr. Justice STRONG delivered the opinion of the court.

That a part of the consideration of the note was the debt due for the oil well which Gruninger had sold six months before to Philpot and Picket, or that the note was intended as an adjustment of that debt, is but faintly denied; but the plaintiffs in error insist that a part at least of the consideration was the agreement of the promisee to contribute to the formation of the proposed company, an agreement which they allege he has failed to perform; and they complain that the jury were misled by an instruction that they might consider whether the signing of the agreement, or the undertaking of Gruninger to put into the company the interests mentioned, was anything more than an inducement to the making of the note by the defendants, furnishing a motive for giving it, but constituting no part of the consideration.

It is, however, not easy to see how the jury could have been misled, to the injury of the plaintiffs in error, by calling attention to a possible distinction between the motive which may have induced giving the note and its consideration, even if no such distinction can be made. For if it be

assumed, as was claimed, that the promisee's undertaking to unite in the formation of a joint stock company was a part of the consideration, it could not aid the promisors. It would not be a step toward showing that the consideration had failed. Gruninger's neglect or refusal to perform his agreement is not to be confounded with the agreement itself. The latter was the consideration, not its performance. He might be answerable in damages for non-performance, but his undertaking to perform would have been the price of the defendants' promise. That undertaking they still have, and with it the full consideration. Nothing is more common than a promise in consideration of a promise, and the defendants' pleas in this case aver that Gruninger's undertaking was the price of their stipulation. Were it then conceded, as the defendants claimed, the jury would not have been warranted in finding that the consideration of the note had failed.

It is, however, not to be doubted that there is a clear distinction sometimes between the motive that may induce to entering into a contract and the consideration of the contract. Nothing is consideration that is not regarded as such by both parties. It is the price voluntarily paid for a promisor's undertaking. An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is "the cause or meritorious occasion requiring a mutual recompense in fact or in law."* Surely a creditor may do a favor to his debtor, or may enter into a new and independent contract with him, induced by which the debtor may assent to giving a note for the previously-existing indebtedness. Without the favor or the new contract there is in such a case a full consideration for the note, and the parties may not have contemplated that the favor or the new contract was to be paid for. To regard them as entering into the consideration of the note would be to make a contract for the parties to which their minds never assented.

It is argued that if Sherman did not owe the debt due

* Dyer, 306 *b*.

from Philpot and Picket to Gruninger (as the jury might have found), there was no motive or inducement, much less even consideration, for his becoming a joint promisor in the note, unless it was Gruninger's agreement, and hence it is inferred that the jury were misled in being allowed to consider that agreement as merely a motive or inducement to his assumption. But he was then a partner of Philpot and Picket, and a joint owner with them of the property for which the debt had been contracted. A consideration moving to his copromisors was enough to support his promise. The note was given for a smaller sum than the price for which the property had been sold to them. It was accepted as a settlement of the promisee's claim, and a conveyance of the property was made to all the defendants, including Sherman. There was, then, adequate consideration for his promise apart from Gruninger's agreement to put other property into the proposed company. For these reasons, we think, there was no error in the instructions given by the court to the jury.

The second assignment is that the court erred in excluding articles of copartnership between the defendants, dated November 8th, 1864. They were offered to show that the partnership did not commence until after the sale of the oil well was made to Philpot and Picket, which was on the 19th of October, 1864, and therefore that Sherman was not a debtor to Gruninger at that time or when the note was afterwards given. The proposed evidence seems to have been intended to show that the debt due for the well was not the consideration of Sherman's promise, and to raise the inference that Gruninger's agreement to join in forming the stock company was. We have already considered that, and from what we have said it appears that the rejection of the evidence did not injure the defendants. That there was error in the rejection has not been seriously contended.

JUDGMENT IS AFFIRMED.

Statement of the case.

THE DELAWARE.

1. A "clean" bill of lading, that is to say a bill of lading which is silent as to the place of stowage, imports a contract that the goods are to be stowed *under* deck.
2. This being so, parol evidence of an agreement that they were to be stowed *on* deck is inadmissible.

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

The Oregon Iron Company, on the 8th of May, 1868, shipped on board the bark Delaware, then at Portland, Oregon, 76 tons of pig-iron, to be carried to San Francisco, at a freight of $4.50 a ton. The bill of lading was in these words:

"Shipped, in good order and condition, by Oregon Iron Company, on board the good bark *Delaware*, Shillaber, master, now lying in the port of Portland, and bound to San Francisco, to say seventy-five tons pig iron, more or less (contents, quality, and weight unknown), being marked as in the margin, and are to be delivered in like good order and condition at the aforesaid port of San Francisco, at ship's tackles (the dangers of the seas, fire, and collision excepted) unto ——, or assigns, he or they paying freight for the said goods in United States gold coin (before delivery, if required), as per margin, with 5 per cent. primage and average accustomed.

"In witness whereof the master or agent of said vessel hath affirmed to three bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void. Vessel not accountable for breakage, leakage, or rust.

"C. E. SHILLABER,
"For the captain.

"PORTLAND, May 8th, 1868."

The iron was not delivered at San Francisco; and on a libel filed by the Iron Company, the defence set up was that by a verbal agreement made between the Iron Company and the master of the ship before the shipment or the signing of the bill of lading, the iron was stowed on deck, and that the

whole of it, with the exception of 6 tons and 90 lbs., had been jettisoned in a storm.

On the trial, the owners of the vessel offered proof of this parol agreement. The libellants objected, and the court excluded the evidence on the ground that parol proof was inadmissible to vary the bill of lading; and decreed in favor of the libellants for the iron that was thrown overboard. On appeal the case was disposed of in the same way in the Circuit Court. It was now here; the question being, as in the two courts below, whether in a suit upon a bill of lading like the one here, for non-delivery of goods stowed on deck, and jettisoned at sea, it is competent, in the absence of a custom to stow such goods on deck, to prove by parol a verbal agreement for such a stowage.

The District Court, in its opinion, among other things, said as follows:

"It is not disputed that the ordinary bill of lading *imports that the goods are to be safely stowed under deck.* It must also be admitted that, if they are stowed on deck with the consent of the shipper, or in accordance with a well-established and generally recognized usage, either of the particular trade or in respect of a particular kind of goods, the ship will not be liable. The point presented is, whether the consent of the shipper can be proved by parol.

"The case of *Creery* v. *Holly*,* is directly in point. In that case Mr. Justice Nelson says:

" 'It is true that in this case nothing is said in the bill of lading as to the manner of stowing the goods, whether on deck or under deck; but the case concedes that the legal import of the contract, as well as the understanding and usage of merchants, impose upon the master the duty of putting them under deck, unless otherwise stipulated; and if such is the judgment of the law upon the face of the instrument, parol evidence is as inadmissible to alter it as if the duty was stated in express terms. It was part of the contract. It seems to me it would be extremely dangerous, and subject to the full force of every objection that excludes the admission of this species of evidence, to permit any stipulation, express or implied, in these instruments, to be thus varied. . . . If the implied obligation of the master in this case,

* 14 Wendell, 26.

arising out of the conceded construction of the bill of lading, may be varied by parol evidence, I do not see how any other stipulation included in it could be sustained upon an offer to impeach it in the same way.' "

"In *Niles* v. *Culver*,* the same principle was applied to a memorandum, which imported a contract.

"In *White* v. *Van Kirk*,† parol proof offered by a shipper of goods to show that the master agreed to take a particular route was held to be inadmissible.

"In *The Waldo*,‡ the language of Mr. Justice Ware is nearly identical with that of Mr. Justice Nelson, above quoted:

" 'It is true that the bill of lading does not say in express terms that the goods shall be stowed under deck, but *this is a condition tacitly annexed to the contract by operation of law;* and it is equally binding on the master, and the shipper is equally entitled to its benefit, although it was stated in express terms. The parol evidence, then, is offered to control the legal operation of the bill of lading, and it is as inadmissible as though it were to contradict its words.' "

"In *Garrison* v. *The Memphis Insurance Company*,§ it was held that, where the bill of lading mentioned that the carrier was not to be responsible for injuries caused by the 'perils of the river,' parol evidence was inadmissible to show that by usage 'fire' was included among those perils.

* * * * * * * * *

"Where a promissory note mentions no time of payment, the law adjudges it to be due immediately, and parol evidence is not admissible to show a different time of payment agreed upon by the parties at the time it was executed."‖

These and other cases were relied on by the court, and in addition to them *Barber* v. *Brace*, in the Supreme Court of Connecticut,¶ was cited by counsel, to show that "a parol agreement anterior to a written contract is inadmissible."

The question, as the reader familiar with the decisions on the subject will see, is one upon which opinions not consistent with some of those thus above quoted have been

* 8 Barbour, 205. † 25 Id. 17. ‡ Davies, 61. § 19 Howard, 312.

‖ Niles *v.* Culver, 8 Barbour, 209; Thompson *v.* Ketchum, 8 Johnson, 109; Hunt *v.* Adams, 7 Massachusetts, 518; S. C., 6 Id. 519; Pattison *v.* Hull, 9 Cowen, 747.

¶ 3 Connecticut, 9.

given in certain courts. In this court the question had never been specifically passed upon. On that account and for the importance of the question, the argument against the view in the courts below, is presented with more than ordinary fulness.

Mr. E. Casserly, for the plaintiff in error:

I. The objection to the parol proof is put on a rule of evidence. What is the rule of evidence? Does it apply in this case?

1. The rule is exactly stated by our leading text writer,* who holds it with all due strictness:

"Parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument."

Mr. Starkie† states the rule substantially the same way. And he adds, as "a general rule,"

"Oral and extrinsic evidence is admissible to rebut a presumption of law or equity. Here it is not offered as a substitute for the written evidence, but to remove an impediment, which would otherwise have obstructed or altered its operation."

The writer,‡ who, more than any other, has discussed thoroughly the whole subject, states the rule explicitly:

"The true meaning of the rule is, that such evidence shall never be received to show that the intention of the parties was directly opposite to that which their language expresses, or substantially different from any meaning the words they have used upon any construction will admit or convey."

Barrett v. *Insurance Company*,§ is almost in the same language as that last above quoted.

In *Parks* v. *Gen. Int. Co.*,‖ it is held that a condition or

* Greenleaf. On Evidence, vol. 1, § 275, and see note 3.

† On Evidence, by Sharswood, *648, *713.

‡ Duer. On Insurance, vol. 1, 176, § 27; and see Ib. 276, § 70; 2 Id. 668-71, §§ 17, 18.

§ 7 Cushing, 175.

‖ 5 Pickering, 37-38.

implied undertaking, not expressed in the terms of the policy, may be superseded by a previous verbal or written statement.

In *Susquehanna Company* v. *Evans*,* Judge Washington states the rule to be:

"The reasons which forbid the admission of parol evidence to alter or explain written agreements do not apply to those contracts implied by operation of law."

In *Brent's Executors* v. *Bank*,† parol proof was admitted of an agreement that payment of a promissory note should be demanded at a particular bank, and not personally of the maker; the note being silent on the subject. Marshall, C. J., says:

"This is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person when the parties are silent is a mere inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference. . . . This does not alter the instrument, so far as it goes, but supplies extrinsic circumstances which the parties are at liberty to supply."

2. Does the rule apply to this case? How did the proposed parol evidence "contradict or vary the terms of the written instrument"—in this case, the bill of lading? By its "terms" the bill makes no provision whatever for stowage of the iron shipped, still less for stowage of it in any particular place. Clearly, then, parol proof of an agreement for a deck stowage cannot be said to "contradict or vary the terms" of the bill. Suppose we read the bill as though it contained the agreement which we offered to prove—"said iron to be carried on deck." In what respect does this provision "contradict or vary the terms of the written contract?" Since it does not, but is obviously in accord with them, how can parol proof of it be said to do so?

* 4 Washington's Circuit Court, 481.

† 1 Peters, 89, 92; see also Rohan *v.* Hanson, 11 Cushing, 44, 46; Weston *v.* Chamberlin, 7 Id. 404, and cases cited, 406.

3. As the bill, by its "terms," provides nothing as to the place of stowage, and as the law allows the parties to make what contracts they choose as to that particular subject, and in what manner they choose, by writing or by words, it is incorrect to say that parol proof of a contract, or consent by the shipper to stow on deck, is within any rule against parol proof, either as "contradicting or varying" "the terms" of the writing, *or* as substituting parol when the law demands a writing.*

II. This argument cannot be answered. It is, therefore, sought to be eluded. It is said that though by its terms the common or clean bill of lading is silent as to the stowage, yet that it "imports that the goods are to be safely stowed under deck;" that this is "a condition tacitly annexed to the contract by operation of law;" and that this implied contract is so conclusive, that the law will not admit parol evidence to show that the parties contracted for a stowage on deck.

1. Is it in any sense correct to say, that the common bill of lading "imports a stowage safely under deck," or that such is "the condition tacitly annexed to the contract by operation of law?" We think not. On the contrary, we submit that what the instrument "imports" or "implies" is not a stowage either in any particular place, or in any particular manner; but simply a stowage as to place and manner, such as is authorized by the custom or usage of trade, whether in respect to the particular goods in the bill of lading, or to the particular voyage which the ship is to make.

2. The law of common carriers of goods had its rise in "the custom of the realm." In suit against a carrier, the ancient practice was to set out and prove the general custom, until the custom became in time so well settled, that the courts took judicial notice of it, which is itself a substitute for proof, if not a mode of proof, and is at times the result of actual

* Vernard *v.* Hudson, 3 Sumner, 406, 407; Lowry *v.* Russell, 8 Pickering, 360, 362; Sayward *v.* Stevens, 3 Gray, 97, 102; Barrett *v.* Ins. Co., 7 Cushing, 175; Ex'rs of Brent *v.* Bank, 1 Peters, 92; also the other cases cited *supra*.

inquiry into proofs.* The same law to-day rests mainly in the custom of trade; perhaps, in all respects, except where either some rule or policy of the law, or some valid agreement between the parties, forbids.† In the absence of such rule, policy, or agreement, a common carrier is obliged only to carry such goods, in such parcels, and with such stowage, in such conveyance, by such route, at such charges, with such dispatch, and such delivery, as are customary in his line of business. And, in practice, almost universally the law and the parties wisely agree in leaving to the custom all these important subjects, except perhaps the charges.

3. Like the other two great instruments of commerce—the charter-party and the policy of marine insurance—the bill of lading in its "terms" is not a complete contract. It is a brief writing in which only the heads of the contract are expressed; the receipt of the goods on board; the places whence and where they are to be carried; the person to whom they are to be delivered in like good order, &c.; and at what freight. In a bill of lading as in the others—and, indeed, even more so—the parties are silent as to the mode and manner in which the heads of the contract are to be performed. These they leave to the custom of the trade. It is a presumption of law that they have made their contract as to the mode and manner, on this basis.

4. This is more true of the subject of stowage than it is perhaps of any other matter under the bill of lading.

Let us refer first to some of the other instances.

a. The express contract, to carry to the place of destination, means, by construction of law, with all reasonable dispatch. Yet, it is held that this contract is controlled by proof of a custom on the Ohio, to allow boats a delay of a month or more, while waiting the rise of water.‡

b. So, upon the question, as to when the carrier's respon-

* 1 Greenleaf on Evidence, §§ 6, 6*a*, Redfield's edition.

† Redfield on Carriers, §§ 210–219; 2 Redfield on Railways, 131–135, § 183.

‡ Broadwell *v.* Butler, 6 McLean, 296; Accord. The Convoy's Wheat, 3 Wallace, 230.

sibility for the goods terminates. The express contract of the bill of lading to deliver to A. is controlled by the usage.*

c. The whole question of delivery, time, mode, place, is a question of the custom of business.† As where the point was as to the duty of the ferryman to carry goods up a slip.‡

d. The express contract in the bill of lading here is for a voyage from Portland to San Francisco. This calls for a direct voyage, without deviation; yet it may be controlled by proof of a usage to make the deviation complained of,§ or of the shipper's knowledge of the intent to make it.‖

5. The power of usage over the subject of stowage as to which the common bill of lading is silent, is still greater. Indeed stowage is completely the creature of usage. Hence it is, doubtless, that the common bill of lading is silent as to it. Under such a bill, whatever usage authorizes, as to either the place or manner of stowage, whether as respects the particular goods to be carried, or other goods in the same ship, or the particular voyage or class of ships in which they are to be carried, may lawfully be done by the carrier. It may be done, though some other place or manner of stowage might be safer for the particular goods themselves or for other goods in the same vessel.

Not only does usage control, but what is the usage varies with the circumstances. In one class of cases the usage turns upon the nature of the goods to be carried; in another class upon the nature of the voyage on which they are to be carried.

a. Thus, in all trades, where the nature of the goods is such that they are dangerous to the ship or cargo—as corrosive or inflammable oils and other liquids—the usage is, that they may be carried on deck, where in case of accident

* 2 Redfield on Railways, 60, 65, § 175.

† 1 Smith's Leading Cases, *319. ‡ Ib *304.

§ Lowry *v.* Russell, 8 Pickering, 360, 362.

‖ The Mary Hawes, cited in 1 Parsons on Shipping and Admiralty, 191, note 1; and see as to the power of custom of trade, Halsey *v.* Brown, 3 Day, 346, approved in Renner *v.* Bank, 9 Wheaton, 582.

they can do the least harm and may be most readily cast overboard.*

b. In like manner live stock are carried on deck, for the sake of their health, and perhaps of convenience of handling them.†

c. A usage to carry lumber on deck, between Quebec and London, was sustained on demurrer in *Gould* v. *Oliver*.‡

d. The usage to carry deck loads is more favored in the case of a steamer plying coastwise than in that of a sailing vessel.§

e. And it is affected by the peculiar build of the vessel, as in the case of propellers with two decks on our great lakes.‖

f. In this court the doctrine is established, that what goods shall be carried in the same ship, and how and where they shall be stowed in reference to each other, is controlled by usage, rather than by the greater or less safety of the goods. The principle of this doctrine is conclusive in our favor.¶

6. Hence, it is not correct to say that a clean bill "imports that the goods are to be stowed safely under deck;" or that it is the "condition tacitly annexed to the contract by operation of law;" or "a rule of law"—that they shall be so stowed. These phrases, which all come to the same thing, are but half truths. They state the effect, not the cause. If they are correct at all, it is because the usage calls for such a stowage under deck. The "import," or the "tacit condition," or "the rule of law" comes back after all to the usage.

Either this is the true view, or else you cannot give any

* De Costa *v.* Edmunds, 4 Campbell, 141, 142.

† Brown *v.* Cornwell, 1 Root, 60; Milward *v.* Hibbert, 3 Adolphus & Ellis, N. S. *120, 131 to 137-8.

‡ 4 Bingham's New Cases, *134, *140, *143.

§ Harris *v.* Moody, 4 Bosworth, 210, 218-219, 221; Affirmed, 30 New York, 266, 273, 274.

‖ Gillett *v.* Ellis, 11 Illinois, 579, 581.

¶ Rich *v.* Lambert, 12 Howard, 356, 357; Clark *v.* Barnwell, Ib. 281, 282; Baxter *v.* Leland, 1 Blatchford, Circuit Court, 526, 527. See note of American editor, 5 C. B., N. S. *164, and cases cited.

well-founded reason why under the same form of words, in the "clean" bill of lading, the carrier's liability differs so greatly, so that in one case he is liable if he carries on deck; in another he is not; while in a third case he is liable unless he does carry on deck.

On this point of the presumption more will be said presently.

The following proposition, then, which is the sum of the preceding authorities, we submit as the true statement of the law:

FIRST POINT. *The common bill of lading, such as that in this case, being silent on the subject of stowage, neither imports nor implies any particular place of stowage of goods. What it imports or implies is simply such a place of stowage as is according to the usage of the trade in regard to such goods on such a voyage.*

III. Next we say, as a

SECOND POINT. *The reason of this rule is, that there being a usage of the trade, that on such a voyage, such goods shall be stowed under deck, it is a presumption of law, in the absence of express words to the contrary, that the parties have contracted for a place of stowage according to the usage.*

1. That the effect of a "clean" bill of lading is simply to raise such a presumption is clear upon principle and on authority.

In trade or commerce the general usage is constantly admitted to expound the contracts of parties, as well where the contract is silent as where the language in which it speaks has by usage a technical meaning. This is because of the presumption arising upon the general usage, that the parties have intended to contract in accordance with the usage.*

As applied to stowage. In *Vernard* v. *Hudson*,† it is held that the presumption that goods shipped under the common bill

* Starkie on Evidence, by Sharswood, *75-6, *710; 1 Greenleaf on Evidence, § 292; Best, Presumptions, *132; 1 Duer on Insurance, lecture 2, pt. 2, p. 254; Ib. 265, § 59; 1 Arnould on Insurance, 278 (London, 1866).

† 3 Sumner, 405-7.

of lading are to be put under deck, is a presumption arising from the ordinary course of business.

So in *The Waldo*:*

"The bill of lading is what is called a clean bill; that is, it is silent as to the mode of stowing the goods. . . . The usual and only safe mode of carrying goods is under deck; and, when the contract is entered into, it is presumed to be the intention of the parties that the goods shall be stowed and carried in the usual way, unless there is an agreement to the contrary."

To the same effect is *The Paragon*,† *The Rebecca*,‡ *The Peytona*.§

THIRD POINT. *The presumption of law that under such a bill of lading the parties have contracted on the basis of the usage, and for a stowage under deck in accordance with the usage, is but a primâ facie presumption, and may be rebutted by parol proof of an agreement for a stowage on deck.*

1. The presumption mentioned is one arising upon an extrinsic fact; *i. e.*, upon the usage of trade. Whether the usage is such as to require extrinsic proof, or is so general—as in this case—as to dispense with such proof and to rest in judicial notice, is not material. In either case the presumption may be rebutted by parol proof.

2. In close connection with the rule, as to the presumption arising upon the usage of trade, is found this other rule, that "oral and extrinsic evidence is admissible to rebut a presumption of law or equity."‖ Mr. Duer justly relies on this rule in support of his views in favor of the admission of parol evidence to rebut a presumption arising upon a usage.¶

Lord Mansfield, speaking of rebutting by parol evidence a presumption of law, in *Brady* v. *Cubitt*,** declared:

* Daveis, 161, 166–167. † Ware, 322. ‡ Ib. 209, 210.

§ 2 Curtis, 21. ‖ 1 Starkie on Evidence, *713.

¶ 2 Duer on Insurance, 669, and note *a*; and see the cases cited, Starkie, §§ 713–716, in illustration; also 1 Greenleaf, § 296 and note 1.

** Douglas, 31.

"I am clear that this presumption, like all others, may be rebutted by every sort of evidence."

3. In *Vernard* v. *Hudson*, already quoted *supra*, 588, the distinct question arose and was decided. The libel was for freight due on a common bill of lading for goods shipped. The defence was that they were stowed on deck and damage thereby caused. The ship offered parol proof of a contract for stowage on deck, and one question was, whether such proof was admissible within the rule against parol evidence. Judge Story says (406, 407):

"I take it to be very clear, that where goods are shipped under the common bill of lading, it is presumed that they are shipped to be put under deck, as the ordinary mode of stowing cargo. This presumption may be rebutted by showing a positive agreement between the parties that the goods are to be carried on deck; or it may be deduced from other circumstances, such, for example, as the goods paying the deck freight only. The admission of proof to this effect is perfectly consistent with the rules of law; for it neither contradicts nor varies anything contained in the bill of lading, but it simply rebuts a presumption arising from the ordinary course of business. The *onus probandi* is, therefore, on the libellant to establish such an agreement."

In *Sayward* v. *Stevens*,* the bill of lading provided for a deck stowage of part of the plaintiff's goods. Other goods of his were, however, stowed on deck. The whole deck load was jettisoned on the voyage. The court says it was obliged—

"To determine whether the contract rests solely in the bill of lading or whether it can be varied or explained by parol proof of the acts and conduct of the parties," &c.

The effect of a clean bill of lading is discussed, and though the court has "no occasion to determine" whether or not the obligation under such a bill to stow under deck "is a

* 3 Gray, 97.

mere presumption, arising from the usual mode of conveying merchandise in vessels and liable to be rebutted by proof of a parol contract," &c., it intimates a strong opinion on the rule of evidence. It says:

"As bills of lading do not usually contain any express stipulation concerning the place or mode of stowing the cargo—these being left to the care and discretion of the master of a vessel—the admission of such evidence would not seem to be a violation of the salutary rule, that written contracts cannot be varied or controlled by parol proof."

The decision, which was unanimous, was by Shaw, Dewey, and Metcalf, JJ.

This case well illustrates when parol proof varies or contradicts the terms of the bill of lading and is therefore inadmissible. The express provision for a deck stowage of a part of the goods excluded parol proof of a consent to such a stowage of any other part.

To this effect, merely, is *Garrison* v. *Memphis Insurance Co.*, cited against us by the District judge, though there the parol proof was admitted but held insufficient.

4. By the express contract in the common bill of lading, for a voyage from A. to B., the presumption is of an agreement for a direct voyage. This is a very important presumption, at least as much so to the interests of commerce as the presumption of a stowage under deck. But, being like that, a presumption arising out of the usage of business, it may be rebutted by parol proof of the shipper's personal knowledge that the master intended to deviate.* The point was made against the proof; but it was not sustained. The court says:

"There is nothing in the evidence contradicting the express terms of the bill of lading," &c.

In the *Mary Hawes*,† decided by Lowell, J., in the District Court for Massachusetts, it was held, that proof of a usage

* Lowry *v.* Russell, 8 Pickering, 360, 362.

† Cited in 1st Parsons on Shipping and Admiralty, 191, note 1.

to make the deviation, or of the shipper's knowledge of the intent to make it, was admissible.

5. By agreement the merchant may have charge of the stowage of his own goods.* This is not unusual where the goods require special care in the handling and stowage. If the merchant should sue the ship for the loss of his goods stowed by himself on deck, as in a deck-house, is it possible that the form of a clean bill of lading would suffice to shut out the parol proof that the stowage was by the merchant himself?

6. So, the rule is that under the common bill of lading the title to the goods is in the consignee. This, too, is a presumption arising out of the usual course of business, and may be rebutted by parol proof.† On the same principle the warranty of title implied in a sale of chattels in the vendor's possession may be rebutted by parol, whether the contract of sale is oral or written.‡

7. The rule that parol proof is admitted to rebut presumptions arising from the usage or ordinary course of business, where the written contract is silent, prevails in analogous cases in the law of marine insurance, under the policy, and for the same reasons as under the bill of lading.

a. Take the case of deviation. From the fact of insurance, it is presumed that the parties agreed for an adventure, to be pursued in the usual manner; in other words, for a direct voyage, without voluntarily changing the risks. This, too, being a presumption arising upon the usage of trade, may be rebutted by parol proof of representations.§

b. Take from the same law of insurance, a still stronger illustration. It is now settled law in this country that even the warranty implied in every marine policy, that the vessel insured is seaworthy, as the fundamental fact of the con-

* Abbott on Shipping, 287. † The Sally Magee, 3 Wallace, 457.

‡ Hilliard on Sales, 391 (edition of 1869); Miller *v.* Van Tassel, 24 California, 465. Accord. Story, Sales, § 367*a* (1871); McCoy *v.* Artcher, 3 Barbour, 331.

§ 1 Phillips on Insurance, 586, §§ 1040, 1041; and see Urquhart *v.* Barnard, 1 Taunton, 450. Also *supra;* Lowry *v.* Russell; The Mary Hawes.

tract, may be superseded by parol proof of previous verbal "representations" of the assured party.* The principle of the rule is, says Mr. Duer, that the warranty of seaworthiness is not implied from any terms of the policy, but rests on the presumption that the seaworthiness of the vessel is understood by the parties to be the basis of their contract. Adopting this view of his, it is clear enough that, when this presumption is repelled, by parol proof of representations to the contrary, such representations become a part of the contract, as they do by the American law, and completely displace the presumption of a warranty.

8. Now, since in regard to the policy and the charter-party, parol proof is admitted to rebut by extrinsic facts, the presumption arising upon the usual course of business—or the "inference of law," in the words of C. J. Marshall—with respect to matters of which the writing is silent, why should not the same rule of evidence apply to the bill of lading? Since these three great instruments work together in one design for the interests of commerce, to speed or to guard them on every sea, why should they not rest before the law upon the same or similar general principles for their interpretation?

IV. In some of the most noted cases in respect to goods carried on deck under a clean bill of lading, parol proof of the merchant's agreement that his goods might be so carried, or of circumstances from which it might be inferred, was admitted without objection from eminent counsel. A few will be cited.

In *Lawrence* v. *Minturn*,† in this court, there was a written memorandum for a deck stowage, but it was of course merged in the bill of lading executed a month afterwards.

In *Gould* v. *Oliver*,‡ the suit was on a charter-party, for lumber stowed on deck, and jettisoned during the voyage.

* 2 Duer, 671, 672, 673, and notes; 1 Phillips on Insurance, 334, 415, edition of 1853; Maude & Pollock on Merchant Shipping, 393, and see note *d*, adopting Mr. Duer's view; 1 Arnould on Insurance, *498–9, *499, American edition, 1850; 2 Kent, *284, note *d*.

† 17 Howard, 106. ‡ 2 Manning & Granger, 208, 214, 216, 219, 235.

The defendant sought to show by parol, a consent, by knowledge and approval of the plaintiffs' superintendent, to the stowage. No objection was made by the counsel for the plaintiffs, Sir Thomas Wilde and Mr. (now Baron) Wightman. The proof held insufficient only for want of authority in the superintendent.

In *The Rebecca*, already cited, parol proof of consent to stow on deck, under common bill of lading, received and considered by the court.

And *The Waldo* is to the like effect.

In *Sproat* v. *Donnell*,* proof was admitted that the merchant knew of the deck stowage, and made no objection.

V. As to the cases cited against the admissibility of the parol proof,† it must suffice to notice those bearing with some directness on the point.

Creery v. *Holly* was not a suit between the parties to a bill of lading. It was a suit by vendor against vendee for the value of a quantity of iron shipped from New York to Baltimore by the former to the latter, upon orders from him. Though there was a clean bill of lading, the iron was stowed on deck, and in stress of weather cast overboard. The defendant offered to show that the plaintiff (the vendor) had agreed orally that the goods might be shipped on deck. This was objected to, as being within the rule against parol evidence, but admitted. For aught that appears, the defendant was neither a party nor privy to the bill of lading, and his parol evidence was admissible to show what amounted to non-delivery of the goods sold through the fault of the vendor. The case is one of doubtful impression.

Barber v. *Brace* is still more unsatisfactory as an authority. Parol proof of an agreement to stow the goods on deck, when first offered on the trial below, was excluded. It was afterwards admitted, to contradict the plaintiff's witnesses, and was limited to that by the judge, who, however, charged the jury to find for the defendant (the carrier), if there was

* 26 Maine, 187.

† Cited by the District Court, or by counsel, see *supra*, pp 580–81.

an agreement to stow on deck. A verdict for the defendant was sustained.

The Waldo was a case of deck stowage, under the common bill of lading, and of an attempt to prove by parol an agreement for such a stowage. The decision is in terms against the admission of the parol proof. Yet the eminent judge, as if not wholly satisfied with his decision excluding the parol proof, goes fully into it in another aspect of the case, and holds it insufficient to prove the agreement so to stow.

White v. *Van Kirk* was the case of a bill of lading for a voyage from Albany to Baltimore. The question was which of two routes—an inside or an outside route—neither of which was specified, should have been taken. The master took the outside route and lost the goods. The merchant offered parol proof of an agreement with the master for the inside or safer route. It was rejected by the court, which at the same time, however, as if not quite sure of its law, held the agreement not proved. As an authority, this case is worse than doubtful.

The same general criticism applies to *Niles* v. *Culver*. The writing there was the carrier's receipt for "245 barrels of apples, to forward to New York, at 44 cents per barrel; advanced $10, and cartage $4.81." The court held this to be not a receipt, but a contract, incapable of being varied by parol proof, &c. It doubts a case which holds that the admission in the bill of lading that the goods shipped are in good order is not conclusive. It excluded all parol evidence of an agreement as to many matters on which the receipt was silent, the time of forwarding, the particular boat, and that there was to be no transshipment.

Most of the other cases cited against us are cases on promissory notes. Of these it suffices to say that the peculiar negotiable character of such instruments makes them so unlike the common bill of lading as to deprive such cases of much application here.

Mr. C. E. Whitehead (*a brief of Mr. J. E. Ward being filed*), *contra.*

Opinion of the court.

Mr. Justice CLIFFORD delivered the opinion of the court.

Ship-owners, as carriers of merchandise, contract for the safe custody, due transport and right delivery of the goods; and the shipper, consignee, or owner of the cargo contracts to pay the freight and charges; and by the maritime law, as expounded by the decisions of this court, the obligations of the ship-owner and the shipper are reciprocal, and it is equally well settled that the maritime law creates reciprocal liens for the enforcement of those obligations, unless the lien is waived by some express stipulation, or is displaced by some inconsistent and irreconcilable provision in the charter-party or bill of lading.* Shippers should in all cases require a bill of lading, which is to be signed by the master, whether the contract of affreightment is by charter-party or without any such customary written instrument. Where the goods of a consignment are not all sent on board at the same time, it is usual for the master, mate, or other person in charge of the deck, and acting for the carrier, to give a receipt for the parcels as they are received, and when the whole consignment is delivered, the master, upon those receipts being given up, will sign two or three, or, if requested, even four bills of lading in the usual form, one being for the ship and the others for the shipper. More than one is required by the shipper, as he usually sends one by mail to the consignee or vendee, and if four are signed he sends one to his agent or factor, and he should always retain one for his own use. Such an instrument acknowledges the bailment of the goods, and is evidence of a contract for the safe custody, due transport, and right delivery of the same, upon the terms, as to freight, therein described, the extent of the obligation being specified in the instrument. Where no exceptions are made in the bill of lading, and in the absence of any legislative provisions prescribing a different rule, the carrier is bound to keep and transport the goods safely, and to make right delivery of the same at the port of destination,

* The Eddy, 5 Wallace, 494; The Bird of Paradise, 5 Id. 555; Bags of Linseed, 1 Black, 112.

unless he can prove that the loss happened from the act of God or the public enemy, or by the act of the shipper or owner of the goods. Stipulations in the nature of exceptions may be made limiting the extent of the obligation of the carrier, and in that event the bill of lading is evidence of the ordinary contract of affreightment, subject, of course, to the exceptions specified in the instrument; and in view of that fact the better description of the obligation of such a carrier is that, in the absence of any Congressional legislation upon the subject, he is in the nature of an insurer, and liable in all events and for every loss or damage, however occasioned, unless it happened by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier, and expressly excepted in the bill of lading.*

Seventy-five tons of pig-iron were shipped by the libellants, on the eighth of May, 1868, on board the bark Delaware, then lying in the port of Portland, Oregon, to be transported from that port to the port of San Francisco, for the freight of four dollars and fifty cents per ton, to be delivered to the shippers or their assigns at the port of destination, they paying freight as therein stipulated, before delivery if required, with five per cent. primage and average accustomed. Dangers of the seas, fire, and collision were excepted in the bill of lading, and the statement at the close of the instrument was, "vessel not accountable for breakage, leakage, or rust."

Process was served and the claimant appeared and filed an answer, in which he admits the shipment of the iron and the execution of the bill of lading exhibited in the record. Sufficient also appears in the record to show that the voyage was performed and that but a small portion of the iron shipped, to wit, some thirteen or fourteen thousand pounds, was ever delivered to the consignees, and that all the residue of the shipment was thrown overboard as a jettison

* The Cordes, 21 Howard, 23; Clark *v.* Branwell, 12 Id. 272; Elliott *v.* Rossell, 10 Johnson, 7.

during the voyage, which became necessary by a peril of the sea, for the safety of the other associated interests and for the preservation of the lives of those on board. Sacrificed as all that portion of the shipment was as a jettison in consequence of a peril of the sea, excepted in the bill of lading, the claimant insists that the libellants have no claim against the ship, and that the libellants as the shippers of the iron must bear their own loss.

Evidence was exhibited by the claimant sufficient to show that the allegations of the answer that the iron, not delivered, was sacrificed during the voyage as a jettison in consequence of a peril of the sea are true, but the libellants allege that the iron was improperly stowed upon the deck of the vessel, and that the necessity of sacrificing it as a jettison arose solely from that fact, and that no such necessity would have arisen if it had been properly stowed under deck, as it should have been by the terms of the contract specified in the bill of lading. That the iron not delivered was stowed on deck is admitted, and it is also conceded that where goods are stowed in that way without the consent of the shipper the carrier is liable in all events if the goods are not delivered, unless he can show that the goods were of that description, which, by the usage of the particular trade, are properly stowed in that way, or that the delivery was prevented by the act of God or the public enemy, or by some other cause or accident, without any fault or negligence on the part of the carrier and expressly excepted in the bill of lading.

Goods, though lost by perils of the sea, if they were stowed on deck without the consent of the shipper, are not regarded as goods lost by the act of God within the meaning of the maritime law, nor are such losses regarded as losses by perils of the sea which will excuse the carrier from delivering the goods shipped to the consignee unless it appears that the manner in which the goods were stowed is sanctioned by commercial usage, or unless it affirmatively appears that the manner of stowage did not, in any degree, contribute to the disaster; that the loss happened without

any fault or negligence on the part of the carrier, and that it could not have been prevented by human skill and prudence, even if the goods had been stowed under deck, as required by the general rules of the maritime law.*

Enough appears in the record to show that all the iron not delivered to the consignees was stowed on deck, and there is no proof in the case to show that the usage of the trade sanctioned such a stowage in this case, or that the manner in which it was stowed did not contribute both to the disaster and to the loss of the goods.†

None of these principles are controverted by the claimant, but he insists that the iron not delivered was stowed on deck by the consent of the shippers and in pursuance of an oral agreement between the carrier and the shippers consummated before the iron was sent on board, and before the bill of lading was executed by the master. Pursuant to that theory testimony was offered in the District Court showing that certain conversations took place between the consignee of the bark and the agent of the shippers tending to prove that the shippers consented that the iron in question should be stowed on the deck of the vessel. Whether any express exception to the admissibility of the evidence was taken or not does not distinctly appear, but it does appear that the question whether the evidence was or not admissible was the principal question examined by the District Court, and the one upon which the decision in the case chiefly turned. Apparently it was also the main point examined in the Circuit Court, and it is certain that it has been treated by both sides in this court as the principal issue involved in the record, and in view of all the circumstances the court here decides that it must be considered that the question as to the admissibility of the evidence is now open for revision, as the decree for the libellant was equivalent to a ruling rejecting the evidence offered in defence or to a ruling granting a motion to strike it out after it had been admitted, which is a course

* Lawrence et al. *v.* Minturn, 17 Howard, 114; The Peytona, 2 Curtis, 23.

† Gould *v.* Oliver, 4 Bingham's New Cases, 142; Story on Bailment, § 531.

often pursued by courts in cases where the question deserves examination. What the claimant offered to prove was that the iron was stowed on deck with the consent of the shippers, but the libellants objected to the evidence as repugnant to the contract set forth in the bill of lading, and the decree was for the libellants, which was equivalent to a decision that the evidence offered was incompetent. Dissatisfied with that decree the respondent appealed to the Circuit Court, where the decree of the District Court was affirmed, and the same party appealed from that decree and removed the cause into this court for re-examination.

Even without any further explanation it is obvious that the only question of any importance in the case is whether the evidence offered to show that the iron in question was stowed on deck with the consent of the shippers was or was not properly rejected, as it is clear if it was, that the decree must be affirmed; and it is equally clear, if it should have been admitted, that the decree must be reversed.*

Different definitions of the commercial instrument, called the bill of lading, have been given by different courts and jurists, but the correct one appears to be that it is a written acknowledgment, signed by the master, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed, to the described place of destination, and there to be delivered to the consignee or parties therein designated.† Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the warehouse of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill

* Angell on Carriers, § 212; Redfield on Carriers, §§ 247 to 269; The St. Cloud, Brown & Lushington Adm. 4.

† Abbott on Shipping, 7th Am ed. 323; O'Brien *v.* Gilchrist 34 Maine, 558; 1 Parsons on Shipping, 186; Machlachlan on Shipping, 338; Emerigon on Ins. 251.

of lading, it is clear that the bill of lading will operate on those goods as between the shipper and the carrier by way of relation and estoppel, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed.* Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument.† Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated.‡ Receipts may be either a mere acknowledgment of payment or delivery, or they may also contain a contract to do something in relation to the thing delivered. In the former case, and so far as the receipt goes only to acknowledge payment or delivery, it, the receipt, is merely *primâ facie* evidence of the fact, and not conclusive, and therefore the fact which it recites may be contradicted by oral testimony, but in so far as it is evidence of a contract between the parties it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol evidence.§ Text writers mention the bill of lading as an example of an instrument which partakes of a twofold character, and such commentators agree that the instrument may, as between the carrier and the shipper, be contradicted and explained in its recital that the goods were in good order and well conditioned, by showing that their internal state and condition was bad or not such as is represented in the instrument, and in like manner, in respect to any other fact which it erroneously

* Rowley *v.* Bigelow, 12 Pickering, 307; The Eddy, 5 Wallace, 495.

† Machlachlan on Shipping, 338-9; Smith's Mercantile Law, 6th ed. 308.

‡ Bates *v.* Todd, 1 Moody & Robinson, 106; Berkley *v.* Watling, 7 Adolphus & Ellis, 29; Wayland *v.* Mosely, 5 Alabama, 430; Brown *v.* Byrne, 3 Ellis & Blackburne, 714; Blaikie *v.* Stembridge, 6 C. B., N. S. 907.

§ 1 Greenleaf on Evidence, 12th ed., § 305; Bradley *v.* Dunipace, 1 Hurlstone & Colt, 525.

recites, but in all other respects it is to be treated like other written contracts.*

Bills of lading when signed by the master, duly executed in the usual course of business, bind the owners of the vessel if the goods were laden on board or were actually delivered into the custody of the master, but it is well-settled law that the owners are not liable, if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board or delivered into the custody of the carrier or his agent.† Proof of fraud is certainly a good defence to an action claiming damages for the non-delivery of the goods, but it is settled law in this court that a clean bill of lading imports that the goods are to be safely and properly stowed under deck, and that it is the duty of the master to see that the cargo is so stowed and arranged that the different goods may not be injured by each other or by the motion or leakage of the vessel, unless by agreement that service is to be performed by the shipper.‡ Express contracts may be made in writing which will define the obligations and duties of the parties, but where those obligations and duties are evidenced by a clean bill of lading, that is, if the bill of lading is silent as to the mode of stowing the goods, and it contains no exceptions as to the liability of the master, except the usual one of the dangers of the sea, the law provides that the goods are to be carried under deck, unless it be shown that the usage of the particular trade takes the case out of the general rule applied in such controversies.§ Evidence of usage is admissible in

* Hastings *v.* Pepper, 11 Pickering, 42; Clark *v.* Barnwell et al., 12 Howard, 272; Ellis *v.* Willard, 5 Selden, 529; May *v.* Babcock, 4 Ohio, 346; Adams *v.* Packet Co., 5 C. B., N. S. 492; Sack *v.* Ford, 13 C. B., N. S. 100.

† The Schooner Freeman, 18 Howard, 187; Maude & Pollock on Shipping, 233; Grant *v.* Norway, 10 C. B. 665; Zipsy *v.* Hill, Foster & Finelly, 573; Meyer *v.* Dresser, 16 C. B., N. S. 657.

‡ The Cordes, 21 Howard, 23; Sandeman *v.* Scurr, Law Reports, 2 Q. B. 98; Swainston *v.* Garrick, 2 Law Journal, N. S. Exchequer, 355; African Co. *v.* Lamzed, Law Reports, 1 C. P. 229; Alston *v.* Hering, 11 Exchequer, 822.

§ Abbott on Shipping (7th Am. ed.), 345; Smith *v.* Wright, 1 Cain, 43;

mercantile contracts to prove that the words in which the contract is expressed, in the particular trade to which the contract refers, are used in a particular sense and different from the sense which they ordinarily import; and it is also admissible in certain cases, for the purpose of annexing incidents to the contract in matters upon which the contract is silent, but it is never admitted to make a contract or to add a new element to the terms of a contract previously made by the parties. Such evidence may be introduced to explain what is ambiguous, but it is never admissible to vary or contradict what is plain. Evidence of the kind may be admitted for the purpose of defining what is uncertain, but it is never properly admitted to alter a general rule of law, nor to make the legal rights or liabilities of the parties other or different from what they are by the common law.* Cases may arise where such evidence may be admissible and material, but as none such was offered in this case it is not necessary to pursue that inquiry. Exceptions also exist to the rule that parol evidence is not admissible to vary or contradict the terms of a written instrument where it appears that the instrument was not within the statute of frauds nor under seal, as where the evidence offered tends to prove a subsequent agreement upon a new consideration. Subsequent oral agreements in respect to a prior written agreement, not falling within the statute of frauds, may have the effect to enlarge the time of performance, or may vary any other of its terms, or, if founded upon a new consideration, may waive and discharge it altogether.† Verbal agreements, however, between the parties to a written contract, made before or at the time of the execution of the contract, are in general inadmissible to contradict or vary its terms

Gould *v.* Oliver, 2 Manning & Granger, 208; Waring *v.* Morse, 7 Alabama, 343; Falkner *v.* Earle, 3 Best & Smith, 363.

* Oelricks *v.* Ford, 23 Howard, 63; Barnard *v.* Kellogg et al., 10 Wallace, 383; Simmons *v.* Law, 3 Keyes, 219; Spartali *v.* Benecke, 10 C. B. 222.

† Emerson *v.* Slater, 22 Howard, 41; Gross *v.* Nugent, 5 Barnewall & Adolphus, 65; Nelson *v.* Boynton, 3 Metcalf, 402; 1 Greenleaf on Evidence, 303; Harvey *v.* Grabham, 5 Adolphus & Ellis, 61.

or to affect its construction, as all such verbal agreements are considered as merged in the written contract.*

Apply that rule to the case before the court and it is clear that the ruling of the court below was correct, as all the evidence offered consisted of conversations between the shippers and the master before or at the time the bill of lading was executed. Unless the bill of lading contains a special stipulation to that effect the master is not authorized to stow the goods sent on board as cargo on deck, as when he signs the bill of lading, if in common form, he contracts to convey the merchandise safely, in the usual mode of conveyance, which, in the absence of proof of a contrary usage in the particular trade, requires that the goods shall be safely stowed under deck; and when the master departs from that rule and stows them on deck, he cannot exempt either himself or the vessel from liability, in case of loss, by virtue of the exception, of dangers of the seas, unless the dangers were such as would have occasioned the loss even if the goods had been stowed as required by the contract of affreightment.† Contracts of the master, within the scope of his authority as such, bind the vessel and give the creditor a lien upon it for his security, except for repairs and supplies purchased in the home port, and the master is responsible for the safe stowage of the cargo under deck, and if he fails to fulfil that duty he is responsible for the safety of the goods, and if they are sacrificed for the common safety the goods stowed under deck do not contribute to the loss.‡ Ship-owners in a contract by a bill of lading for the transportation of merchandise take upon themselves the responsibilities of common carriers, and the master, as the agent of such owners, is bound to have the cargo safely secured under deck, unless he is authorized to carry the goods on

* Ruse *v.* Ins. Co., 23 N. Y. 519; Wheelton *v.* Hardisty, 8 Ellis & Blackburn, 296; 2 Smith's Leading Cases, 758; Angell on Carriers, 4th ed., § 229.

† The Rebecca, Ware, 210; Dodge *v.* Bartol, 5 Greenleaf, 286; Walcott *v.* Ins. Co., 4 Pickering, 429; Copper Co. *v.* Ins. Co., 22 Id. 108; Adams *v.* Ins. Co., Ib. 163.

‡ The Paragon, Ware, 329, 331; 2 Phillips on Insurance, § 704; Brooks *v.* Insurance Co., 7 Pickering, 259.

deck by the usage of the particular trade or by the consent of the shipper, and if he would rely upon the latter he must take care to require that the consent shall be expressed in a form to be available as evidence under the general rules of law.*

Where goods are stowed under deck the carrier is bound to prove the casualty or *vis major* which occasioned the loss or deterioration of the property which he undertook to transport and deliver in good condition to the consignee, and if he fails to do so the shipper or consignee, as a general rule, is entitled to his remedy for the non-delivery of the goods. No such consequences, however, follow if the goods were stowed on deck by the consent of the shipper, as in that event neither the master nor the owner is liable for any damage done to the goods by the perils of the sea or from the necessary exposure of the property, but the burden to prove such consent is upon the carrier, and he must take care that he has competent evidence to prove the fact.† Parol evidence, said Mr. Justice Nelson, in the case of *Creery* v. *Holly*,‡ is inadmissible to vary the terms or legal import of a bill of lading free of ambiguity, and it was accordingly held in that case that a clean bill of lading imports that the goods are stowed under deck, and that parol evidence that the vendor agreed that the goods should be stowed on deck could not legally be received even in an action by the vendor against the purchaser for the price of the goods which were lost in consequence of the stowage of the goods in that manner by the carrier. Even where it appeared that the shipper, or his agent who delivered the goods to the carrier, repeatedly saw them as they were stowed in that way and made no objection to their being so stowed, the Supreme Court of Maine held that the evidence of those facts was not admissible to vary the legal import of the contract of shipment; that the bill of lading being what is called a clean bill of lading, it bound the owners of the vessel to carry the goods

* The Waldo, Davies, 162; Blackett *v.* Exchange Co , 2 Crompton & Jervis, 250; 1 Arnould on Insurance, 69; Lenox *v.* Insurance Co., 3 Johnson's Cases, 178.

† Shackleford *v.* Wilcox, 9 Louisiana, 38.

‡ 14 Wendell, 28.

under deck, but the court admitted that where there is a well-known usage in reference to a particular trade to carry the goods as convenience may require, either upon or under deck, the bill of lading may import no more than that the cargo shall be carried in the usual manner.* Testimony to prove a verbal agreement that the goods might be stowed on deck was offered by the defence in the case of *Barber* v. *Brace*,† but the court rejected the testimony, holding that the whole conversation, both before and at the time the writing was given, was merged in the written instrument, which undoubtedly is the correct rule upon the subject. Written instruments cannot be contradicted or varied by evidence of oral conversations between the parties which took place before or at the time the written instrument was executed; but in the case of a bill of lading or a charter-party, evidence of usage in a particular trade is admissible to show that certain goods in that trade may be stowed on deck, as was distinctly decided in that case.‡ But evidence of usage cannot be admitted to control or vary the positive stipulations of a bill of lading, or to substitute for the express terms of the instrument an implied agreement or usage that the carrier shall not be bound to keep, transport, and deliver the goods in good order and condition.§

Remarks, it must be admitted, are found in the opinion of the court, in the case of *Vernard* v. *Hudson*,‖ and also in the case of *Sayward* v. *Stevens*,¶ which favor the views of the appellant, but the weight of authority and all the analogies of the rules of evidence support the conclusion of the court below, and the court here adopts that conclusion as the correct rule of law, subject to the qualifications herein expressed.

DECREE AFFIRMED.

* Sproat *v.* Donnell, 26 Maine, 187; 2 Taylor on Evidence, §§ 1062, 1067; Hope *v.* State Bank, 4 Louisiana, 212; 1 Arnould on Insurance, 70; Lapham *v.* Insurance Co., 24 Pickering, 1.

† 3 Connecticut, 14.

‡ Barber *v.* Brace, 3 Pickering, 13; 1 Smith's Leading Cases, 6th American edition, 837.

§ The Reeside, 2 Sumner, 570; 1 Duer on Insurance, § 17.

‖ 3 Sumner, 406. ¶ 3 Gray, 101.

LEARY *v.* UNITED STATES.

1. If by the terms of a charter-party the entire vessel is let to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel.
2. Stipulations in a charter-party that the general owners shall keep the vessel in good condition during the existence of the charter, and receive on board certain goods at the request of the government (the charterer) and refuse to receive other goods without its assent. *Held*, to be conclusive evidence that the possession and control of the vessel had not passed to the charterer but had been retained by the general owner.
3. In a charter-party by which a vessel was hired by the government for the purpose of plying in the harbor of Port Royal, in South Carolina, or for such other service as the government might designate, it was stipulated that in case the vessel, while executing the orders of the government, should be destroyed or damaged, or by being compelled by the government to run any *extraordinary marine risk*, the owner should be indemnified. In complying with the orders of the harbor master in Port Royal the vessel struck upon the fluke of a sunken anchor in the harbor, and was sunk; *held*, that the risk which the vessel thus incurred was not an extraordinary marine risk within the meaning of the charter-party, but an ordinary risk which every vessel runs that enters a harbor, and which every marine policy covers.

APPEAL from the Court of Claims.

On the 19th of November, 1862, one Leary, owner of the steamer Mattano, chartered her to the United States, for the purpose of plying in the harbor of Port Royal, South Carolina, or for any other service the government might designate.

By the terms of the charter-party Leary engaged that the vessel during the existence of the charter, should be kept tight, stanch, well-fitted, tackled, and provided with every requisite, and with men and provisions necessary; that the whole of it (with the exception of room necessary for the accommodation of the crew and the storage of cables and provisions) should be at the sole use and disposal of the

government during the existence of the charter; and that no goods or merchandise should be laden on board otherwise than from the government or its agent, on pain of forfeiture of the amount that may become due on the charter; that he, Leary, would receive on board the vessel, during the charter, all such goods and merchandise as the government might think proper to ship. The government on its part agreed to charter and hire the vessel at $250 a day, for each day that it might be retained under the charter, the government to supply the coal; and that in case the vessel, while executing the orders of the government, should be destroyed or damaged by a hostile force from any quarter, or by being compelled by the government *to run any extraordinary marine risk*, then Leary was to be indemnified; in case of loss, the value of the vessel being fixed at $26,000, "and in case of damage, the amount to be assessed *by a board of survey*, to be convened on her, after her arrival at Port Royal, South Carolina, or other friendly port, at the expense of the government."

While under charter, the vessel was lying at one of the wharves in the harbor of Port Royal. On the 12th of May, 1863, the military harbor-master ordered her out to make room for another steamer. The captain of the Mattano objected to going out, as the tide was very low; and, as he believed, there was a considerable breeze from an unfavorable quarter. The harbor-master ordered the Mattano peremptorily to back out, and her captain let go his lines and did so. In thus backing out she struck upon the fluke of a sunken anchor imbedded in the sand, and sunk in fifteen minutes.

This anchor, against whose fluke the vessel struck, was a mooring anchor, and had been placed where it was by the United States quartermaster, to moor big ocean steamers prior to November, 1862, and had a buoy attached to it which showed its position; but, about the 1st of January, 1863, the buoy had gone adrift in a gale of wind, and had never been replaced, and there was nothing at the time of the accident to warn vessels of the position of the sunken

anchor. No one could have pointed out where the anchor was at that time. The captain of the Mattano knew of the existence of the anchor, but thought he was a long way outside of it. There was no unskilfulness in executing the order to back out.

The Mattano was removed from where she sank by a wrecking-boat sent there by the Secretary of War, and under orders from the quartermaster, about July 4th, 1863, and the cost of this service was paid by the United States. A gale of wind, which came on after she sank, did damage to her by carrying off her upper works, wheel-house, and joiners' work clear to the hull. No board of survey was convened to assess the damage done to the vessel.

After the vessel had been raised by the United States Leary took possession of her, carried her to New York, and there had her put in order in such a way as to leave her fit for a towing or carrying vessel, but not fitted for passengers. These repairs were completed on the 10th of December, 1863, and cost Leary for her restoration $18,265.25; and she was worth then $12,000 less than before the accident. From the time this occurred, 12th of May, 1863, until the time the repairs were completed, December 10th, 1863, there were two hundred and fourteen days. The repairs were made as rapidly and as economically as possible. She was chartered again to the defendants in May, 1864, at $100 a day.

On this case the Court of Claims decided that the disaster was a usual marine disaster, such as was covered by ordinary marine policies of insurance, and not such extraordinary marine risk as was contemplated in the charter-party; and that if the owners neglected to protect themselves against such perils by insurance they would have to bear the loss. The court accordingly dismissed the petition, and hence the appeal to this court.

Messrs. Chipman, Hosmer, and Durant, for the appellants, argued in substance:

1st. That the United States were the owners of the injured

vessel, by the terms of the charter-party, during the continuance of the service stipulated, and were consequently responsible for the damages sustained by the vessel whilst engaged in that service.

2d. That the damages to the vessel were occasioned by her running an extraordinary marine risk under compulsion from the United States, and for indemnity against such damages the charter-party stipulated, and they sought a reversal of the decree accordingly on those grounds.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice FIELD delivered the opinion of the court.

There is no doubt that under some forms of a charter-party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter-party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only the use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel.

In examining the adjudged cases on this subject we find some differences of opinion, especially in the earlier cases, as to the effect to be given to certain technical terms used

in the charter-party in determining whether the instrument parts with the entire possession and control of the vessel, but no difference as to the rule of law applicable when the construction is settled. All the cases agree that entire command and possession of the vessel, and consequent control over its navigation, must be surrendered to the charterer before he can be held as special owner for the voyage or other service mentioned. The retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer.*

If, now, in the light of these observations we look at the charter-party in this case we shall find little difficulty in disposing of the first ground for reversal presented by the appellants. The vessel here was chartered for the purpose of plying in the harbor of Port Royal, in South Carolina, or for such other service as the government might designate, and the provisions which the charter-party contains on the part of the owners sound only in covenant. By it they engage that during the existence of the charter the vessel shall be kept tight, stanch, well fitted, tackled, and provided with every requisite, and with the necessary men and provisions; that the whole of the vessel, with the exception of the necessary room for the accommodation of the crew and the storage for the cables and provisions, shall be at the sole use and disposal of the government; that no goods or merchandise shall be laden on board otherwise than from the government, or with the assent of its agent, on pain of forfeiture of the amount that may become due on the charter; and that the owners will receive on board all lawful goods and merchandise which the government may think proper to ship. In consideration of these stipulations the United States agree that the owners shall receive the sum of two

* Christie *v.* Lewis, 2 Brod. & Bing. 410, 434; Marcardier *v.* The Chesapeake Insurance Company, 8 Cranch, 39, 49; The Schooner Volunteer and Cargo, 1 Sumner, 551, 556; Drinkwater *v.* Freight and Cargo of Brig Spartan, Ware, 149, 154; Donahoe *v.* Kettell, 1 Clifford, 135; Holt on Shipping, 461–471.

hundred and fifty dollars per day for each day the vessel is retained under the charter, and that they will supply the vessel with coal; and in case the vessel, whilst executing the orders of the government, shall be destroyed or damaged by a hostile force, or by being compelled to run any extraordinary marine risk, that the owners shall be indemnified.

The stipulations here designated on the part of the owners imply the possession and command of the vessel by them, and would be inconsistent with such possession and command by the government.

Stipulations that the general owners shall keep the vessel in good condition during the existence of the charter and receive on board certain goods at the request of the government and refuse to receive other goods without its assent, would be out of place and inappropriate if the government were, at the same time, special owners of the vessel for the service stipulated, having the vessel in its entire possession and control. Great weight was given to similar clauses by the King's Bench, in *Saville* v. *Campion*,* and by the Supreme Court of New York, in *Clarkson* v. *Edes*.† In each of these cases they were held conclusive that the possession and control of the vessel had not passed to the charterer, but had been retained by the general owner.

The fact that the service stipulated in the present case was to be rendered for the government cannot alter the natural import of the terms used in the charter-party, or change its construction, although in a doubtful case that fact might be entitled to much consideration.

2. The second ground presented by the appellants for a reversal of the decree is readily answered. The risk that the vessel incurred in complying with the orders of the harbor-master was not an extraordinary marine risk within the meaning of the charter-party. The term extraordinary is there used to distinguish an unusual risk which the vessel might be compelled to run by order of the government, from those risks which would be covered by an ordinary

* 2 Barnewall & Alderson, 511. † 4 Cowen, 477.

Syllabus.

marine policy and which might be expected to arise from the service in which the vessel was engaged. The contract of the government was not intended to apply to the usual risks attendant upon the performance of a service such as was here mentioned, but risks outside and beyond them.

The risk incurred was of a possible collision with a sunken anchor in the harbor. This was an ordinary risk which every vessel must run that enters a harbor, and is one which every marine policy covers.

DECREE AFFIRMED.

ERSKINE, COLLECTOR, *v.* HOHNBACH.

1. An appeal to the Commissioner of Internal Revenue from an assessment is only a condition precedent to an action for the recovery of taxes paid, and not a condition precedent to any other action where such action is permissible.
2. A collector of taxes of the United States cannot revise or refuse to enforce an assessment regularly made by the assessor of his district in the exercise of the latter's jurisdiction. The duties of a collector in the enforcement of a tax assessed are purely ministerial. The assessment, duly certified to him, is his authority to proceed, and constitutes his protection.
3. If an officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to a ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued.
4. The replication of *de injuriâ*, interposed to a special plea, justifying the seizure and conviction of property sued for by one as collector of internal revenue under an assessment against the plaintiff, duly made by the assessor of the district and certified to him, puts in issue the material averments of that plea. It throws upon the defendant the burden of proving so much of the plea as constitutes a defence to the action.

Statement of the case.

5. When to a declaration two special pleas are interposed, each setting up substantially the same defence, and by the replication to one issue is joined on the merits, and by the replication to the other an immaterial issue is formed, and upon the trial all the issues are found for the plaintiff, it is a matter of discretion in the court whether to arrest the judgment for the verdict on the immaterial issue and award a repleader, with which this court will not interfere.
6. The effect of the replication *de injuriâ* considered upon the authorities. However regarded, its sufficiency to put the material averments of the plea in issue cannot be raised after verdict.

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

The 19th section of the act of July 13th, 1866,* enacts:

"That no suit shall be maintained in any court *for the recovery of any tax* alleged to have been erroneously or illegally assessed or collected, until appeal shall have been duly made to the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof, and a decision of said commissioner be had thereon."

With this statutory provision in force, Hohnbach sued Erskine, a collector of internal revenue, in an *action of trespass* for the seizure by him, the said collector, and conversion to his use of certain personal property of the alleged value of $10,000, belonging to him, the plaintiff.

The declaration was in the usual form in such cases, and alleged that the seizure and conversion were made in May, 1869, at Milwaukee, in the State of Wisconsin. To this the defendant pleaded the general issue, and two special pleas, in which he justified the acts complained of on the ground that they were done by him as collector of internal revenue of the first collection district of Wisconsin, in the enforcement of an assessment chargeable against the plaintiff, duly made by the assessor of the district, and certified to him, with an order directing its collection. Both pleas set up the same defence of justification as collector of internal revenue,

* 14 Stat. at Large, 152.

Statement of the case.

differing only in the particularity with which the facts of assessment and distraint and sale of the property were detailed.

To the first special plea the plaintiff replied *de injuriâ suâ propriâ absque tali causâ*—that the defendant committed the several trespasses mentioned in the declaration of his own wrong, and without the cause alleged by him; and upon this replication issue was joined.

To the second special plea the plaintiff replied that the tax assessed, which was upon tobacco sold and materials used in its manufacture, was never chargeable to him, inasmuch as he did not manufacture and sell, or remove, within the period mentioned in the assessment, the tobacco described, or any part thereof, and that he had paid all the taxes chargeable against him upon the tobacco manufactured by him, and sold or removed for consumption or use during that period. To this replication the defendant rejoined that the plaintiff had not paid the sum assessed against him, as stated in the plea, for the tobacco thus manufactured by him and sold or removed for consumption. The conclusion was to the country, and the plaintiff joined in the issue.

On the trial which followed the jury found the several issues in favor of the plaintiff, and assessed his damages accordingly.

The defendant then moved in arrest of judgment on several grounds. They amounted, however, substantially to this: that the second special plea set forth a good defence to the action, inasmuch as it showed that the seizure and conversion complained of were made by the defendant as collector of internal revenue in the enforcement of a tax regularly and legally assessed against the plaintiff; and that the replication did not answer this plea because it did not allege that the plaintiff had taken an appeal from the assessment to the Commissioner of Internal Revenue, without which the action was not maintainable. The motion was denied, and judgment was entered upon the verdict for the plaintiff. To review this judgment the defendant brought the case here on writ of error.

Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error; Messrs. Smith and Stark, contra.

Mr. Justice FIELD delivered the opinion of the court.

We do not think that the omission, in the replication, to allege that the plaintiff had taken an appeal from the assessment to the Commissioner of Internal Revenue affected the character of the replication, or that the insertion of the allegation would have aided it. The defect of the replication consisted in the fact that it raised an immaterial issue. An appeal to the Commissioner of Internal Revenue from an assessment is only a condition precedent to an action for the recovery of taxes paid. It is not a condition precedent to any other action where such action is permissible.

The collector could not revise nor refuse to enforce the assessment regularly made by the assessor in the exercise of the latter's jurisdiction. The duties of the collector in the enforcement of the tax assessed were purely ministerial. The assessment, duly certified to him, was his authority to proceed, and, like an execution to a sheriff, regular on its face, issued by a tribunal having jurisdiction of the subject-matter, constituted his protection.

Whatever may have been the conflict at one time, in the adjudged cases, as to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now, that if the officer or tribunal possess jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law, or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement against any prosecution which the party aggrieved thereby may institute against him, although

serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued.*

Now, the replication to the second special plea did not deny the jurisdiction of the assessor to make an assessment under the circumstances alleged in the plea; nor that the assessment made by him was duly certified to the defendant as collector of the district, with an order to proceed to enforce it, nor that the property assessed was subject to taxation; but only averred that the assessment made was not chargeable against the plaintiff, because he had not manufactured and sold or removed the property assessed within the period mentioned, and had paid all the taxes chargeable against him upon such property—an averment which, if true, would only have shown that the assessor had erred in his judgment in making the assessment, and could not have controlled the action of the collector, nor have justified him in suspending the enforcement of the tax. A judgment debtor might as well complain of the enforcement of an execution by a sheriff on the ground that the court erred in finding that he was indebted to the plaintiff and so giving judgment against him.

An immaterial issue having been thus tendered the proper course for the defendant to pursue was to demur to the replication, and thus force the plaintiff to join issue on the merits of the defence pleaded, or to allow judgment to pass against him. Had the issue here made been the only one in the case tendered to the defence pleaded by the second special plea, the defendant, not being able to set up that defence under the general issue, would have been entitled after verdict to an arrest of judgment and an award of repleader.† But such was not the fact here. The first special plea set up the same defence as the second. In both of the special pleas the defendant justified the seizure and conversion of

* Savacool *v.* Boughton, 5 Wendell, 171; Earl *v.* Camp, 16 Id. 563; Chegaray *v.* Jenkins, 5 New York, 376; Sprague *v.* Birchard, 1 Wisconsin, 457.

† Gould on Pleading, chap. x, § 29.

the property, described in the declaration, as collector of internal revenue, under an assessment against the plaintiff duly made by the assessor of the district and certified to him. The difference in the language used in the two pleas, and in the particularity with which the assessment of the tax and the distraint and sale of the property were set forth, did not change the substantial identity of the defence made.

Now the replication of *de injuriâ*, which was interposed to the first special plea, put in issue the material averments of that plea. It threw upon the defendant the burden of proving so much of the plea as constituted a defence to the action. As no error in the ruling of the court on the trial is presented, we are forced to presume that the defendant was afforded every opportunity allowed by law to establish the facts averred by him. To arrest judgment upon the verdict rendered on this issue because an immaterial issue was formed upon a replication to another plea setting up the same defence, and award a repleader, would be in effect to allow the same matter to be twice tried. Such being the case, the granting or refusing the motion rested in the discretion of the court below, with which this court will not interfere.

We are aware of numerous decisions in this country to the effect that the replication *de injuriâ* is only a good replication where the plea sets up matter of excuse, and is not good where the plea sets up matter of justification, though the justification be under process from a court not of record, or rest upon some authority of law other than a judgment of a court. Such are the decisions of the Supreme Court of New York,* and they proceed upon the supposed doctrine of the resolutions in *Crogate's Case*.† But an examination of that case will show that the doctrine is not supported to the extent laid down in the New York decisions. The third resolution in Crogate's case does state that a replication *de injuriâ* is bad where the justification is under au-

* Griswold *v.* Sedgwick, 1 Wendell, 131; Coburn *v.* Hopkins, 4 Id. 577.
† 8 Coke, 132.

thority of law, but, as observed by Mr. Justice Patteson, in *Selby* v. *Bardons*,* this, if taken to the full extent of the terms used, is inconsistent with that part of the first resolution which states that where the plea justifies under proceedings of a court not of record the replication may be used. In that case the declaration was in replevin for goods and chattels. The avowry of the defendant stated that the plaintiff was an inhabitant and occupier of a tenement in a certain parish; that a rate for the relief of the poor of the parish was duly made and published, in which the plaintiff was rated at seven pounds; that he had notice of the rate and was required by the defendant, as collector, to pay the same, which he refused; that he was then summoned before two justices to show cause why he refused; that he appeared, but showing no cause, the justices issued a warrant to the defendant to distrain the plaintiff's goods and chattels, under which he, and the other defendant as his bailiff, took the goods and chattels mentioned in the declaration. To this avowry the plaintiff filed the plea of *de injuriâ*, to which a special demurrer was interposed assigning for cause that the plea offered to put in issue several distinct matters, and was pleaded as if the avowry consisted wholly in excuse of the taking and detaining and not as a justification and claim of right. The court considered at length both causes, and held that the plea was good. On error to the Court of Exchequer Chamber this ruling was affirmed,† and the decision, it is believed, has never been departed from in the English courts. The plea *de injuriâ* in this case to the avowry stands like the replication *de injuriâ* to a plea setting up similar matter in an action of trespass. There is no distinction in the effect of the plea in one case and the replication in the other. This was held by the King's Bench in the case cited, and by the Court of Exchequer Chamber on error.

This case is authority for the sufficiency of the replication to the first special plea. Other cases might be cited to the same purport. The decisions in England on this point will

* 3 Barnewall & Adolphus, 2.

† 3 Tyrwhitt, 430.

be found collected in a learned note to Crogate's case by Mr. Smith in his Leading Cases, and the decisions in this country will be found collected in an equally learned note by the American editors of that work.

But aside from the considerations mentioned, however the replication might be regarded in some courts on special demurrer, its defective character, if at all defective, was cured by the verdict. The objection to its sufficiency to put the averments of the plea in issue cannot be raised after verdict.*

JUDGMENT AFFIRMED.

MOWRY *v.* WHITNEY.

1. Asa Whitney's patent of April 25th, 1848, for an "improvement in the process of manufacturing cast-iron railroad wheels," was for a process, not for a combination.
2. Where only vague and uncertain directions could be given as to the degree of foreign heat to be applied in any particular case, there, when a patentee in his specification, establishes a *maximum* and a *minimum*, the ascertainment of the proper intermediate degree may be left to the skill and judgment of the operator practicing the process.
3. It is as true of a process, invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture.
4. In such a case the question to be determined is, what advantage did the infringer derive from using the invention, over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits, and that advantage is the measure of profits to be accounted for.
5. When a patent is for an entire process made up of several constituent steps or stages, the patentee not pretending to be the inventor of those constituents, his claim to the process as an entirety does not secure to him the exclusive use of the constituents singly. What is secured is their use when arranged in the process.
6. The profits recoverable from an infringer are the measure of the paten-

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* See Lytle *v.* Lee & Ruggles, 5 Johnson, 112, and the cases there cited.

Statement of the case.

tee's damages, and though called *profits* are really *damages;* and unliquidated until a final decree is made.

7. Interest upon unliquidated damages is not generally allowable, and should not be allowed before a final decree for profits.

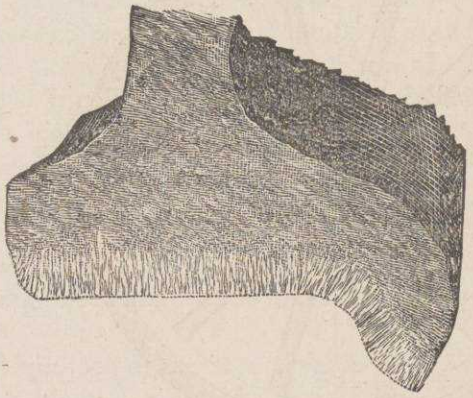
APPEAL from the Circuit Court for the Southern District of Ohio; the suit being a bill by Whitney for an alleged infringement by Mowry, of a patent which Whitney had for an improvement in the process of making wheels for rail-cars. The case was thus:

Wheels for rail-cars require to be made in a special way. The "tread" of the wheel, as it is commonly called—that is to say, the periphery—the surface which runs over the rail—must be very hard, or else it will wear out. On the other hand, the interior portions of the wheel, especially the hub, against which there is no friction, but on which there is great strain, need not be so hard, but must be very tough. Now here are requisites which by a law of the metal do not coexist in the same casting. Iron can be very hard only when it exists in a state of *laminated* crystallization, and then it is brittle. It can be very tough only when it exists in a state of *granulated* crystallization, and then it is soft. Now how is the "tread" to be made very hard and the interior very tough? This was the first problem in regard to iron car-wheels. And it was thus solved. It had been long observed that where molten iron was cooled *suddenly*, it came out solid in the laminated or hard and brittle form, but when cooled slowly it came out solid in the tough and softer form.

The problem, of course, then was to cool rapidly the part of the melted mass of iron which was to make the "tread" of the wheel, and to cool more slowly the rest which was to make the interior of the wheel; that is to say, the spokes and hub. To do this the moulds into which the molten iron was to be cast were made of sand, *surrounded by a circle of iron;* this circle, called in the manufacturer's language a "chill." Iron being a rapid conductor of heat and sand a slow one, the part of the molten mass which came against

the iron or chill—the part, in other words, of the molten mass which was to form the *tread*, was cooled rapidly, and came out in the laminated and *hard* (though brittle) form; while the parts of the wheel nearer to the hub, and especially the hub itself (which is a very thick part of the wheel, and where a very great strain is put when the rail-car is in motion), cooling slowly, the requisite toughness was obtained, through *this* part (and particularly the hub, owing to the greater mass of it) coming out in the granulated and tough (though soft) form. The cut below, which represents a piece fractured from off that part of the wheel including the flange, which runs over the rail, indicates the two forms. The lower part or chilled "tread" (which in the ordinary car-wheel itself is about half an inch deep) being distinguished by its laminated crystallizations and light gray color, and the upper part which runs in the direction of the hub by its granular crystallization, and a deeper gray line.

FIG. 1.



This problem, therefore—the problem of obtaining a hard tread, and a tough interior and hub—was solved. The thing desired was attained through the process of a sand mould with an iron "chill."

But of this good result in one way, a very bad one in another was the consequence. The wheels had no strength. And here was the cause. A mass of iron in its molten state

is larger than the same mass of iron when cold. Now here the molten iron was poured into the mould at the hub. Thence it flowed out through the sand mould of the spokes to the tread. There it came in contact with the chill, and as soon as it touched the chill it was cooled, crystallized, and reduced in volume almost instantly. The metal immediately behind it, on the contrary, being in contact with the sand, parted with its heat more slowly, and remained in a fluid or semifluid state much longer. Thus it happened that the periphery of the tread cooling and shrinking first, reduced its diameter, while the hub and spokes remaining in a fluid or soft state, presented little or no resistance to the contraction of the tread or rim. But as these spokes and

FIG. 2.

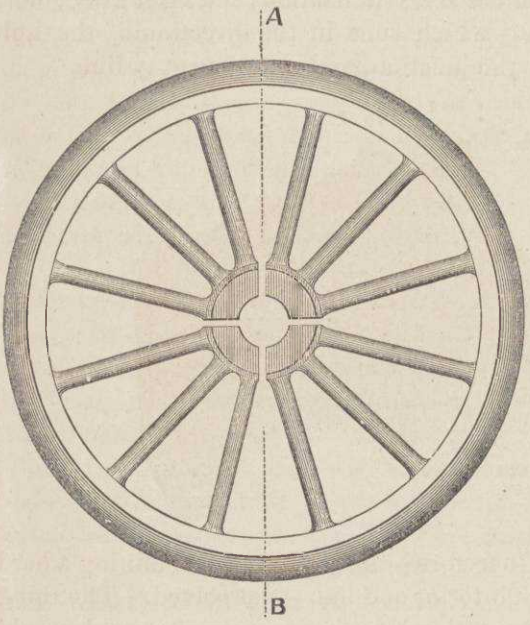


FIG. 3.

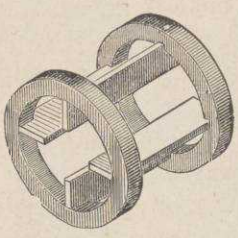
hub subsequently parted with their heat, and passed into the solid state, an inherent strain began to be exerted between the rim and hub. The spokes were too short. Restoration of so much of their length as had been diminished by the

prior cooling and shrinking of the rim was demanded. All parts of the wheel having passed into the solid state, and become comparatively unelastic, the spokes were severed by mere tensile strain before the temperature of the whole mass was reduced to that of the atmosphere. And the same result followed when, instead of spokes, disks or plates were used on the sides of the wheel, as shown in Figure 3.

To obviate this effect, a rude practice was, on the one hand, to uncover and expose to the air the thick parts of the wheel, sometimes, in addition, pouring cold water on them; while, on the other, the thin portions would be covered with burning fuel or hot sand. Still, however, the wheel would always strain, and usually break.

The great matter now was to remove this difficulty. One plan was to divide the *hub* into sections, as shown in Figures 2 and 3, instead of casting it solid. This, of course, relieved the spokes from the tensile strain they were subjected to when connected with the solid hub; the spokes connected with each of the sections being left comparatively free to contract in length (only, however, it may be added) by carrying the section of hub to which they were attached with them.

FIG. 4.



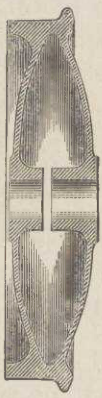
To restore the requisite *strength* to the hub, the spaces between these sections would be subsequently filled with pieces of metal of the exact size of the spaces, and wrought-iron bands would be shrunk on to each end of the hub, so as to hold firmly together all the sections, and the metal fillings or plates between them. Figure 4 illustrates the metal fillings or plates and bands that would be put into and on the hubs.

Wheels of this description were used till 1840. At that date our roads began to be made more substantial, and higher velocities upon them being demanded, the cast *spoke*-wheel, thus filled out at the hub, began to show great defects. The expense of filling the spaces between the sections was considerable. There was difficulty in putting the

wrought-iron bands on the ends of the hub and of boring out the divided hub so as to make it fit well on the axle and to secure it from becoming loose. Yet if these things were not effectually done, the wheel broke or changed its position on the axle, and the cars were thrown from the track.

To avoid these difficulties other means were employed to compensate for the unequal cooling and shrinking of the parts. These were nearly all confined to making the hub solid, and connecting the hub and rim by a disk or plate, which was generally made double; two plates extending from hub to rim, in form convex, as in Fig. 5, or otherwise curved, so as to be susceptible, as was supposed, of contracting or expanding in diameter as much as would be required by the unequal cooling and contraction before noticed. In one of these forms the hub was also divided, as shown in Fig. 5, it being expected that with the shrinking of the outer disks it would about close up. These wheels, when skilfully made, were an improvement on the spoke-wheel, with the hub divided into sections, so far as safety was concerned, but they were still faulty.

FIG. 5.

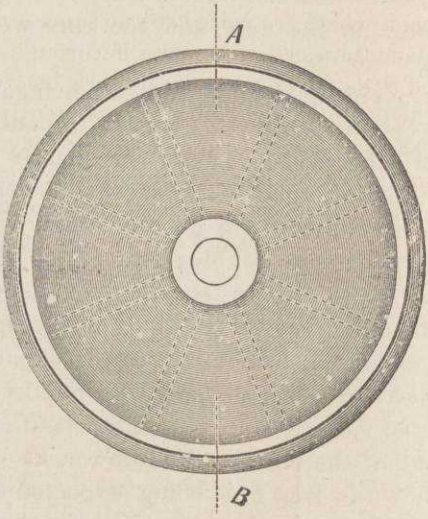


What, in this obviously not yet perfect art of making cast-iron car-wheels, was wanted, was some way to make such wheels, having a solid hub, and either *spokes*, or any desired form of *plates*, single or double, straight or curved, as represented in Figs. 6 and 7 below, and possessing all the requisites of durability and strength in the respective parts, and yet free from the defects which had attended, up to this time, all wheels yet made; and not requiring the expenditure of special labor upon the mould or pattern before casting, nor upon the finishing of the wheel for use, after it had been cast and cooled; some new and effective device which should eradicate and annihilate the difficulties which have been already imperfectly described, and which were still baffling manufacturers and inventors in this art. A new process of

prolonging the time of cooling, in connection with annealing wheels would, if rightly conceived, secure the desired end.

FIG. 6.

FIG. 7.



It was in this state of the art and of its necessity that Whitney made a claim for what he called "a new and useful improvement in the process of manufacturing cast-iron railroad wheels," and on the 25th of April, 1848, obtained a patent for it, for fourteen years.

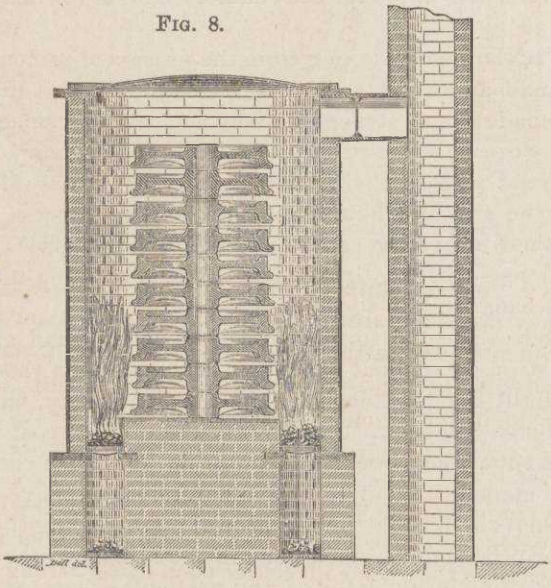
The specification in his patent was thus:

"My improvement consists in taking railroad wheels from the moulds in which they are ordinarily cast, as soon after being cast as they are sufficiently cool to be strong enough to move with safety, or before they have become so much cooled as to produce any considerable inherent strain between the thin and thick parts, and putting them in this state into a furnace or chamber that has been previously heated to a temperature as high as that of the wheels when taken from the moulds. As soon as they are deposited in this furnace or chamber, the opening through which they have been passed is closed, and the temperature of the furnace or chamber, and its contents, gradually raised to a point *a little below that at which fusion commences*,

when all the avenues to and from the interior are closed, and the whole mass left to cool no faster than the heat it contains permeates through, and radiates from the exterior surface of the materials of which it is composed. By this process all parts of each wheel are raised to the same temperature, and the heat they contain can only pass off through the medium of the confined atmosphere that intervenes between them and the walls of the furnace or chamber; consequently, the thinnest and thickest parts cool and shrink simultaneously together, which relieves them from all inherent strain whatever when cold.

"The figure below represents a vertical cross-section of the FURNACE OR CHAMBER, wherein is shown a pile of wheels as they

FIG. 8.



are placed to be annealed. The cover of the furnace, being movable, is raised when the wheels are put in, and then closed and covered with earth, to prevent the too rapid escape of the heat. The damper in the flue leading to the chimney is also closed, after the wheels are put into the furnace, and the opening in the lower wall stopped by an iron plate banked with earth, which prevents the escape of the heat in that direction.*

* There were other drawings and descriptions, not given by the reporter.

Statement of the case.

"To heat this furnace, I have used anthracite coal, it requiring less than one-fourth of a ton to anneal two tons of wheels. The heat required to perform the process may, however, be obtained by the use of any other fuel that may be less expensive at the place where the process is to be performed; or the requisite heat may be taken in a suitable conduit from the furnace in which the metal is melted from which the wheels are made, after it has performed that office, to the chamber in which the annealing process is to be performed. In either case, however, the furnace or chamber must be made of such form, and have such appendages connected with it, as to enable the operator to control the quantity and intensity of the heat used, by admitting more or less of it into the chamber, and of excluding it entirely.

"The advantages resulting from the process of prolonging the cooling and annealing, as above described, are that the wheels may be made much stronger, when made of the same weight, than they can be when cast and cooled in the ordinary manner; and railroad wheels, having any form of spokes or disks connecting the rim and hub, if subjected to this process, will not require their hubs to be cast in sections, and the spaces between the sections subsequently filled with some suitable metal, and wrought bands put on to the hub.

"Wheels subjected to this process of cooling and annealing will be stronger without bands on their hubs than those of the same weight cast and cooled in the ordinary way, having the wrought-iron bands on. In this way the original cost is diminished, and the wheels rendered more durable than they would be when made in any of the ways heretofore employed.

"I do not claim to be the inventor of annealing castings made of iron or other metal, when done in the ordinary way; nor do I claim to be the inventor of any particular form or kind of furnace, in which to perform the process. But what I *do* claim as my invention, and desire to secure by letters-patent, is the process of prolonging the time of cooling, in connection with annealing railroad wheels, in the manner above described; that is to say, the taking them from the moulds in which they are cast, before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength, and immediately after being thus taken from the moulds, depositing them in a previously-heated furnace or

chamber, so constructed, of such materials, and subject to such control that the temperature of all parts of the wheels deposited therein, may be raised to the same point (*say a little below that at which fusion commences*), when they are allowed to cool so fast, and no faster, than is necessary for every part of each wheel to cool and shrink simultaneously together, and no one part before another."*

Whitney being in possession of his patent as already described, one Mowry, of Ohio, conceived that he too had made a valuable improvement in the same branch as Whitney professed to have made one; and on the 7th of May, 1864, also obtained a patent. His specification, illustrated by a vertical cross-section of his furnace, says:

"My invention consists in the use of charcoal or other equivalent substance, interlaid with the wheels in the annealing pits, in connection with the regulated admission of air, for the purpose of heating the wheels up to a proper temperature, prolonging the heat, and permitting them to cool in the course of a given time, gradually, as will be more particularly explained below.

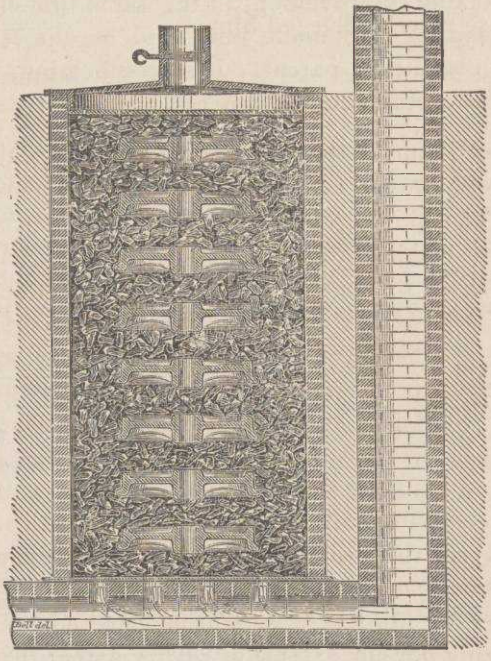
"The operation of my invention is as follows: A layer of charcoal having been laid on the perforated bottom of the annealing pit, the wheels, as they are turned out of the moulds red hot, are placed in the pits, with a layer of charcoal between each wheel, a layer of charcoal being laid on the uppermost wheel, and on this a perforated metal plate is laid.

"The charcoal, becoming now ignited by the hot wheels, the cover of pit is then laid on, and the damper opened so as to admit just sufficient air to effect the combustion of the contained charcoal, in the space of seventy-two hours, less or more, as may

* It may here be stated that, on the 7th of August, 1849, there was granted to one Murphy a patent (extended subsequently for seven years from the 7th of August, 1863) for a mode of cooling car-wheels, which consisted in encasing and protecting from the air all parts of the wheels except the hubs, and causing a current of cold air, by means of connection with the main chimney, to pass through the hubs, thus retarding the cooling of the plates and speeding the cooling of the hubs. This process, it will be observed, was the antithesis of Whitney's, the essence of which consisted in heating the wheels until all parts of them had attained the same degree of heat.

be found necessary for the annealing operation. The draft of air in the apparatus shown on drawings, is from above downward, but it may, without affecting my invention, be from below upwards, by conveying the air from the horizontal flue, up through the pits, and through the aperture in cover, and from thence through flues, into the main shaft or chimney *C;* the result will be the same in both cases, and the adoption of one or the other plan will be dictated by convenience."

FIG. 9.



Under his patent Mowry employed a process of annealing such as it described; and Whitney thereupon filed a bill to enjoin him as an infringer. Mowry answered, denying infringement, alleging the invalidity of Whitney's patent for want of novelty and for want of utility,

"*Inasmuch as the said process would ruin and destroy the hardness on the rim of the car-wheels, known as the 'chill,' and thus greatly detract from the usefulness and durability of the wheels.*"

Statement of the case.

A large amount of testimony being taken on both sides, the cause was brought to a final hearing on the pleadings and proofs, and all the issues being found for Whitney, the cause was referred to a master to take and state an account of the gains and profits which the defendant had derived from the infringement of Whitney's patent.

The master reported, on the 1st of August, 1868, that Mowry had made use of Whitney's patent in the manufacture of 19,819 wheels, and for the use of the process in making these wheels charged him:

Profits on these wheels, ...	$91,501 86
Interest on the said profits to 1st August, 1868, .	19,984 21

He further reported that Mowry, prior to the 1st of April, 1861, and without the use of the process complained of in this cause, had built up his business to its then condition. That the use of the process did not diminish, but did increase the cost of making the wheels manufactured by Mowry. That while Mowry used the said process, he did not make any difference in the quality of iron used for the manufacture of car-wheels, nor in the weight or form of car-wheels, nor by reason of the use of such process, in their price. That Mowry's business was apparently not increased by the use of the process; and that he had sold the wheels he had since manufactured without the process complained of, as readily as those manufactured by use of the process, and at the same *prices*.

[The patentee himself, it should be here added, in 1862, when applying for an extension of his patent, had stated, under oath, that he believed there was no essential difference in the cost, per pound, of making cast iron chilled car-wheels of the various patterns, and by the different modes in use, provided the same skill and system controlled the manufacture; that by his process he was enabled to make them lighter than those made in any other way for a similar service, and therefore could afford to sell them at the same price per wheel as other makers, and save the cost of the

difference in weight; that this saving of metal he deemed to measure the essential advantage he had over his competitors, and also the profits arising from his patent, and he estimated that *ten pounds per wheel would be a fair average of the metal saved by his process.**]

Mowry excepted to the charge made, as above stated by the master, of profit derived by the entire manufacture of the wheel, and the case was recommitted to the master with instructions to inquire:

1st. Whether the wheels made and sold by Mowry had, or could have any market value without being subjected to the process patented by Whitney.

2d. If they had or could have been made to have such value by any annealing or slow cooling process outside of the Whitney patent, how much additional value, if any, they derived from being subjected to that patented process?

To this the master returned that he was unable to report any division of profits; and, being uninformed as to what was covered by the patent, he reported that, if the entire process of reheating and prolonged cooling used by Mowry in the manufacture of the wheels was an infringement of the complainant's patent, the total profit realized by the defendant from the manufacture and sale of the wheels was due to the use by him of the complainant's invention.

He reported, secondly, that if there was no infringement of the complainant's patent, unless the wheels were subjected to the process of reheating, that is to say, if the process of slow cooling used in connection with reheating was old, and not a part of the complainant's invention, nor included in his patent, no part of the profits realized by the defendant from the manufacture and sale of the wheels was due to the use by him of the complainant's invention.

[This second finding of the master the court set aside, sustaining an exception to it, that not only the entire process described in the patent but each part of such entire process was the invention of Whitney, and the use of any material,

* See *supra*, 435, Mowry *v.* Whitney.

substantial and essential part of such entire process—the slow cooling being a substantial and material part, whereby only an improved chilled cast-iron railroad wheel could be made, and beneficial effects the same in kind, if not in degree attained, that were attained by Whitney's entire process—was an infringement of Whitney's patent, and that the profits derived from the use of such material, substantial and essential part should be accounted for in this case.]

But the master, in addition to the second finding thus, as just mentioned, set aside, further found that, had the wheels manufactured by the defendant been left to cool in the open air, they would have had no value as car-wheels, and have been worth only the value of the iron of which they were made; that reheating in connection with slow cooling, or slow cooling without reheating, was indispensable to make marketable cast-iron wheels of the configuration of those made by the defendant; that there was no reheating process for the manufacture of cast-iron car-wheels outside of the complainant's patent.

The master also found that the wheels could have been removed from the moulds and finished, without being subjected to the reheating process, or without any extraneous heat, and he specified two modes in which it might be done. Wheels so manufactured, he reported, have and did have, during all the time in which the defendant used the complainant's process, a market value equal to that of wheels manufactured by that process.

There were some other findings which may be briefly noticed:

1. That the 19,819 wheels were annealed wheels, and sold as such.

2. That if the complainant's patent included prolonging the time of cooling the wheels, as used by the defendant, the process conferred upon them their entire market value, above their weight in iron, but not so if the complainant's patent covered only the application of extraneous heat to the wheels after they are taken from the moulds.

3. That taking annealing to mean reheating in connection

with slow cooling, no other process of annealing in connection with slow cooling than that patented to the complainant and that described in the patent of the defendant appeared to have been known.

4. That the wheels made by the defendant required no treatment other than that described in the complainant's patent to complete them as annealed wheels.

5. That still taking annealing to mean reheating in connection with slow cooling, the annealed wheels could not have been made by any process outside the complainant's patent.

Upon these findings the court below decreed against Mowry the entire profits made by him in the manufacture and sale of the wheels from beginning to end; the profits resulting from the reheating, and regulated slow cooling in connection, and those also which might have resulted from mixing and melting the iron, casting in moulds, making the chill, and from the possible advance on the iron above its cost, with $10,980.22 additional interest on the whole, from the 1st of August, 1868, when the original reports were made, to August 1st, 1870; at which time the subject was finally heard.

The final decree thus stood:

Profits on 19,819 wheels, ...	$91,501 86
Interest to date of original report (August 1, 1868), . . .	19,984 21
Interest on $91,501.86 (from August 1, 1868, to August 1, 1870),	10,980 22
	$122,465 29

From this decree Mowry, the defendant, appealed.

Messrs. A. G. Thurman and C. B. Collier, for the appellant:

1. Whitney's patent is invalid for want of novelty, his process being, at most, simply the application of a well-known process to a purpose analogous to those purposes to which, long anterior to him, it had been applied.

The *Artist's Manual*, &c., published by James Cutbush, Philadelphia, 1814, under the head of "Annealing," says:

"When a substance melted, or nearly in a state of fusion, is

cooled very hastily, its texture is so much altered, that, if a ductile metal, it loses much of its malleability, and cannot be extended far under the hammer without cracking; or if a brittle metal, a glass or vitrescent mixture, it is liable to fly to pieces by a very slight temperature or external injury. To avoid this, the process of *annealing* is resorted to, which is nothing more than cooling the heated or melted substance as slowly or equally as possible, often in a separate furnace of the requisite heat, and sometimes called an annealing oven. The utility of annealing is shown very conspicuously in the manufacture of glass, the casting of speculum metal, or the heating of gold. By the process of annealing the glass is preserved for some time in a state *approaching to fluidity*. A similar process is now used for rendering kettles and other vessels of cast iron less brittle, which admits of the same explanation as that above stated."

So the *Philosophical Transactions* of 1840,* after describing experiments as to best alloy for speculum metal, &c., says:

"It was evident that the flaws of so frequent occurrence in the plates formerly cast, and also their extreme brittleness, arose from the contraction of the metal in some places more than others, just at the time of transition from the fluid to the solid state. *The edge of the plates* always became solid first, and the central portions, thus prevented from contracting, were *strained* when no longer ductile. When the metal has become solid in the ingate or hole through which it enters the mould, the plate is to be removed quickly to an *oven heated a little below redness* to remain till cold, which, where the plates are nine inches diameter, should be three or four days at least."

The same thing, with a special reference to speculum metal, is treated of and declared in Holtzapfel's *Turning and Mechanical Manipulation*, London, 1843.

Now in view of such well-known writings, what *invention* was made by Mr. Whitney? The ultimate purpose of all that he describes is to relieve the wheels from inherent strain. Is not this the very purpose of the processes which the prior writers, whom we quote, also describe?

* Royal Society of London, 1840. Account of Experiments on the Reflecting Telescope. Lord Oxmantown.

2. Whitney's patent is void because that which is described and claimed therein is not useful, inasmuch as it designates and provides for such degree of reheating, and none other ("*a little below that at which fusion commences*") as will destroy the chilled periphery, or tread, an essential feature to a useful car-wheel.

3. Mowry's process does not infringe Whitney's patent. In Mowry's process, while the charcoal may raise the temperature of the plates of the wheels to some extent (*it being only applied to the plates*), yet practically its effect is only to *retard* the cooling of the plates. The current of free air which is constantly passing through the *hubs* of the wheels accelerates the cooling of those parts, and the contiguity of the *rims* to the walls of the pits hastens their cooling.

The only language in Whitney's patent indicating the degree of heat required is a point "*a little below that at which fusion commences.*" Now, should it be assumed that there is a reheating of the wheels, or any parts of them, in Mowry's process, it is impossible in the nature of things that with a current of cold air constantly passing through the hubs, the draft being caused by a connection with the main chimney, the wheels being placed one upon the other, so as that the hubs shall coincide with each other, the charcoal being confined to the plates, and the air for its combustion finding its way only between the horizontal faces of the hubs, the combustion taking place, as the patent says, in "72 hours, more or less"—it is incredible that any such reheating is, or could result in such a process as is contemplated in Whitney's patent.

4. *As to the matter of damages.* The manufacture of a cast-iron car-wheel is a succession of processes, consisting of, 1st. The mixing of the iron, having reference to the proper proportion of iron possessing the property of receiving a "chill." 2d. The melting, stirring, and pouring of the metal, having reference to the duration of the operation, and the *temperature* of the metal when poured. 3d. The formation of the wheel, having reference, both to the *configuration* of the wheel, and the character of the *mould* in

which it is cast, the same being composed in part of iron and in part of sand. 4th. The removal of the wheel from the mould, having reference to temperature. 5th. The *prolongation of the cooling* of the wheel, having reference to uniformity of contraction and proper adjustment of its particles, so as to prevent inherent strains, and secure, as nearly as possible, the ultimate strength of the casting.

Whitney's *invention* does not extend to either of the above processes, but consists in ingrafting upon the fifth process above—the slow cooling—the element of reheating. Mowry's infringement, if any, began when he added reheating to slow cooling, and ended when he ceased to reheat and resumed slow cooling. The use of the reheating element determining the *fact* of infringement, the inquiry is, what proportion of his aggregate profit was due to, or derived from, the use of such element; in other words, what advantage was gained from using that element over what he might have gained from using processes that he was unquestionably free to use, and which would have brought about as good a result. The profits, therefore, were found on quite a wrong principle.

Messrs. B. R. Curtis, E. W. Stoughton, and H. Baldwin, Jr., contra:

1. Annealing, of course, has long been known; but it is not pretended that a cast-iron car-wheel was ever before the date of Whitney's patent removed from its mould, placed in a heated chamber, and there subjected to a process of slow cooling, for the purpose of preventing inherent strains. It is moreover not denied that the process, as described by Whitney, will accomplish precisely what he states it will; that is to say, simultaneous cooling and shrinkage of all parts of the wheel, and relief from all inherent strain.

2. The specification is directed to persons skilled in casting car-wheels, and, of course, those having a chilled tread. This chill is complete so soon as the wheel is sufficiently cooled to be removed from the mould. This is not disputed; and the direction in the specification is, to take the wheel

from its mould as soon after being cast as it can be removed with safety, or before it has become so much cooled as to produce any considerable inherent strain between the thin and thick parts. The inventor is here giving instructions which cannot, from the nature of the subject, be so precise as to dispense with the practical knowledge and skill of the operator. All the inventor could do in his specification was to state in what condition the wheel should be when removed, leaving the operator to ascertain this.

3. The process employed by Mowry was a palpable infringement of Whitney's patent. Mowry usually removed his wheels from their moulds as soon as they were so hardened by cooling as to maintain their shape, and before they had been subjected to any considerable inherent strain. It is argued that as he placed the first wheel in a cold instead of a hot chamber, he thereby materially varied from the respondent's process; but it should be remembered that, before depositing this first wheel, there was placed in the bottom of the pit such a quantity of charcoal as the operator saw fit to use; and the moment the red-hot wheel was applied to this it ignited and commenced rapidly to heat the chamber, so that, when the second and third of the series of ten or twelve were placed therein, each red-hot wheel being accompanied by its quota of charcoal, each and all, after the first and second, were thus deposited not only within a hot chamber, but in a mass of flame fully capable of reheating the wheels to the condition they were in when taken from the moulds, and no doubt to a much higher temperature, depending, of course, very much on the quantity of charcoal employed.

4. *As to the damages.* The specification of Whitney's patent includes the entire process, and is not limited to the mere reheating of the car-wheels.

The master finds that defendant made a certain profit by using the patented process entire. Also, that if defendant had used only a part of the process, he might have made wheels which would have sold in the market at an equal profit. Does it affect the amount of profits to be recovered,

that the defendant might have used another process, not patented, and thereby made as much profit? In other words, when a defendant has used the patent and the whole of it, as in this case, can he come in and say, "There was an outside process which I might have used as profitably?" The defendant is held as a trustee who has used another person's property, and only has to account for the profits actually made by this invasion. If a trustee uses trust funds in his own business and makes profit, he is held to account for it if the *cestui que trust* elects to have an account for them; they are his. It could be no answer by the trustee to say, "I could have borrowed money at six per cent., and made more profit than I have made by using your money." Equity knows only what a trustee has *done*. It does not inquire what he *might have done* if he had not done what he did do.

Mr. Justice STRONG delivered the opinion of the court.

The defences set up to the complainant's bill for an infringement are, that the patent is void for want of novelty in the invention, and for want of utility, and also that it has not been infringed by the defendant.

To determine how far these defences are sustained it is important to have a clear apprehension of the state of the art when the patent was granted, and of the invention which it was intended to secure to the patentee. Prior to the 2d of August, 1847, cast-iron railroad wheels had been cast, and cast in chills, that is, they had been cast in sand moulds with an outer circumference of iron. The effect of this outer circumference was to produce a more rapid chill on the periphery of the wheel, thereby crystallizing and hardening it, so that the wheel was made stronger, and more capable of resisting the friction of the rails. But the parts of the wheel were of different thicknesses. The hub and the rim were much thicker than the plate which connected them, and of course they cooled after casting more slowly than the plate. The consequence of this unequal cooling was to produce a strain between the thick and thin parts that greatly impaired the strength of the wheel. Various devices had

been made to guard against, or to remedy the mischief resulting from this inherent and inevitable strain, caused by unequal contraction in cooling. The most common of these, perhaps, was casting the wheel with the hub in sections, in order that the sections might accommodate themselves to the contraction of the plate. But this was expensive. It required the open space between the sections to be filled up with other metal, and generally it required the hub to be hooped. It is unnecessary, however, to describe these devices. It does not appear that in any of them the idea existed of making a car-wheel with chilled tread, straight plates, and solid hub, *annealed* and cooled so as to leave it uninjured by the strain attendant upon the unequal cooling of the thick and thin parts. Annealing some kinds of castings was known and practiced before 1847. This is abundantly proved by the witnesses, and various modes of annealing plain castings had been described by scientific writers both in this country and abroad, before that time. But there is no evidence that we have been able to discover that cast-iron car-wheels had ever been subjected to an *annealing* process, in connection with slow cooling, before the process was discovered or invented by Whitney. In all the experiments made for annealing other castings the object sought was different, and in them all, as well as in the process described in the publications given in evidence, the effect upon the annealed metal or glass was not to leave them in the condition in which it was sought to bring car-wheels, with the crystallization or chill of the periphery unimpaired, and the plate or thin part unaffected by strain. Cast-iron railroad wheels are castings of a peculiar kind. The methods of slow cooling, or of annealing and slow cooling, which were applied to other castings before 1847, were not adapted to their peculiarities, or to what they needed. They are not homogeneous throughout. They are of different thickness in their several parts, and hardened at the tread, while the plate and hub are not crystallized, but are soft and tough. These different qualities of the different parts it is necessary to preserve, and what was needed when Whitney's inven-

tion was made, was to preserve them, and at the same time relieve against any strain, caused by unequal cooling, which might impair the strength of the wheel.

If now we proceed to inquire what Whitney's alleged invention was, as described in his specification and claim, it will be seen that it was a process, not to make a car-wheel or to destroy any of the advantages which had already been secured, but to add another. Its avowed object was to obtain a new value, or rather exemption from imperfection. It was to remedy the evil of strain resulting from the more rapid cooling of one part of the wheel than the cooling of the other parts. And this was sought to be accomplished by a process that insured the cooling of all parts, both the thick and the thin, with equal slowness. The process consists of several parts. The first is taking the wheels from the moulds after the melted iron has been run into the moulds, before they become so much cooled as to produce strain on any part sufficient to impair their ultimate strength. The second is placing the wheels immediately after their removal in a furnace or chamber previously heated to about the temperature of the wheels when taken from the moulds, the heat in the furnace being subject to control. The third is applying heat until the temperature of all parts of the wheels shall again be raised to the same point (indefinitely said to be a little below that at which fusion commences). The fourth and last stage in the process is allowing the wheels after they have been thus reheated, to cool so fast as, and no faster than, is necessary for every part of each wheel to cool and shrink simultaneously together, and no one part before another. It is therefore a patent for a process, not for a combination. Neither as a whole nor in parts can it be considered without reference to the ultimate object in view, which was to retard cooling by a second application of heat supplied until all parts of the wheel are raised to the same temperature, and then permit the heat to subside so gradually that the cooling of the parts shall not only commence at the same point of temperature, higher than that where hurtful strain begins, but shall continue

equable till all artificial heat ceases. The removal from the moulds to the furnace or chamber, the removal at the time described, before the incipient strain has become permanently hurtful, and to a place where more heat may be applied, and where the heat can be under control, are parts of the process to secure equable cooling during the time when cooling without such appliances is likely to produce strain and consequent weakness. It is apparent that this is more than a process for *annealing*. That is included, it is true, but it is only a small part. It is applying foreign heat to a hot chilled wheel, at the point of time when it has reached a particular stage of cooling, by means of such foreign heat bringing the whole casting up to a higher and uniform temperature, and maintaining an equable abatement of heat in a furnace or chamber under the control of the operator. We have sought in vain through the proofs submitted in this case, for any satisfactory evidence that this process was known before 1847, when Whitney commenced it, or that anything equivalent to the process was known. Certainly nothing of the kind had ever been applied to cast-iron railroad wheels, and, as we have seen, they are castings of a peculiar character, not admitting of the treatment that may be applied to other castings. What they needed was (what was substantially described by one of the witnesses), the discovery of the fact that the chilled cast iron, constituting one part of the wheel, could be subjected to heat less than that which would cause fusion, without producing any material effect upon its hardness, while the cooling of other parts of the wheel could be so prolonged by applying that heat externally, as to enable all parts to cool without being subjected to the strain attendant on unequal contraction, and, in addition to the discovery, they needed the invention of a process by which it could be practically carried out. Such a discovery and such a process were needed for no other castings. The novelty of the patentee's invention is not therefore disproved by evidence that glass, or speculum metal, or even other iron castings had been annealed and slow-cooled, prior to the time when it was made. Of this

there is very considerable evidence both in the testimony of witnesses and printed publications. The specification disclaims invention of annealing iron castings done in the ordinary mode. It claims annealing when applied to cast-iron railroad wheels, in the mode or by the process described. It is not therefore merely an old contrivance or process applied to a new object, a case of double use. A new and previously unknown result is obtained, namely, the relief of the plate of the wheels from inherent strain without impairing the chilled tread, a result which, though anxiously sought, had not been obtained before Whitney's invention. We are therefore of opinion that the defence set up that the patent was void for want of novelty of invention is unsustained.

The validity of the invention is next assailed for the reason that the process described in it, and claimed, is denied to be useful, because it would destroy the hardness of the rim, or tread of the car-wheel known as the chill, and thus greatly detract from the durability and usefulness of the wheels.

It is undoubtedly true that a chilled periphery or tread is essential to the usefulness of a car-wheel. Indeed, the evidence is, that whenever car-wheels are spoken of, wheels with chilled tread are meant, and any process which destroys the chill must render them valueless for the purposes for which they are needed.

It is also true that the fusing-point of cast iron is in the neighborhood of 2786 degrees of Fahrenheit, twelve or fifteen hundred degrees above the point at which, according to the evidence, the chill of the tread of a car-wheel would be destroyed. If, therefore, the process patented to Whitney, requires, after the removal of the wheel to the heated furnace or chamber, the application of a degree of heat closely approximating the point of fusion, it must be conceded that instead of being beneficial it is positively hurtful. And this is what is contended by the appellant. The objection seems to be aimed at the sufficiency of the description of the

patentee's invention, which it is abundantly proved he practiced successfully through many years, rather than at its utility. Whitney conceived a process and practiced it. That process may have been a highly useful invention, and therefore patentable, and yet he may have failed so to describe it as to teach the public how to practice it. The law requires every inventor, before he can receive a patent, to furnish a specification or a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms, avoiding unnecessary prolixity, as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same. The specification, then, is to be addressed to those skilled in the art, and is to be comprehensible by them. It may be sufficient, though the unskilled may not be able to gather from it how to use the invention. And it is evident that the definiteness of a specification must vary with the nature of its subject. Addressed as it is to those skilled in the art, it may leave something to their skill in applying the invention, but it should not mislead them. The objection here is that in describing the degree of heat to be applied after the wheels have been deposited in the heated chamber the patentee states it to be such that the temperature of all parts of the wheels "may be raised to the same point (say a little below that at which fusion commences)," and the defendant insists that this amounts to a direction to raise the heat to a degree that must destroy the chill of the tread, and thus render the casting valueless as a railroad car-wheel. But it is obvious that only vague and uncertain directions could have been given respecting the extent to which the heat is necessary to be raised. It must differ with the difference in the progress of cooling which has taken place before the wheels are removed from the moulds. The process requires this removal before they have become so much cooled as to produce such inherent strain on any part as to impair its ultimate strength. Precisely when such a strain begins cannot

be known. Cooling commences the instant the casting is made, and with cooling commences contraction, and strain must soon follow. Plainly it is impossible to describe the point of time when the strain has proceeded so far as to impair the ultimate strength of any part of the wheel. That, in the nature of things, must be left to the judgment of the operator. But before that time the strain may be checked, and this is what is contemplated by raising the temperature of all parts of the wheel to the same point or degree. The moment that is done the strain ceases, and the primary object of the patentee's process is accomplished. The state of things is reproduced which existed before the contraction and attendant strain began, when the slow cooling is allowed to follow in an atmosphere so heated and regulated that each part of the wheel loses its heat at an equal pace with all others.

Now, any one skilled in making cast-iron railroad car-wheels in view of this specification must see that the object of the process is to relieve from and guard against hurtful strain, without destroying the chill, and that heat is applied only for that purpose. It requires no particular science or skill to enable an operator to perceive that the moment all parts of the wheel are raised from a point above where serious strain begins, and where yet the thick and thin parts are in different stages of cooling, to a stage where the degree of temperature of all parts is the same, and above the degree where serious strain commenced, the thing sought has been attained. Then the avowed purpose of the inventor has been accomplished. It would be most unreasonable to read the directions of the specification without reference to the object which they profess to have in view. The evidence is that the chill is formed while the casting is in the mould, and that the hurtful strains commence after the formation of the chill. Indeed, it is manifest there can be no strain until the chill is complete. It must be, therefore, that all the heat which is needed to relieve from the strain is that which suffices to raise the temperature of the thin part, or plate, to the degree at which the strain commenced—a lower

temperature than that which existed when the chill was formed. Hence an operator, in following the directions of the specification, would be taught by his practical knowledge that the instant all parts of the wheel had been heated to that temperature no more heat was needed.

And we do not think it a fair construction of the patentee's language to hold that it requires the heat to be raised in all cases to a degree only a little below the point of fusion. He does not attempt to give any more definite direction than that all parts of the wheel must be raised to the same temperature, suggesting in a parenthesis ("say, a little below that at which fusion commences"). He fixes a *maximum*. The heat must not reach the point of fusion, and the prescribed *minimum* is that degree where the heat of the different parts of the wheel is equal. Within those limits the degree is left to the judgment of the operator, and within those limits it is clear from the evidence that the process may be applied without injury to the chill. The proof is that it has been successfully applied in the manufacture of a vast number of wheels, and that failure has been very rare.

There are some witnesses who have testified that the Whitney process, as they understand it, would destroy the chill of the wheel. But they explain their understanding to be that the wheels are to be reheated to a degree far beyond what is required to relieve from strain, and thus heated for no purpose. They keep in sight the *maximum* limit, and approach near to that, overlooking entirely the *minimum*, and disregarding the single object of the process, namely, relief of the plate, or thin part of the wheel, from the strain caused by unequal contraction.

We are, therefore, of opinion that the patent is not void for want of utility, and that the specification sufficiently describes the process invented and claimed.

The remaining defence is a denial that the process conducted by the defendant is an infringement of Whitney's patent.

What the process of the defendant was is clearly set out

in a patent which he obtained on the 7th of May, 1861. It consists in placing in a pit the wheels as they are turned out of the moulds red hot, with a layer of charcoal beneath the lowest wheel, and a layer between each wheel as well as above the uppermost, and covering the pit with a perforated metal plate. The charcoal is ignited by the hot wheels, and just sufficient air is admitted to effect combustion of the coal. Thus the wheels are reheated and permitted gradually to cool. There are some minor details which it is unnecessary to mention. So far as relates to reheating the wheels and retarding the cooling by the application of additional heat, it is obvious that the process is substantially the same as that covered by the complainant's patent. The object is the same, and the mode of attaining it is in substance the same. The purpose of the charcoal interlaid with the wheels is avowed to be to heat them in the pit to a proper temperature, prolonging the heat and permitting them to cool gradually in a given time, said to be seventy-two hours, more or less, as may be found necessary for the annealing operation. The rapidity of combustion of the charcoal is regulated by a damper in the flue. And this process is followed, as the specification explains, that the different parts of the wheels may adjust themselves to each other, and accommodate the unequal contraction which results from the process of chilling. It is under this patent, and in accordance with its directions, that the defendant has prepared his car-wheels for market. As the object of the patentees is the same, relief from the strain incident to unequal contraction, the only inquiry is whether the object is attained by substantially the same means. The idea of Whitney was undoubtedly arresting contraction before any remediless strain had commenced, and regulating the progress of cooling so that all parts of the wheel may maintain an equal temperature at all stages of cooling. Manifestly the process of the defendant embodied the same idea, and carried it out by means identical in principle. It reheats the wheels when removed from the moulds to the chamber or pit. It prolongs the cooling in connection with the re-

heating, and it subjects the rapidity of cooling to control of the operator. The form or structure of the furnace, chamber, or pit, is not claimed by either patentee.

It hardly seems necessary to resort to the opinions of experts in order to reach the conclusion that the process of the defendant is only formally different from that of Whitney, while the essential element of the two processes is the same. But the testimony of the experts examined, taken as a whole, clearly supports such a conclusion. It is true some of the witnesses testify that in their opinion the processes are different, but when they attempt to describe the difference they point out only matters which are merely formal, only variances in the mode of using the same process. On the other hand, several witnesses, entirely competent to apprehend the principle of the invention, and the devices for practically using it, have testified that the processes of the defendant and of the complainant are substantially the same in principle, mode of operation, and in the effect produced. We must, therefore, conclude that the charge of infringement made in the bill has been sustained, and that the complainant was entitled to a decree for an injunction and an account.

We come next to the consideration of the account stated by the master and confirmed by the Circuit Court.

The master reported that Mowry, the defendant, used Whitney's process in the manufacture of 19,819 wheels, and the account has been stated on that basis. For the use of the process in making these wheels the defendant has been charged with $91,501.86 as profits made by him (more than four dollars and sixty cents on each wheel), besides $19,984.21 interest upon such profits to the first day of August, 1868, and the further sum of $10,980.22, being interest from August 1, 1868, to August 1, 1870.

It is very obvious, in view of what the patentee himself stated, under oath, in 1862, when applying for an extension of his patent,* that the account has been erroneously stated. If

* See this statement, *supra*, in brackets, beginning at foot of p. 631.

he was correct in this statement the profits arising from the use of his patent in manufacturing 19,819 wheels (valuing iron at the price proved to have been paid for it by the defendant) must have been less than $5500, instead of over $91,000, decreed in the Circuit Court—about thirty cents per wheel, instead of four dollars and sixty cents. It is not an unfair presumption that if the profit to the patentee was no greater than he claimed it was, it could not have been more when the invention was used by an infringer. Now, it is clear that Whitney is not entitled to receive more than the profits actually made in consequence of the use of his process in the manufacture of the 19,819 wheels. It is the additional advantage the defendant derived from the process—advantage beyond what he had without it—for which he must account. But he has been held liable far above this. The master reported, in the first instance, the difference between the cost of the wheels and the price for which they were sold as the profits realized by Mowry, thus charging him the profit obtained from the entire wheel, instead of that resulting from the use of Whitney's invention in a part of the manufacture; and this, though he found at the same time and reported that Mowry had built up his business before he commenced the use of Whitney's process; that the use of the process did not diminish the cost of making wheels, but increased it; that while he used the process he used the same quality of iron that he had used before, and made no difference in the weight or form of the wheels, or in their price, and that the wheels made by him before he commenced the use of Whitney's invention, and since he has abandoned it, have sold as readily and at the same prices as those manufactured by that process.

Exception was taken to the charge of the profit made by the entire manufacture of the wheel, including not only the selection and mixing of the iron, but its melting, pouring into moulds, forming the chill, removing from the moulds, and cleaning, as well as annealing and slow cooling; and the case was again sent to the master with instructions to inquire:

First. Whether the wheels made and sold by the defendant had, or could have been made to have any market value without being subjected to the process patented to Whitney; and,

Second. If they had, or could have been made to have such value by any annealing or slow-cooling process, outside of the Whitney patent, how much additional value, if any, they derived from being subjected to that patented process.

Upon the findings (stated *supra*, 632—REP.) made by the master on this order, the court decreed against the defendant the entire profits made by him in the manufacture and sale of the wheels from beginning to end, not only the profits resulting from the reheating and regulated slow cooling in connection, but also those which may have resulted from mixing and melting the iron, casting in moulds, making the chill, and from the possible advance on the iron above its cost, with interest on the whole.

This we think was an error. The findings of the master justified no such decree. It must be conceded that the findings are incomplete, obscure, and in some particulars incongruous, but it is not a legitimate construction of them taken together, that the benefit which the defendant derived from the use of the complainant's invention was equal to the aggregate of profits he obtained from the manufacture and sale of the wheels as entireties, after they had been completed. It is as true of a process invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture.* If the wheels made by the defendant would have had no market value above that of cast iron if they had not been annealed and slow cooled, the same may be said if they had been cast without a chill. The same principle, therefore, which gives to the complainants the aggregate profits of the entire manufacture would give the same profits to a patentee of the process of chilling,

* Jones *v.* Morehead, 1 Wallace, 155; Seymour *v.* McCormick, 16 Howard, 480.

if there were one, and as there are many processes in the manufacture, for each of which it is conceivable there might be a patent, and as every one of the processes is necessary to make a marketable wheel, an infringer might be mulcted in several times the profits he had made from the whole manufacture. We cannot assent to such a rule. The question to be determined in this case is, what advantage did the defendant derive from using the complainant's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result. The fruits of that advantage are his profits. They are all the benefits he derived from the existence of the Whitney invention. It is found that there were other processes by which the inherent strain caused by unequal cooling could be, and was prevented, counteracting which strain was the sole object of the complainant's invention, and a car-wheel could be prepared for similar service, valuable in the market, and salable at a price not less than was obtained for those which the defendant manufactured. The inquiry then is, what was the advantage in cost, in skill required, in convenience of operation, or marketability, in bringing car-wheels by Whitney's process from the condition in which they are when taken hot from the moulds, to a perfected state, over bringing them to the same state by those other processes, and thus rendering them equally fit for the same service. That advantage is the measure of profits. It is quite unimportant what name was given to the products of the processes, whether one could be called annealed wheels and the other could not, except so far as affected their marketability.

The record shows that the court overruled the alternative finding of the master, that if there is no infringement of the complainant's patent unless the wheels are subjected to the process of reheating—that is to say, if the process of slow cooling used in connection with reheating is old, and not a part of the complainant's invention, no part of the profit derived by the defendant from the manufacture and sale of the wheels was due to the use by him of that invention.

One exception taken to this finding was that not only the entire process described in the patent, but each part of such entire process was the invention of the complainant, and the use of any material, substantial, and essential part of such entire process, the slow cooling being a substantial and material part, whereby only an improved chilled cast-iron railroad wheel could be made, and beneficial effects the same in kind if not in degree attained, that were attained by the complainant's entire process, is an infringement of complainant's patent, and the profits derived from the use of such material, substantial, and essential part, should be accounted for in this case. This exception the court sustained and thereby held that the defendant is chargeable with the profits he derived from slow cooling alone. We cannot assent to this. The patent is for an entire process, made up of several constituents. The patentee does not claim to have been the inventor of the constituents. The exclusive use of them singly is not secured to him. What is secured is their use when arranged in the process. Unless one of them is employed in making up the process, and as an element of it, the patentee cannot prevent others from using it. As well might the patentee of a machine, every part of which is an old and known device, appropriate the exclusive use of each device, though employed singly, and not combined with the others as a machine. The defendant was not, therefore, responsible for slow cooling alone, or for the profits he derived from it. He was liable to account for such profits only when he used slow cooling in connection with reheating in the manner described in Whitney's claim substantially, or when extraneous heat was employed to retard the progress of cooling. We have said that slow cooling is not claimed in the specification as the invention of the patentee. And it is found by the master that there are other modes of slow cooling, and even other modes of relieving against the inherent strain caused by unretarded cooling, than that practiced by the complainant and claimed by him. Though, therefore, slow cooling is an essential part of the complainant's process, it is an equally essential part of other processes which

the defendant was at liberty to use in preparing his car-wheels for market.

We add only that in our opinion the defendant should not have been charged with interest before the final decree. The profits which are recoverable against an infringer of a patent are in fact a compensation for the injury the patentee has sustained from the invasion of his right. They are the measure of his damages. Though called profits, they are really damages, and unliquidated until the decree is made. Interest is not generally allowable upon unliquidated damages. We will not say that in no possible case can interest be allowed. It is enough that the case in hand does not justify such an allowance. The defendant manufactured the wheels of which the complaint is made under a patent granted to him in 1861. His infringement of the complainant's patent was not wanton. He had before him the judgment of the Patent Office that his process was not an invasion of the patent granted to the complainant, and though this does not protect him against responsibility for damages, it ought to relieve him from liability to interest on profits.

DECREE REVERSED, and the cause remanded with instructions to proceed in accordance with the rules laid down IN THIS OPINION.

THE KEY CITY.

1. While courts of admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defence.
2. No arbitrary or fixed period of time has been, or will be established, as an inflexible rule; but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case.
3. When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and a more rigid scrutiny of the delay than when the claimant is the party who owned the property when the lien accrued.

4. When two corporations united their vessels and other property used in navigation, and formed a new corporation, in which no money was paid by either party, and in the contract of consolidation made arrangements for the payment of the debts of one or both before any dividends should be declared in the new stock, the new corporation cannot avail itself of the doctrine applicable to such a purchaser without notice; and a lien, three years and a half old, will be enforced against one of the vessels so transferred to the new corporation.

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

Young shipped a quantity of wheat on the steamboat Key City, a vessel owned by a corporation called the Northwestern Packet Company, which had this and several other steamboats engaged in the navigation of the Upper Mississippi River. The cargo was lost, and so never delivered. At the time when the shipment was made and the cargo lost on the Key City, there was engaged in the same business in the same waters with the Northwestern Packet Company, a rival corporation known as the La Crosse and Minnesota Steam Packet Company.

After the loss of the wheat, these two companies united their stock in trade, their steamboats, barges, and other property, and formed a new corporation, the corporators of which were taken exclusively from those in the two old companies; and to the new corporation they gave the name of the Northwestern Union Packet Company. To this company all the property of the two other companies was transferred by appropriate instruments. Whether at the time of this union and transfer the La Crosse and Minnesota Company owed debts or not, or what became of them, did not appear. But it did appear that the Northwestern Company, the original owner of the Key City, was largely indebted, and that this was well known to all the parties. Not only was it well known, but provision was made for the payment of the debts generally of that company by the newly formed company out of a fund to come within its control. The nature of that provision was this: certificates of stock of the value of the boats, barges, and other property of the Northwestern

Company merged in the new company were issued, but on their face they recited that no dividends would be paid on such stock until the debts of the Northwestern Company should be paid out of the proportion of the net profits which the shareholders of that company would otherwise be entitled to.

In this state of things, Young, *three years and a half after the wheat was lost, and his cause of action had accrued*, filed a libel in admiralty against the Key City for its failure to perform its contract of affreightment. The Northwestern Union Packet Company, that is to say, the new corporation, appeared as claimants, and set up as a defence that the lien was lost by the lapse of time, to wit, the three years and a half which had intervened between the date when the cause of action accrued and the date of the commencement of the suit; and that defence was sustained by the Circuit Court. The change in the ownership of the vessel during the interval was relied on as strengthening the defence.

Mr. J. W. Cary, for the appellant:

1. Professor Parsons* says as follows:

"It has been decided that neither the statute of Anne limiting suits in the English admiralty, nor the statute of limitations of any of our States, is of any force in our admiralty. Whether a claim is to be considered stale or not must depend upon the peculiar circumstances of each particular case, and it is difficult to lay down any general rule. It is, however, we think, evident that a party may have a suit *in personam*, when he cannot sue *in rem;* because in this latter case, the rights of a *bonâ fide* purchaser may intervene. If the vessel remains in the hands of the owners who were in possession at the time the debt accrued, an action may be brought after a considerable lapse of time. But if the vessel has been sold to a *bonâ fide* purchaser, the suit should be brought as soon as an opportunity is presented; and if it is not, a delay is fatal."

The position laid down in this last sentence rests alike on reason and authority.

* 2 Maritime Law, 663.

It rests on reason, because admiralty liens are secret; they are not accompanied by possession, and there is no record of them, as in the case of chattel mortgages. It rests equally on authority. In *The Admiral*,* decided by Sprague, J., a collision occurred October 7th, 1852. The vessel continued for some months plying on her old course, and was then sold to a stock company, and stock in the company given in payment. On a libel being afterwards filed the judge dismissed the libel. He says:

"The rule adopted in courts of admiralty, is to allow the continuance of the lien until a reasonable opportunity is given to enforce it. If a party neglects to avail himself of it, third persons are not to be prejudiced by his delay."

In *The Louisa*,† the libel was for a seaman's wages, and was filed in November, 1845, for wages, commencing in March, 1842, and ending in November after. The vessel in the interim had been sold, and one of the old owners was insolvent. Both the District and Circuit Courts refused to sustain the libel, on the ground "of the long delay to resort to the vessel, and when, in the meantime, the owners had changed and one of them become insolvent."

In *The Buckeye State*,‡ it was held that a delay of three years to enforce a lien by a material-man, was a bar to recovery, and the libel was dismissed for that reason, a third person in the meantime having become the owner of the boat.

In *The Lillie Mills*,§ supplies were furnished in March, June, and October, 1853, and the libel was filed October, 1855; a change of ownership having previously occurred. Sprague, J., says:

"When the rights of third persons have intervened, the lien will be regarded as lost, if the person in whose favor it existed has had a reasonable opportunity to enforce it, and has not done so. This is the well-settled rule in admiralty."

In *The General Jackson*,‖ the supplies were furnished Sep-

* 18 Law Reporter, 91.
† 2 Woodbury & Minot, 48.
‡ 1 Newberry, 111.
§ 18 Law Reporter, 494.
‖ 17 Id. 324.

tember, 1852. The vessel was sold to the claimant in May, 1854, and the libel filed about eighteen months after supplies furnished. Sprague, J., says:

"During all that period the vessel was plying between this port and the ports of Maine, as often as once a month, giving the libellant ample opportunity to enforce his claim, had he seen fit, long before the sale of the vessel to the present claimant. It must, therefore, be held that the libellant has waived his lien."

2. Was there then a *bonâ fide* change of ownership of this particular boat, the Key City, May the 1st, 1866? Of this there can be no doubt. Prior to that time the boat was owned by the Northwestern Packet Company; after that it was owned by the Northwestern Union Packet Company, an entirely different corporation, with different stockholders, and holding their interests in different proportions. There is no pretence that any notice of this lien was given to the new company, or that they ever had any knowledge of it until the marshal took possession of the boat. The two old companies remained corporations, legal existences, notwithstanding the formation of the new company and the sale to it of this property. There was no consolidation or legal union of the two. The old companies remained liable to suit and liable for their debts, and the individual stockholders were also liable if they had appropriated the property of the company. The property of the Northwestern Packet Company was paid for in stock of the new company, which was a good and valid payment, as much so as if paid in money. The new company was to pay the debts of the old out of the earnings of the new, in certain proportions, but in no other way. Dividends were withheld and applied for that purpose. To allow this suit to prevail would affect the rights, stock, and property of all the stockholders unjustly and inequitably. The new company cannot be subjected to this proceeding. The claimant could be compelled to appropriate net earnings belonging to the Northwestern Company or to the stockholders who were of that company, after

a debt had been established. The libellant could have pursued the Northwestern Company, and after judgment its stockholders, for the stock held in the new company.

Does the fact that the stockholders of the Northwestern Company were paid, but in stock of the new company, alter the case? We think not. In *The Admiral*, already cited, and where after the collision the vessel was sold to a stock company, and stock in the company given in payment to the former owners, the court say:

"It is said all the former owners of the Admiral were stockholders in the claimant's company, and that thus the corporation is affected with knowledge of this lien. It does not appear that they owned in the company in the same proportion as before, and if it did, it would make no difference, because there were other stockholders in the company who took in ignorance of the claim, and they ought to be protected. The former owners became merely stockholders in the new company, and their knowledge does not affect the corporation with knowledge. The difficulty is, that as this is a process *in rem*, and the boat the property of the corporation, there is no process to reach the interests of the former owners without affecting the interests of others who purchased innocently. The boat is now owned by a corporation and not by individuals. The persons owning do not own as before any part or rights in the boat, but they own stock in the company."

Mr. N. J. Emmons, contra:

The mere conveyance of a vessel, even to an innocent purchaser, without notice, will not of itself necessarily disturb a maritime lien.*

In order to defeat the lien, some other circumstance than mere lapse of time should be made to appear, before the equity, upon which the doctrine is based, can arise.

In *The Batavia*,† Lord Stowell concluded upon the facts proven, that the transfer was merely colorable to avoid payment of certain port charges and duties at Batavia, hence no equity in the purchaser to demand a discharge of the lien.

* Sheppard et al. *v.* Taylor et al., 5 Peters, 675. † 2 Dodson, 500.

Opinion of the court.

In *Willard* v. *Dorr*,* while Story, J., passing on the question, says in substance, that courts of admiralty, like courts of equity, will refuse their aid to enforce old, dormant demands, and that it prescribes a rule to itself, by analogy to statutes of limitation, yet enforced a remedy after *twelve years had elapsed;* no equitable circumstance appearing, to bring the case within the rule suggested.

In *The Admiral*, relied on by opposing counsel, stress is laid by the court upon the circumstance that the cause of action was a collision; that the facts were denied, and the witnesses dispersed. The purchasers were without notice, and without ability to contest the claim upon the facts.

In the present case the new company received its conveyance with notice of an existing debt, and covenanted to pay it. The validity of our demand is conceded, and the new company received and still holds a full consideration for what it covenanted. That we could, in equity, compel the performance of such covenant will not be doubted. What consideration arises here—what condition—to demand that our maritime lien be discharged more than would have arisen had the vessel remained in the hands and ownership of the Northwestern Packet Company? The rule, relied on by opposing counsel, exists and is enforced for the protection of innocent purchasers without notice, and as against whom it would be inequitable to decree payment of another's debt, but the rule does not apply. If there be a recovery here, it will be charged in account to the Northwestern Packet Company; and it is not denied that the respondent has an abundant indemnity fund. The fact that dividends were to be retained from the stockholders of the old companies to answer their old debts, is a material feature in this case. No such feature existed in the case of *The Admiral.*

Mr. Justice MILLER delivered the opinion of the court.

The authorities on the subject of lapse of time as a defence to suits for the enforcement of maritime liens are

* 3 Mason, 91.

carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made without specifying them more particularly.

We think that the following propositions as applicable to the case before us may be fairly stated as the result of these authorities.

1. That while the courts of admiralty are not governed in such cases by any statute of limitation, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defence.

2. That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.

3. That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued.

Counsel for the appellees argue that the libel in the present case was rightfully dismissed under this last proposition; and we are of opinion that if the claimants had shown an ordinary case of purchase and payment without notice, the lapse of time would protect them. While on the other hand we are of opinion that if the claimant had been the owner when the lien accrued, it would not be a good defence in this instance.

We must, therefore, inquire into the special circumstances under which the claimant became the owner of the vessel against which the lien is asserted. These show that there was no sale of the property of one of these original corporations to the other, but that they agreed to unite their property and their interests, and for convenience assumed a new corporate name; that in doing this they recognized a large and undefined indebtedness on the part of the Northwestern Company, and provided for its payment out of the earnings otherwise payable to that company. No doubt

these debts were most of them, like the present one, liens on the property of that company, and known to be so by all who united in the transaction. And, finally, that neither the stockholders of the La Crosse and Minnesota Company, nor of the new corporation, have ever parted with or paid any money or other thing of value for the Key City, otherwise than by this consolidation of the companies into one; and it is not apparent, nor even a reasonable presumption, that if the new company has to pay the libellant's debt in this case they will be the losers, but it is nearly certain the loss will fall where it should, on the stockholders coming in through the Northwestern Company.

We do not see, under these circumstances, how the claimants can avail themselves of the rule for the protection of purchasers without notice.

DECREE REVERSED, with directions to enter a decree for libellant for the amount due him for his wheat lost by the Key City,

WITH INTEREST BY WAY OF DAMAGES.

DELMAS *v.* INSURANCE COMPANY.

1. On a writ of error to a State court, this court cannot revise a decision founded on the ground that a contract is void on the general principles of public policy or morality, when that is the only ground on which the contract is held to be void.
2. But if the decision of a State court is based upon a constitutional or legislative enactment, passed after the contract was made, this court has jurisdiction to inquire whether such legislation does not impair the obligation of the contract, and thereby violate the Federal Constitution.
3. In the prosecution of that inquiry, this court must decide for itself, whether any valid contract existed where the legislation complained of was had, and in making up its judgment on that question is not concluded by the decisions of the State court.
4. This court is of opinion that the notes of the Confederate States, in ordinary use as money during the rebellion, might constitute a valid consideration for a contract; and that a provision in the constitution of a

State, subsequently adopted, declaring such contracts void, was an impairing of the obligation of such contract within the meaning of the Federal Constitution.

5. A judgment of a State court, holding such a contract void, expressly based on the constitutional provision and not on general ground of public policy, must be reversed in this court.

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

J. Menard, of New Orleans, gave to one Delmas an obligation, the consideration of which (as was said) was Confederate money. On this obligation Delmas obtained a judgment. Subsequent to the date of the obligation given, as above said, the State of Louisiana adopted a new constitution of government, the 127th article of which thus ordained:

"All agreements, the consideration of which was Confederate money, notes or bonds, are null and void; and shall not be enforced by the courts of this State."

So far as to Delmas and the debt to him.

The same Menard, above mentioned, gave also, May 28th, 1857, to the Merchants' Insurance Company, a note payable at one year, and secured by mortgage. On the 16th March, 1866, the note was thus indorsed:

"The payment of this note is without novation extended to 1st of December, 1866.

"J. MENARD."

The mortgage also was reinscribed; but to neither the extension of the note nor to the reinscription of the mortgage was there any stamp affixed.

The Stamp Act of June 30th, 1864,* it is here perhaps necessary to remind the reader, specifies in a schedule a great number of instruments of writing (not including, however, either the extension of the time of payment of a promissory note, or the "reinscription" of a mortgage) on which

* 13 Stat. at Large, 298.

stamps must be affixed, and prescribes the amount of the stamp; and says, also:

"Agreements or contracts other than those specified in this schedule, 5 cents."

In this state of things, one Henderson — having in his hands a sum of money belonging to Menard, on which both Delmas and the insurance company set up respectively liens under the judgment and mortgage above mentioned—filed a bill in one of the State courts of Louisiana, in the nature of an equitable bill of interpleader, to have it determined by the court to which of the claimants upon it the money should rightfully be paid. Coming in to interplead, the insurance company, on the one hand, impeached the judgment of Delmas because it was based upon a contract the consideration of which was Confederate money; and Delmas, on the other, impeached the mortgage of the insurance company because neither the extension of the note nor the reinscription of the mortgage had a stamp affixed to it.

The court where Henderson filed his bill decided both matters in favor of the insurance company; and the Supreme Court of Louisiana, where the matter went on appeal, did the same.

As respected the matter of the consideration of Delmas's note, it said (assigning no other reason):

"His judgment was based on a contract or agreement the consideration of which was Confederate money. *To render the decree asked for would be to enforce a prohibited agreement.* (*Article* 127 *Constitution.*)"

In thus stating the reasons of its judgment, the Supreme Court of Louisiana followed the Code of Practice of the State, which requires it to state those reasons by citing as exactly as possible the law on which it founds its opinions.*

As respected the stamps, it decided that the extension of time on the note was not such an agreement as required

* Code, article 909.

stamps; nor the reinscription of the mortgage either. From this decision Delmas brought the case here, as within the 25th section of the Judiciary Act,* alleging that the validity of the article 127 of the Constitution of Louisiana had been drawn in question as impairing the provision of the Federal Constitution forbidding any State to pass a law violating the obligation of contracts, and that the Supreme Court had decided in favor of its validity, and also because the construction of an act of Congress about stamps had been drawn in question, and that the court below had decided that it was inapplicable.

Mr. T. J. Durant, for the plaintiff in error:

The renewal of the note is clearly a new agreement, and comes under the head of "Agreements other than those specified in this schedule."

The same may be said of the reinscription of the mortgage. A mortgage to affect third persons must be publicly inscribed on records kept for that purpose.† This preserves the mortgage during ten years. The effect ceases, even against the contracting parties, if the inscriptions have not been *renewed* before the expirations of their time, in the manner in which they were first made.‡ Nothing could come more completely within the meaning of the Stamp Act than such a reinscription; it is a *renewal* of the mortgage, and that is the case provided for in Schedule B.

Mr. A. G. Riddle, for the defendant in error:

The extension of the note did not require to be in writing at all, and neither the extension nor reinscription required a stamp.

On the other matter this court has no jurisdiction. In *Bethel* v. *Demaret*,§ a writ taken under an assumption that the case was within the 25th section, seems to settle the case. The syllabus there is:

* See the sections, *supra*, 5, 6. † See Civil Code of Louisiana, art. 3314.
‡ Ib. art. 3333. § 10 Wallace, 587.

"The decision of a State court which simply held that promissory notes given for the loan of 'Confederate currency,' together with a mortgage to secure the notes, were nullities on the ground that the consideration was illegal according to the law of the State at the time the contract was entered into, is not a decision repugnant to the Constitution."

The writ in that case was accordingly dismissed, as not within the 25th section. So we ask that this one may be. The judgment of the Supreme Court of Louisiana would have been the same if the article 127 had not been referred to.*

Mr. Justice MILLER delivered the opinion of the court.

The plaintiff in error relies upon two propositions ruled against him by the Supreme Court of Louisiana as bringing the case within the revisory power of this court.

1. The first of these is that the court below decided that a judgment in his favor, which was otherwise conceded to be a valid prior lien, was void because the consideration of the contract on which the judgment was rendered was Confederate money.

2. That the note under which the insurance company claimed had been extended as to time of payment, and the mortgage given to secure it reinscribed, without having the stamps affixed which such agreements required.

1. In regard to the first of these propositions this court has decided, in the case of *Thorington* v. *Smith*,† that a contract was not void because payable in Confederate money; and notwithstanding the apparent division of opinion on this question in the case of *Hanauer* v. *Woodruff*,‡ we are of opinion that on the general principle announced in *Thorington* v. *Smith* the notes of the Confederacy actually circulating as money at the time a contract was made may constitute a valid consideration for such contract.

The proposition involved in this conclusion, however, does

* Palmer *v.* Marston, *supra*, 10; Sevier *v.* Haskell, *supra*, 13.

† 8 Wallace, 1. ‡ 10 Id. 482.

not of itself raise one of those Federal questions which belong to this court to settle conclusively for all other courts. When a decision on that point, whether holding such contract valid or void, is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, the decision is one we are not authorized to review. Like in many other questions of the same character, the Federal courts and the State courts, each within their own spheres, deciding on their own judgment, are not amenable to each other.

Accordingly, in several cases coming here on writ of error to the State courts where the same question of the sufficiency of Confederate money and the sale of slaves as a consideration for a contract was the error complained of, we have dismissed the writ because it appeared that the State court had rested its decision on this ground of public policy, tested by which the contract was void when made.*

In *Bethel* v. *Demaret*, the first of these cases, the opinion of the Supreme Court of the State was expressly based on the general doctrine and the previous decisions of that court, and not on the constitutional provision. In the next case, *The Bank of West Tennessee* v. *The Citizens' Bank of Louisiana*, that court speaks both of the constitutional provision and the adjudications of that court made prior to the adoption of the article 127 of the Constitution. And as it was apparent from the record that the judgment of the court of original jurisdiction was rendered before that article was adopted, we could not entertain jurisdiction when the decision in that particular point was placed on a ground which existed as a fact and was beyond our control and was sufficient to support the judgment, because another reason was given which, if it had been the only one, we could review and might reverse.

In the case before us that court say in express language that they hold the judgment of the plaintiff in error void

* Bethel *v.* Demaret, 10 Wallace, 537; Bank of West Tennessee *v.* The Citizens' Bank, *supra*, 9; Palmer *v.* Marston, *supra*, 10; Sevier *v.* Haskell, *supra*, 12; Jacoway *v.* Denton, not reported.

because the 127th section of the State constitution declares that it shall be so held. That article reads as follows: "All agreements, the consideration of which was Confederate money, notes, or bonds, are null and void, and shall not be enforced by the courts of this State." This provision was made a part of the constitution of Louisiana after the contract now in dispute was made, and if the contract was valid then, this provision clearly not only impairs but absolutely destroys its obligation within the meaning of the tenth section of the first article of the Constitution of the United States.

It has long been settled that under the act of Congress of 1824, and by reason of the peculiarity of the practice in the courts of that State, the opinions delivered by the appellate court of Louisiana are treated by us as part of the record, and are looked into to learn what they decided when their judgments are brought here by writs of error.* So long as they in those opinions placed the invalidity of this class of contracts on the ground of a public policy existing at the time the contract was made, or so long as they left us to infer that such was the ground, having once before so decided, the decision presented no question over which we had any revisory power. But when, going a step further, they expressly rest the decision of the same question on the constitutional provision we have quoted, and on no other ground, the question necessarily arises, is that provision in conflict with the Constitution of the United States? And the answer to this question depends solely on the validity of the contract when made; for, if valid then, the Federal Constitution protects it from all subsequent acts of State legislation, whether in the form of constitutional or ordinary legislative enactments.†

It may be said that since we know that the Supreme Court of Louisiana has in other cases held this class of contracts void in their inception, for the very reasons for which

* Cousin *v.* Blanc's Ex., 19 Howard, 207; Almonester *v.* Kenton, 9 Id. 9.
† Hart *v.* White, 13 Wallace, 650.

the constitution annuls them, we are bound to follow the State courts in that decision. But, as we have already said, this is not the class of questions in which we are bound to follow the State courts. It is not based on a statute of the State, or on a construction of such a statute, nor on any rule of law affecting title to lands, nor any principle which has become a settled rule of property, but on those principles of public policy designed for the protection of the State or the public, of which we must judge for ourselves, as they do when the question is fairly presented.

Besides, this court has always jealously asserted the right, when the question before it was the impairing of the obligation of a contract by State legislation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision could always be evaded by the State courts giving such construction to the contract, or such decisions concerning its validity, as to render the power of this court of no avail in upholding it against unconstitutional State legislation.*

These views are in precise conformity to what has been held by this court in the analogous subject of slaves as a consideration of contracts made before the abolition of slavery. The case of *Palmer* v. *Marston*, decided at this term, was a writ of error to the Supreme Court of Louisiana, on the ground that that court had held such a contract void. And it was urged that it was so held by that court under section 128 of the Louisiana constitution, which declared contracts for slaves void, in the same terms that section 127 declared contracts for Confederate money void; but this court dismissed the writ of error for want of jurisdiction, because the Supreme Court of Louisiana had said in its opinion that it did not place the decision on the constitutional provision, but on the ground that the same principle had been promulgated and acted on in that court before the constitutional provision was adopted.

* Bridge Proprietors *v.* Hoboken Co., 1 Wallace, 145; Jefferson Branch Bank *v.* Skelley, 1 Black, 456.

Yet, in the case of *Hart* v. *White*,* in which the Supreme Court of the State of Georgia held such a contract void by reason of a provision in the constitution of that State, adopted after the contract was made, this court entertained jurisdiction and reversed the judgment. This was done on the ground taken in the present case, namely, that the contract being in our judgment valid when made, any constitutional provision which made it void was in violation of the Federal Constitution on the subject of impairing the obligation of contracts; and any judgment of a State court resting on such enactment of a State constitution, after the date of the contract, must be reversed in this court on error.

We are of opinion, for these reasons, that there was error in the Supreme Court of Louisiana in deciding that the judgment of Delmas was void by reason of the constitutional provision of that State concerning contracts for which Confederate notes were the consideration.

As the case must be reversed for this reason, we might pass without examination the question raised in regard to the necessity of stamps on the extension of time for the payment of the note, and on the reinscription of the mortgage; but as that may arise again in the further progress of the case, we will dispose of it now. As regards the latter, which is the mere act of the party who holds the mortgage, we are at a loss to perceive any ground on which this act of reinscription—the same as recording a deed the second time—can be held to be an agreement requiring a stamp. The assent of the mortgagor is not necessary, nor was it asked or given. Nor do we believe it was the purpose of the Stamp Act to hold a mere extension of the time of payment, indorsed on the note, without any consideration for such extension, or change in any other term or condition of the contract, to be an agreement requiring a stamp.

In the case of *Pugh* v. *McCormick*,† it was held that the indorsement of a note by which the bill passed to the indorsee,

* 13 Wallace, 646.

† *Supra*, 361.

did not require a stamp, and also that a writing on the back of the note by the indorser waiving demand, protest, and notice, and agreeing to be liable without them, was good without a stamp. We think this ample authority for holding that a gratuitous extension of time did not require a stamp, as both the writings relied on in that case have more of the elements of an agreement than the one before us. In the matter of the stamp, we think the court committed no error.

But for the error first considered the judgment is REVERSED, and the case remanded for further proceedings,

IN CONFORMITY TO THIS OPINION.

PROPELLER COMPANY *v.* UNITED STATES.

A vessel was let by its owners to the United States for an indefinite period, not less than thirty days, and the government undertook to pay $150 for each day that she might be employed under the contract, and to bear the war risk. In addition to this the value of the vessel was fixed at $40,000, and it was agreed that should she be retained in the service of the United States until the money paid and due on account of the charter should be equal to such value, she should become the property of the United States without further payment, except of such sum as might then be due on account of her hire under the charter. It was further agreed that if at any time during the continuance of the charter the United States should elect to purchase her, they might take her at $40,000, in which case all money paid and due on account of the charter should be applied on account of the purchase. *Held* that this was not a mere affreightment; that transmission of the ownership of the vessel to the United States was also contemplated; that this transmission was to be at the option of the United States; that in no event were the owners to have more than $40,000 for her, and that this sum might be paid in full by the *per diem* hire, in which case the vessel was to become the property of the government so soon as the hire should equal in amount the price named, or at such earlier time as the United States might elect to take her at that price. The vessel having accordingly been lost by a war risk, after $11,397.64 had been paid on account of her hire, the

government was held bound to pay no more than the difference between that sum and $40,000; that is to say, bound to pay no more than $28,602.36.

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

The New Bedford and New York Propeller Company, by a charter-party dated the 5th of April, 1864, chartered a steamer to the United States at $150 per day. The charter-party contained these clauses:

"The war risk is to be borne by the United States, the marine risk by the owner, for a period of thirty days, and as much longer as the services of the vessel may be required to be employed in such service as the United States may direct.

"The vessel is valued at $40,000, and should she be retained so long in the service of the United States that the money paid and due on account of the charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of 33 per cent. per annum on said appraised value) shall be equal to said appraised value, then the said vessel shall become the property of the United States without further payment, except such sum as may then be due on account of the services of said vessel, rendered under the said vessel-charter.

"And, further, if at any time during the continuance of this charter the United States shall elect to purchase the vessel, then they shall have the right to take her at the appraised value at the date of charter, and all money then already paid and due on account of said charter (deducting therefrom the actual cost of running and keeping in repair the said vessel during the said time, together with a net profit of 33 per cent. per annum on the original appraised value) shall apply on account of the said purchase."

The steamer remained in the military service of the government until the 4th of March, 1865, when she was sunk in the Cape Fear River by the explosion of a torpedo placed there by the enemy. The owners presented to the government a claim for $40,000 for the loss of said steamer. This claim being transmitted to the proper officer, he made out an account thus:

Statement of the case.

DR.

By valuation as per charter, ...		$40,000 00
By 33 per cent. per annum, from 12 M., April 5th, 1864, to 4 P.M., March 4th, 1865, 10 27—3' 4—24 months, ...		11,996 11
By running expenses, 11 months, at $2100 per month, ...		23,100 00
		$75.096 11

CR.

To amount received from United States for services from 12 M., April 5th, 1864, to March 4th, 1866, 4 P.M., being 333 6-24 days, at $150,	$49,975 00	
Less 23 5-24 days lost . . .	3,481 25	
		$46,493 75
Balance due, ...		$28,602 36

The amount so found due and no further sum was paid to and received by the owners of the vessel.

In this state of the case the owners filed a petition in the Court of Claims—

Claiming as still due, ...	$11,397 64
In addition to the sum received, viz. . . .	28,602 36
So as to give the whole valuation, . . .	$40,000 00

The Court of Claims found that the steamer was worth $40,000; that the United States never at any time notified to the owners their election to purchase her or to take her under the accruing or purchase clauses of the charter-party above quoted.

And held that "the United States, under such a charter-party, became the equitable owner of the vessel to the extent of the sum earned over and above the expenses and profits stipulated for, and that to the extent of such sum the owners had received so much payment on the price of the vessel, and that whether she was taken by the United States under the option given to purchase at any time, or perished by one of the perils against which the United States engaged to insure, this accruing clause was equally applicable." The court accordingly decreed that it was only the balance due

on the price of the vessel which the original owner could claim, and not the amount of the valuation.

The owners appealed.

Messrs. N. P. Chipman and T. J. Durant, with whom was Mr. C. F. Peck, for the appellants:

The government could purchase only during the continuance of the charter-party; but at the time of the alleged purchase, the charter-party had come to an end by the destruction of the vessel. In addition to this, the steamer did not exist; the circumstance of a sale could not be predicated of it; it had ceased to be the subject of such a contract; the owner then had no property to transfer. There can be no valid sale when the subject of the intended sale has no existence.

Even if this were not all plainly true the Court of Claims has committed error. According to its reasoning the United States became joint owners day by day, and while the petitioner would be paying the defendants' (if owner) portion of the expenses of crew and provisions, and of ordinary repairs, defendants (if owner) would be paying petitioner hire for their own (in part) steamer. This is inconsistent with the terms of the contract and the meaning of the parties, and the premises which give rise to such conclusions must necessarily be false.

The contract gives the right of purchase to the United States on the happening of a future and uncertain event; they are not bound to purchase; they might decline to do so; but the petitioner on the happening of the event could not compel the United States to take the vessel.

The obligation was in its nature indivisible, and could not be executed in part; the happening of the event of the net earnings being equal to $40,000, was an entirety; and the clause makes no mention of fractions, so that the obligation is indivisible by the contract and by its nature.*

The contract made by the parties is not to be changed

* Parsons on Contracts, vol. 2, p. 520, edition 1866.

under notions of equity. Such a contract as the court below made for them might have been a better one, perhaps, than the one they made, but it is the province of courts to enforce such contracts as are presented, and not to make new ones.

Mr. G. H. Williams, Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

The agreement between the plaintiffs and the United States was not a mere contract of affreightment. The vessel, it is true, was let to hire for an indefinite period, not less than thirty days, and the charterers undertook to pay $150 for each and every day she might be employed under the contract, and to bear the war risk, the marine risk being borne by the plaintiffs. But, beyond this, the contract looked to a sale of the vessel to the charterers at a stipulated price. Her value was fixed at $40,000, and it was agreed that should she be retained in the service of the United States until the money paid and due on account of the charter should be equal to such value (after deducting therefrom the cost of running and keeping her in repair, together with a percentage on her appraised value), she should become the property of the United States without further payment, except of such sum as might then be due on account of her hire under the charter. Another clause in the agreement stipulated, in effect, that at any time during the continuance of the charter, namely, while the vessel was employed by the charterers, and until she should be returned to the owners at New York, the United States might elect to purchase her, they might take her at her appraised value (viz., $40,000), in which case all money paid and due on account of the charter, after making the deductions above mentioned, it was agreed should be applied on account of the purchase. The plain meaning of these stipulations is that transmission of the ownership of the vessel to the United States was contemplated; that the transmission of ownership was to be at the option of the United States; that in no event were the

plaintiffs to have more than $40,000 for her, and that this sum might be paid in full by the *per diem* hire, in which case the vessel was to become the property of the government so soon as the hire, less the specified deductions, should equal in amount the price named, or at such earlier time as the United States might elect to take her at that price. The plaintiffs, therefore, were in no contingency entitled to more than the price fixed for the vessel by the contract. Whether received as freight or in direct payment of the stipulated price, all money which was paid them, or became due to them, was consideration for the transmission of title, if the United States chose so to regard it. In effect, therefore, the contract vested an equitable ownership in the defendants, proportioned to the money paid and due under the charter. Had a third party, with knowledge of the agreement, bought the vessel from the plaintiffs, he would doubtless have acquired only a right to the purchase-money remaining unpaid at the time of his purchase, if the charterers had afterwards elected to take the vessel during her retention as purchasers, or had retained her until the freight equalled the price agreed upon.

It is true the United States became insurers against war risks, and the vessel was destroyed by such a risk before the freight earned amounted to the appraised value or price. But as insurers they were only bound to make good the loss the plaintiffs sustained, and as the plaintiffs had agreed to sell for $40,000, that loss could not have exceeded what remained unpaid of that sum. It cannot be doubted that the United States had also under the contract an insurable interest. Suppose both they and the plaintiffs had insured severally for their interests, as they might have done, with another underwriter, could more than $40,000, the value of the vessel, have been recovered on both the policies? That will not be maintained. Or, suppose the plaintiffs had insured against marine risks, and the vessel had been lost by one of them. By the contract they undertook such risks. If the vessel had been lost on the day before the freight, less the deductions agreed upon, would have amounted to her

entire value, could the plaintiffs have recovered the whole $40,000, and have retained it, together with the $39,850 paid or due for freight? Would not the policy have enured to the benefit of the United States to the extent of the payments made? To hold that it would not would be giving to the contract a most unreasonable construction. And if not, how can the plaintiffs now be entitled to the whole value of the vessel, in addition to all they have received for her hire, as if no part of her price had been paid, or as if the United States had no interest? We think they are not thus entitled. In our opinion the government had an equitable interest in the vessel at the time she was lost, and as the interest of the plaintiffs amounted to no more than $40,000, which sum they have already received, they have no further just claim.

JUDGMENT AFFIRMED.

WILLARD *v.* PRESBURY.

1. Congress has power to confer on the city of Washington authority to assess upon the adjacent proprietors of lots, the expense of repairing streets with a new and different pavement, or of repairing an old pavement. The tax need not be a general one on the city.
2. A bill charging fraudulent misrepresentations in procuring the passage of an ordinance to pave a street, with the intent to cast on lessees of certain property on the street the burden (the lessees, by their leases, being bound to pay all taxes), and so to benefit the lessor's reversionary interest, dismissed on proofs held insufficient.

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

An act of Congress, passed February 23d, 1865, provides:

"That the corporation of the city of Washington shall have full power and authority to levy taxes on particular wards, parts, or sections of the city for their particular local improvements, and to cause the curbstones to be set, the foot and carriage-ways (or so much thereof as they may deem best) to be graded and paved."

Another clause in the same act provides:

"That the corporation, &c., is hereby authorized to lay and collect a tax upon all property bordering upon each street or alley that may be paved, sewered, lighted, cleaned, or watered by said corporation, in accordance with the provisions of this act."

On the 12th October, 1865, the city authorities of Washington passed an ordinance which provided for the grading and paving a certain part of Fourteenth Street (including a part which passes on the east side of the hotel known as Willard's, at the northwest corner of Pennsylvania Avenue and Fourteenth Street), with a particular kind of pavement referred to; to replace or reset the curbstones, repair or renew the sidewalks or foot-pavements, &c. And to defray the expenses incurred, the ordinance directed a special tax to be levied under the authority of the above quoted act of Congress of the 23d February, 1865, on all lots and parts of lots along the said Fourteenth Street, the said taxes to be assessed and collected in the same manner as provided by an act of May 23d, 1853.

The street, including that part running along the east side of Willard's Hotel, having been repaved under the ordinance, the city assessed $1835 on the hotel property, of which at this time, Presbury, Sykes & Chadwick were lessees, from the owners, J. C. and H. A. Willard, under a lease which contained a covenant that the lessees should pay all taxes imposed by Congress or the city authorities on the property.

Hereupon, Presbury, Sykes & Chadwick filed their bill in the court below against J. C. Willard, setting forth their lease and the covenant just mentioned, that the portion of Fourteenth Street in front of the premises had been graded and paved, and that the pavement was in good condition and repair; that, notwithstanding this, the common council of the city passed the ordinance already mentioned, directing that Fourteenth Street, including the portion referred to, should be regraded and repaved, although as to this portion it was wholly unnecessary, and had not been called for

by the adjacent proprietors of lots; that the ordinance, as originally drafted, omitted this portion, and would have thus been adopted had it not been for the misrepresentations of the defendant, J. C. Willard, and a contract made by him with the mayor and common council in respect to the payment of the expenses; that the defendant, the said Willard, persuaded the authorities to include the portion of the street mentioned, by representing that he and his brothers were the exclusive owners of all the property contiguous to it; that they all desired the work to be done; and that he and they would be required to pay all the assessments, he (the bill alleged), the said Willard, well knowing that the said representations were untrue, and that the said work was not necessary, and was not desired by the adjacent owners; and also, well knowing that, by the covenant in their lease, the complainants, lessees of the hotel, would be required to pay the assessments. The bill further charged that J. C. Willard agreed with the mayor and common council that if they would pass the ordinance requiring the work to be done he would pay the full amount of the expense assessed; that the grading and paving had since been completed, and the assessments made upon the adjacent owners, and the sum of $1835 had been charged upon the property included in the lease, which the said defendant refused to pay, and payment of which he caused to be demanded of them, the complainants. The bill prayed that the common council be enjoined from collecting the assessment, or that it be set aside for irregularity, or, if not, that the defendant, the said Willard, be decreed to pay it.

There were four witnesses examined in the case. Mr. Wallach, who was the mayor at the time the ordinance was passed and the work done, was one. He stated in substance that Willard had an interview with him while the ordinance was pending in the city councils, and expressed great anxiety for its passage; that he made no representation to him while the bill was pending; that after the ordinance was passed, and while the work was in progress, it was not the intention of the witness to regrade and pave the portion of the street

to which Willard's hotel was adjacent;* that that portion had been paved within a few years with cobble-stones; that the defendant urged him to pave it with the new material; and, as an inducement, said that he had the entire portion of one side to pay for; and that he and his brother owned a larger portion of the property fronting on it than any one person. On the witness suggesting that there might be objections on the part of Mrs. Farnum and Mrs. Burke, the owners of the remaining portion, he said that if they objected he would be responsible for their assessments. The witness stated that he thinks that he would not have had the paving done at that time had it not been for the representations and urgent request of the defendant; that he, the mayor, had full power in the matters given him in the ordinance. The witness also stated there was no agreement between him and the said defendant, that he was to be personally responsible for the assessments or cost of the pavement. Willard gave him to understand that he would have to bear the expense of the pavement in front of his property.

Mr. Owen, an alderman at the time, also a witness, stated that he drew the original ordinance for paving the streets, and omitted the portion of the street to which Willard's Hotel was adjacent; that defendant presented an ordinance which included this portion, and that the witness amended his so as to include it. He had omitted this portion as it was well enough paved with cobble-stones. He had a conversation with defendant while the ordinance was pending. He seemed vexed at the delay, and said that he and his brothers would have to pay for most of the work, and that the other property-owners were fully able to pay their proportion, except as to the Burch property, and, if that was any objection, he would have to pay it himself. The witness stated that he knew of no inducements held out by Willard to procure the passage of the ordinance, except what he had stated.

Mr. Chadwick, one of the complainants, was also called as

* The portion namely between Pennsylvania Avenue and F Street.

a witness. He stated that before taking the lease he took a full survey of the property and its surroundings; that the pavement of Fourteenth Street in front was in good condition, and when taken up was the best in the city. He received a notice from J. C. & H. A. Willard, the landlords, to take up the pavement of the street and put a new one down, at which he was greatly surprised; and that shortly after, workmen proceeded to take up the old pavement; that he had no knowledge of the ordinance till the work was begun; that the street at the time needed no repair.

Mr. Ball, called as a witness, simply stated, in answer to a question, that the street, at the time the old pavement was taken up, was in the best condition.

The court, upon this evidence, decreed that the defendant, Willard, should be liable personally to pay the assessments levied upon the premises leased to the complainants, directing that, if not paid in ten days, the city authorities should proceed and sell his reversionary interest therein to pay the same. From this decree Willard appealed.

Messrs. W. D. Davidge and W. F. Mattingly, for the appellant; Messrs. R. T. Merrick and R. J. Brent, contra.

Mr. Justice NELSON delivered the opinion of the court.

Some question has been made by the counsel for the appellees as to the power of Congress to confer upon the city authority to assess upon the adjacent proprietors of lots the expense of repairing streets with a new and different pavement or repairing an old one. It is asserted that this should be a general tax on the city. But the power, we think, cannot well be denied. The Constitution confers upon Congress the authority to exercise exclusive legislation over this District.*

The bill seeks to compel Willard to pay the tax levied on the hotel (of which the appellees are lessees, and bound by their covenant to pay the same), upon the ground,

* Article 1, § 8.

Opinion of the court.

1st. That he procured the passage of the city ordinance to make the improvement in the street by fraudulent misrepresentations to the mayor and common council, with the intent to cast upon the lessees the burden of the tax, and to benefit his own reversionary interest in the premises; and

2d. That he had agreed with the mayor and common council, if they would pass the ordinance requiring the improvements to be made, he would pay the full amount of any assessments or tax for and on account of the expense of the same.

On looking into the proofs in the record it will be seen that this second ground for charging Willard, the appellant, with the expense of the improvements is wholly unsustained. No such agreement was made as alleged in the bill.

And as it respects the first ground, the only evidence in support of it is that, pending the ordinance before the city council, in a conversation with Alderman Owen, he said that he and his brothers would have to pay for most of the work, and that the other property owners along there were fully able to pay their proportions, except as to the Burch property, and if there was any objection as to that he would pay for it himself—that portion of it. The witness said that he knew of no inducements held out by Willard to procure the passage of the ordinance, except as stated above.

Without stopping to inquire whether a misrepresentation simply to one of the aldermen constituting the board, to induce him to pass an ordinance for the improvement of a street, could be regarded as making out a case of misrepresentation that would subject the guilty party to any responsibility for its passage, or whether, if such responsibility was established, the appropriate remedy would not be an action at law, it is sufficient to say, in the present case, that there is no evidence in the record showing that the representations made were untrue, and hence the first ground for subjecting the appellant also fails.

We say nothing as to the representations made to the mayor after the passage of the ordinance and while the work was in progress, or how far these might subject the appellant

to liability, as that evidence is not pertinent to the issue made in the bill before us.

DECREE REVERSED and CAUSE REMITTED, with directions to DISMISS THE BILL.*

* This case was adjudged at December Term, 1869.

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1. A judgment by confession when both parties to it knew of the insolvency of the debtor, though taken before the first day of June, 1867, is an unlawful preference under the 35th section of the Bankrupt Act, if taken after the enactment of the law. *Traders' Bank* v. *Campbell*, 87.
2. The proceeds of the sale of a bankrupt's goods being in the hands of one sued as a defendant, another person who had a like judgment and execution levied on the same goods is not a necessary party to this suit, being without the jurisdiction. The rule laid down as to necessary parties in chancery. *Ib.*
3. The proceeds of the sale being in the hands of a bank, though it had given the sheriff a certificate of deposit, the assignee was not obliged to move against the sheriff in the State court to pay over the money to him, but had his option to sue the bank which had directed the levy and sale and held the proceeds in its vaults. *Ib.*
4. The defendant having money received as collections for the bankrupt delivered it to the sheriff, who levied the defendant's execution on it and applied it in satisfaction of the same. This is a fraudulent preference, or taking by process under the act, and does not raise the question whether if the defendant had retained the money it could be set off in this suit against the bankrupt's debt to the defendant. *Ib.*

BANKRUPT ACT (*continued*).

5. So taking a check from the bankrupt and crediting the amount of the check then on deposit, on the bankrupt's note the day before taking judgment, was a payment by way of preference and therefore void, and does not raise the question of set-off. *Ib.*
6. The two clauses of the 35th section of the Bankrupt Act, construed and held to differ mainly in their application to two different classes of recipients of the bankrupt's property or means. *Gibson* v. *Warden*, 244.
7. Where an assignee in bankruptcy claims a fund as the property of his bankrupt, which some time before the bankruptcy a firm of which the bankrupt was a member transferred to a third party, and which the transferee now claims adversely to the assignee, the proceedings in the District Court should not be summary and under the first section of the Bankrupt Act, but formal and under the second clause of the third section. *Smith* v. *Mason, Assignee*, 419.
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1. The bill delivered to the shipper of the goods shipped is the bill that makes the contract concerning them, and if it is different from the one retained by the ship, *it* and not the "ship's bill," is evidence of the contract. *The Thames*, 98.
2. Goods shipped under a bill of lading must be delivered to the person named in it or to his order, and under no circumstances may be delivered to a mere stranger. The obligation of the ship stated where the indorsee of the bill is unknown. *Ib.*
3. The indorsee of a, may libel a vessel for non-delivery of the goods shipped, though he be but an agent or trustee of the goods for others. *Ib.* And see *The Vaughan* v. *Telegraph*, 258.
4. A "clean" bill of lading, that is to say a bill of lading which is silent as to the place of stowage, imports a contract that the goods are to be stowed *under* deck. *The Delaware*, 579.
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1. When navigating in a port, it is no excuse for a steamer which runs against another vessel 200 feet and more outside of the ordinary channel, and between 300 and 400 feet out of the ordinary track of steamers, that she was rounding a point and coming into her dock; and that she could not see in consequence of a fog, and that she *supposed* she was at the right place to change her course. *The Bridgeport*, 116.
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4. Though a steamship pursuing, in a crowded harbor, for her own greater convenience in getting into dock in a particular state of the harbor, a channel not entirely the ordinary one for vessels of her size, be bound to more than ordinary precaution, yet if she has a right to use that channel and do take such more than ordinary precaution, she is not responsible for accidents to other vessels that, with it all, were inevitable. *The Java*, 189.
5. The fact that a steamship is in charge of a pilot taken conformably to the laws of a State, is not a defence to a proceeding *in rem* against her for a tortious collision; the laws of the State providing only that if a ship coming into her waters, refuse to receive on board and pay a pilot, the master shall pay the refused pilot half pilotage, and no penalty for the refusal being prescribed. *The China* (7 Wallace, 58) affirmed. *The Merrimac*, 199.
6. A steamship of 2000 tons having a tug, each of 500 tons, on each side, condemned as guilty of a rash act for sailing in a place from 70 to 75 feet wide, which had little or no more than the width of the ship and tugs abreast, between a buoy which indicated an entire obstruction of navigation, and a ship aground with a steamtug on each side. *Ib.*
7. Where a ship ordered a tug to tow her out of harbor to sea when the navigation was made dangerous by wind, tide, and ice, and the master of the tug remonstrated, and finally went only on the ship's owners insisting and on their agreeing to take the risk of all accident, both ship and tug were held liable on a libel for a collision, there being in addition some evidence of faulty navigation. *The Mabey and Cooper*, 204.

COMMISSIONERS OF TAXES.

1. Though "*authorized*" under the act of 6th February, 1863, to bid off property to the United States "at a sum *not exceeding* two-thirds of its assessed value," are not bound to bid it up so as to make it bring in all cases that much. *Turner* v. *Smith*, 553.
2. Under this act and that of June 7th, 1862, the tax commissioners are not bound to hunt up the real owners. The tax laid is a direct tax on the land and on all the estates, interests, and claims connected with or growing out of it. A rent charge is accordingly cut off and destroyed by a sale of the land. *Ib.*

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CONTRACT.
1. In the matter of a contract, a distinction sometimes exists between a *motive* which may induce entering into it and the actual consideration of the contract. This subject illustrated. *Philpot* v. *Gruninger*, 570.
2. A consideration moving to A. and B., with whom C. afterwards enters into partnership, and of which consideration C. thus gets the benefit, will support a promise by C. *Ib.*
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When a corporation has power under any circumstances to issue negotiable securities, the *bonâ fide* holder has a right to presume that they were issued under the circumstances which give the requisite authority, and they are no more liable to be impeached in the hands of such a holder for any infirmity than any other commercial paper. *City of Lexington* v. *Butler*, 282.

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COURT AND JURY. See *Evidence*, 8; *Practice*, 7.
1. When a plaintiff presents as an important part of his case a written proposal, and then insists on a recovery on the ground of mere suspicion that there was a verbal proposal differing from it, it is the duty of the court, if there is no evidence at all of such different verbal proposal, to tell the jury when requested that there is none; and to tell them that they may in such a case find such a verbal proposition is error. *Ward* v. *United States*, 28.
2. Where there is such a written proposal it is the duty of the court, at the request of either party, to construe it, and in doing so the admitted facts concerning the relation of the parties to the transaction are to be considered. *Ib.*
3. Parties may by consent waive a jury in the District Court, and state a case for the court independently of any legislative provision. *Henderson's Distilled Spirits*, 44.
4. Whether—under a policy which provides that fraud or false swearing in furnishing the preliminary proofs of loss, or in an examination which by the terms of the policy the assured, on a claim for loss, was

COURT AND JURY (*continued*).
bound to submit to—there has been such fraud or false swearing is a question for the jury. *Insurance Company* v *Weides*, 375.
5. Whether the evidence before a jury does or does not sustain the allegations in a case is a matter wholly within the province of the jury, and if they find in one way, this court cannot review their finding. *Gregg* v. *Moss*, 564.

COURT OF CLAIMS.
1. The 4th and 5th rules regulating appeals from, were designed to enable a party to secure a finding of fact on any point material to the decision by that court. *Mahan* v. *United States*, 109.
2. But a failure of the court to find the fact as the party alleges it to be, will not justify the bringing of all the evidence on that subject before the Supreme Court, though on a refusal of that court to make any finding on the subject, the Supreme Court may remand the case for such finding. *Ib*
3. Directed, by the Supreme Court, to interpret an act of Congress, passed for the furtherance of hearing a claim against the government, in a liberal spirit, and not in a narrow view of the legislative intention, and so as to give substantial effect to technical defences. *Cross* v. *The United States*, 479.

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2. One executed by an attorney appointed by a husband and wife under a power drawn in France, and with the verbiage which notaries there usually indulge in, to sell the lands in the United States of the husband and wife, the husband owning lands here, but not the husband and wife, *held* sufficient in favor of a *bonâ fide* purchaser, long in possession, to convey the husband's lands. *Dolton* v. *Cain*, 472.

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DERELICT. See *Salvage*.
The master, officers, and crew of a vessel, with every person on board, having gone off, in extreme anxiety for their personal safety, from the vessel on to another which they had brought to them by signals of distress, the mere expressed intention by the master to employ if possible a tug to go and rescue his vessel (she then lying at anchor in a violent gale), to which expression of intention, the person to whom it was made replied, that he "could not get a tug that would come and bring the boat in, as the weather was too rough," was held not sufficient to deprive the vessel of the character of a derelict, so far as timely effort to save her was contemplated. *The Laura*, 336.

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DISTRICT OF COLUMBIA.

An appeal from a proceeding in bankruptcy disposing under the first section of the Bankrupt Act of certain claims (see *supra*, *Bankrupt Act*, 8), lies from the Supreme Court of the District of Columbia, to the Supreme Court of the United States. *Smith* v. *Mason*, *Assignee*, 419.

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EQUITY. See *Parties*, 2–6.

1. The rule stated as to necessary parties in a proceeding in. *Traders' Bank* v. *Campbell*, 87; *Bigler* v. *Waller*, 297.
2. Will not set aside a contract whose purpose is a settlement of disputes, simply because one party to it was in want of money when he made it, and because such want may have been an inducing cause for his making it; the party having been an intelligent person, who acted deliberately and with knowledge of what he was doing. *French* v. *Shoemaker*, 315.
3. Will consider that a party to a contract who, when the act of the other side renders impossible literal performance, has performed all that can be reasonably expected of him, comes in certain cases within the character of a party performing his part. *Dolton* v. *Cain*, 472.
4. Will look through forms to substance, and protect a *bonâ fide* purchaser long in possession under a deed of *cestui que trusts*, and plainly intended for their benefit, from disturbance by conveyance, long afterwards, from the heirs of the party named in the deed as trustee, and now claiming the land under a sharp and mere technical rule of conveyancing. *Ib.*

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1. Parol evidence not admissible to show, in the case of a "clean" bill of lading, that there was an agreement to stow the goods on deck. *The Delaware*, 579.
2. A presumption exists *primâ facie* that the military and fiscal officers of the United States have done their official duty. *United States* v. *Crusell*, 1.
3. To show that a person to whom a deed has been made conveying property in trust did not accept the trust, a declaration not under seal, but signed by him, nine years after the deed, making known to all whom the matter concerned, "that immediately on his receiving notice of

EVIDENCE (*continued*).

the conveyance he did positively refuse to accept, or to act under the trust intended to be created, and that he had at no time since accepted the trust or acted in any wise as trustee in relation to it," is proper evidence; the party making the declaration being dead and his handwriting proved. *Armstrong* v. *Morrill*, 120.

4. Courts may take judicial notice of the fact that, by the common consent of mankind, certain rules of navigation, fixing the number, color, position, power, &c., of lights to be used at sea by night, on steamers and sailing vessels respectively, so as the better to guard against collision by establishing a uniform rule on the subject, have been acquiesced in, as of general obligation. *The Scotia*, 170.
5. An amended answer in admiralty, setting up an improbable defence, and one quite departing from that set up in the original answer, treated unfavorably. *The Mabey and Cooper*, 204.
6. A statement in figures of the value of certain merchandise destroyed by fire, which statement professed to be a copy of another and original statement contained in a book—itself destroyed in the fire—accompanied by proof that on a certain day the witnesses took a correct inventory of the merchandise and that it was correctly reduced to writing by one of them and entered in the volume burnt, and that what is offered is a correct copy, may, on a suit against insurers, be received in evidence to fix the value of the merchandise burnt, even though there be no *independent* recollection by the witnesses affirming to the correctness of the original statement of what they found the value of the merchandise to be. *Insurance Companies* v. *Weides*, 375.
7. The result of an undertaking is sometimes a safe criterion by which to judge of an act which caused it. *The Steamer Webb*, 406.
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10. On an issue between a partnership and third parties as to the day when the partnership was formed, the mere articles of partnership are not evidence in favor of the partnership It must be shown by extrinsic evidence, that they were made on the day when they purport to have been made. *Philpot* v. *Gruninger*, 570.

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HOMESTEAD LAWS OF ILLINOIS.

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1. Under a policy one of whose conditions is that in case of loss the assured, after furnishing evidence of his loss, shall submit to an examination under oath, and until such examination should be permitted, no loss should be paid; the insurers cannot as a condition of recovery compel the assured to answer questions as to the sum per cent. of claim for which he had settled with other parties insuring him. *Insurance Companies* v. *Weides*, 375.
2. Under a policy one of whose conditions is that fraud or false swearing on the part of the assured in an examination which, by the terms of the policy, he was bound to submit to on a claim by him for loss, it is only fraudulent false swearing in furnishing the preliminary proofs or in the examination which avoids the policy. *Ib.*
3. What may not be asked for, when one of the conditions is that in case of loss the assured shall produce "*certified copies*" of all bills and invoices, the originals of which have been lost, and exhibit the same for examination to any person named by the insurers, and that until the proofs, declarations, and certificates are produced and examinations and appraisals permitted the loss shall not be payable. *Ib.*
4. Insurance may be effected in the name of a nominal partnership where the business is carried on by and for the use of one of the partners. *Phœnix Insurance Company* v. *Hamilton*, 504.

INSURANCE (*continued*).

5. In case of an insurance thus effected, where no representations are made with regard to the persons who compose the firm, there is no misrepresentation on that subject which avoids the policy. *Ib.*
6. And where the firm has no actual care or custody of the property insured (grain), but so far as regards its preservation from fire, it is entirely in the control of the other parties, and is so understood to be by the company making the insurance; the omission to inform the insurance company of an agreement of dissolution previously made cannot be considered a concealment which will avoid the policy. *Ib.*

INTEREST. See *Patents*, 7, 8.

Eight per cent., with annual rests, held to have been properly charged against a fraudulent administrator in a State where as high as ten per cent. is allowed. *Hook* v. *Payne*, 252.

INTEREST WARRANT. See *Coupon.*

INTERNAL REVENUE. See *Collector; Forfeiture; Stamps.*

1. A removal of distilled spirits from the place where distilled to a bonded warehouse of the United States, if made with *intent* to defraud the United States of the tax due on the spirits, is illegal, and, though the intent was never executed, the spirits removed are subject to forfeiture. Removal to even such a place *may be* part of a scheme to defraud the government of its duties. *Henderson's Distilled Spirits*, 44.
2. The 5th section of the act of July 14th, 1870,—by which the power of collectors of internal revenue to post-stamp certain instruments of writing and remit penalties for the non-stamping of them when issued, is extended in point of time,—applies to notes issued before the passage of the act as well as to notes issued subsequently. *Pugh* v. *McCormick*, 361.
3. On a distiller's bond, given under the 7th section of the Internal Revenue Act of July 20th, 1868, conditioned that the obligors "shall in all respects comply with all the provisions of law in relation to the duties and business of distillers," the condition is prospective as well as present, and embraces such provisions of law relating to the duties and business of distillers as may be in force during the term for which the bond is given, whether enacted before or after its execution. *United States* v. *Powell*, 493.
4. The "distillery warehouses" which distillers are required by the 15th section of the same act to provide, situated on their distillery premises, are "bonded warehouses," within the meaning of the joint resolution of Congress of March 29th, 1869, which declares that the proprietors of all "internal revenue bonded warehouses" shall reimburse to the United States the expenses and salary of all storekeepers put by it in charge of them. *Ib.*
5. These expenses properly include *per diem* wages paid to storekeepers for taking charge of them on Sundays. *Ib.*

INTERPRETATION OF ACTS OF CONGRESS.

Acts for the furtherance of hearing a claim against the government in the

INTERPRETATION OF ACTS OF CONGRESS (*continued*).
Court of Claims, not to be interpreted in a narrow view, and so as to give substantial effect to technical defences. *Cross* v. *United States*, 479.

INVENTION. See *Patents.*

JUDGMENT. See *Pleading*, 1, 4.

JUDGMENT, CONCLUSIVENESS OF. See *Parties*, 2–5.

JUDICIAL NOTICE.
Courts may take judicial notice of the fact that, by the common consent of mankind, certain rules of navigation, fixing the number, color, position, power, &c., of lights to be used at sea by night, on steamers and sailing vessels respectively, so as the better to guard against collision at sea, by establishing a uniform rule on the subject, have been acquiesced in as of general obligation. *The Scotia*, 170.

JURISDICTION. See *Ministerial Officers.*

I. OF THE SUPREME COURT OF THE UNITED STATES.

(*a*) It HAS jurisdiction—

1. Of appeals from the highest State courts, under the 25th section of the Judiciary Act, only in a limited number of cases, and this court, in a pointed way, calls the attention of the bar of the court generally to the fact that much expense would be saved to suitors, if before they advised them to appeal from decisions of these courts to this one, they would see that the case was one of which this court had cognizance under the section. *Hurley* v. *Street*, 85.
2. Of a judgment of a State court holding void a contract of which the consideration was the notes of the Confederate States in ordinary use as money during the rebellion, when the judgment holding the contract void was based on a constitutional or legislative enactment passed after the contract was made and not on general grounds of public policy. *Delmas* v. *Insurance Company*, 661.
3. (Other things allowing) of a writ by one defendant, on a judgment against three, the defendant who prosecutes the writ having given notice to his co-defendants of his intention to prosecute it, and there being a refusal by them to co-operate. *O'Dowd* v. *Russell*, 402.
4. As of a "final" judgment, of a judgment in a court of last resort, that a judgment against A. (who had been sued for not faithfully discharging the duties of a vendue-master of a city and been held discharged under the Bankrupt Act) be reversed. As also as of the same final nature, of a judgment in a court of last resort, that a judgment in an inferior court, holding B. and C. (the sureties of A. on his bond as vendue-master) liable, be affirmed. *Ib.*
5. Of appeals from proceedings in bankruptcy from the Supreme Court of the District of Columbia in certain cases. *Smith* v. *Mason, Assignee*, 419.

(*b*) It has NOT jurisdiction—

6. Under the 25th section of the Judiciary Act, unless it can be seen from the record that a State court *decided* the question relied on to give this court jurisdiction. *Cockroft* v. *Vose*, 5.

JURISDICTION (*continued*).

7. Nor under that section, when the decision of the State court is made on precedents of general jurisprudence of this court or on one of its own similar pre-existent rules; notwithstanding (in the latter case) that the State have subsequently made the rule one of the articles of its constitution. *Caperton* v. *Bowyer*, 216; *Tennessee Bank* v. *Bank of Louisiana*, 9; *Palmer* v. *Marston*, 10; *Sevier* v. *Haskell*, 13.
8. Nor under that section, if the judgment of the State court *may* have been given on grounds which the section does not make cause for error, as well as upon some ground which it does so make. *Steines* v. *Franklin County*, 15; *Kennebec Railroad* v. *Portland Railroad*, 23.
9. Nor under that section, when nothing appears in the record to show on what grounds the decision of the matter in which the Federal question is alleged to be involved was made. *Caperton* v. *Bowyer*, 216.
10. Nor under that section, *of necessity*, and in the presence of disproof in the record, merely because a certificate of the presiding justice of the highest court of a State may certify that there was drawn in question the validity of an act of the State, on the ground that it was repugnant to the Constitution of the United States, and that the decision was in favor of its validity. *Ib.*
11. Nor under that section, unless the record shows that more than one Federal question was decided when the certificate certifying that a certain one which it mentions was, is silent as to any other, and when this court considers that the certificate in what it does mention is disproved by the record; and when, moreover, the case may have been well decided on grounds not Federal. *Ib.*
12. Nor under that section when the writ is taken on the ground that the provision of the Constitution which ordains that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," has been violated by a refusal of the highest State court to give proper effect to a judicial record of another State, unless it appear that the record have been authenticated in the mode prescribed by the act of May 26th, 1790, "to prescribe the mode in which the public acts, records, and judicial proceedings in each State shall be authenticated, so as to take effect in every other State." *Caperton* v. *Ballard*, 238.
13. Nor where the decision of the State court consists only in granting or refusing to grant a motion for a rehearing in an equity suit. *Steines* v. *Franklin County*, 15.
14. Nor (when the State court is composed of a chief justice and associates) unless the writ be allowed by the chief justice himself. *Bartemeyer* v. *Iowa*, 26.

II. Of the Circuit Courts of the United States.

(*a*) They HAVE jurisdiction—

15. Under the act of March 2d, 1867, of a suit brought by the assignee of a chose in action, when the case has been transferred under that act from a State court into one of them. *City of Lexington* v. *Butler*, 282.
16. Of negotiable paper (other things allowing), though the plaintiff be an assignee of it. *Ib.*

JURISDICTION (*continued*).

(*b*) They have NOT jurisdiction—

17. (Where the suit is between citizens of the same State) of a suit which does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of, an original suit. Such second suit is an original and not an ancillary suit. *Christmas* v. *Russell*, 69.

III. OF THE DISTRICT COURTS OF THE UNITED STATES.

IV. OF THE COURT OF CLAIMS.

JURY AND COURT. See *Court and Jury*.

LAWS OF THE SEA. See *Judicial Notice*.

May be considered as created by the published rules of navigation of a great commercial nation (as Great Britain) regulating the subject of lights at sea on her vessels; which rules are afterwards adopted by another great commercial nation (as the United States) for hers, and adopted finally by nearly all other commercial nations of whatever size and importance having any shipping on the sea, as the law of their vessels, respectively, there. *The Scotia*, 170.

LEGAL TENDER.

1. A cargo was shipped from Canada to New York, October 7th, 1864, when gold was 101 per cent. above legal tender notes of the United States. The cargo was wrecked soon after, on the Hudson. On libel in the admiralty at New York, and on appeal from the District Court, the Circuit Court, on the 26th of March, 1870, when gold was only 12 per cent. above notes, gave the libellants a decree for the value in gold of the cargo on the day and at the place of shipment, converting that value, at the same time, into legal tender notes, at the rate at which such notes stood as compared with gold on the day of shipment, that is to say, when gold was 101 per cent. above legal tender notes, or, in other words, when it required $201 legal tender notes to buy $100 of gold. On appeal to this court (the difference between gold and notes having now sunk to about 9 per cent.), *held* that this decree was right. *The Vaughan and Telegraph*, 258

2. A decree ordering payment in coin of a debt contracted before the passage of the Legal Tender Acts reversed, on the authority of the *Legal Tender Cases* (12 Wallace, 475). *Bigler* v. *Waller*, 298.

LIBEL IN ADMIRALTY.

A bill of lading indorsed and sent to the consignees, who make, on the receipt of it, advances on the cargo, gives the consignees sufficient title to maintain a libel in admiralty against a vessel by whose tortious collision with the vessel in which the cargo consigned to them was coming, the cargo has been wrecked and lost. *The Vaughan and Telegraph*, 258. And see *The Thames*, 98.

LIEN IN ADMIRALTY.

1. While courts of admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial en-

LIEN IN ADMIRALTY (*continued*).
forcement of maritime liens, will, under proper circumstances, constitute a valid defence. *The Key City*, 653.
2. No arbitrary or fixed period of time has been, or will be established, as an inflexible rule; but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case. *Ib.*
3. When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defence will be held valid under shorter time and a more rigid scrutiny of the delay than when the claimant is the party who owned the property when the lien accrued. *Ib.*

LIGHTS AT SEA AND ON RIVERS.
1. A boat fastened to shore and out of the proper path of vessels navigating in a port is not bound in the absence of a harbor regulation requiring it to keep a light on deck. *The Bridgeport*, 116.
2. The sorts of lights which steamers and sailing vessels, British, American, and others are required to show at sea since the rules of navigation established by the British Orders in Council of January 9th, 1863 (prescribing the sorts of lights to be used on British vessels) and by our act of Congress of April 29th, 1864, adopting them, and by acceptance, before April, 1857, as obligatory, by almost all states of the world which have shipping on the Atlantic Ocean—the whole matter considered in detail and passed on in a case of collision at sea, and a rule of uniformity enforced. *The Scotia*, 170.
3. Although one vessel may be sailing at night with lights other than those whose use is made obligatory on her by acts of Congress, and may by actually misleading another vessel tend to cause a collision, yet this will not discharge the other vessel if she, on her part, have suffered herself to be misled by the wrong lights when, if she had been intelligently vigilant, other indications would have pointed out or led her to suspect that the vessel was not what her lights indicated. *The Continental*, 345.

LIMITATION OF ACTIONS. See *Coupon; Lien in Admiralty.*

LIMITATION, STATUTES OF. See *Coupon; Lien in Admiralty.*

LOUISIANA.
Inchoate rights to land in the Territory of, such as some made A.D. 1789, were of imperfect obligation on the United States when succeeding A.D. 1803 to the ownership of the region. Their nature and obligation stated. *Dent* v. *Emmeger*, 308.

MANDAMUS.
Cannot perform the office of appeal or writ of error; and will not lie to a Circuit judge to compel him to entertain jurisdiction of a cause on appeal from the District Court, he having once decided that the case—a controversy between a captain and crew of a Prussian vessel, and brought by appeal before him from the District Court—was not within his jurisdiction, but, under a treaty stipulation, within that of the Prussian consul alone. *Ex parte Newman*, 152.

MARINE RISKS.

1. Distinguished from war risks. *Morgan* v. *United States*, 531.
2. Extraordinary marine from ordinary marine. *Leary* v. *United States*, 607.

MATTER OF FACT. See *Court and Jury.*

MEMORY. See *Evidence*, 6.

MINISTERIAL OFFICERS.

Protected, when acting in obedience to process or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon. *Erskine* v. *Hohnback*, 613.

MISTAKE. See *Bond.*

MORTGAGE. See *Evidence*, 9; *Foreclosure; Parties*, 6.

To redeem property which has been sold under a mortgage, as is alleged, irregularly, the whole mortgage-money must be tendered, or if suit be brought, be paid into court. *Collins* v. *Riggs*, 491.

MORTGAGEE. See *Evidence*, 9; *Parties*, 6.

A mortgagee claiming under a proceeding which purported to be a foreclosure, but which was a void proceeding, is not liable for rents and profits unless he have actually received them. *Bigler* v. *Waller*, 297.

MOTION FOR REHEARING.

In an equity suit. The granting or refusal to grant by the highest court of the State, not a subject for review by the Supreme Court of the United States. *Steines* v. *Franklin County*, 15.

MUNICIPAL CORPORATION. See *Corporate Securities.*

NATIONAL BANKS.

1. May be sued in any state, county, or municipal court in the county or city where located, having jurisdiction in similar cases. *Bank of Bethel* v. *Pahquioque Bank*, 383.
2. Do not lose corporate existence by mere default in paying circulating notes, and upon the mere appointment of a receiver. *Ib.*
3. May be sued though a receiver have been appointed and is acting. *Ib.*
4. The decision of the receiver against the validity of a claim presented to him for a dividend is not final; the creditor may proceed afterwards to have the validity of the claim judicially adjudicated in a suit in a proper State court, against the bank. *Ib.*

NEGOTIABLE PAPER. See *Corporate Securities; Jurisdiction*, 16.

NOTICE. See *Foreclosure.*

OHIO.

Under the statutes of, a seal not necessary to a chattel mortgage. *Gibson* v. *Warden*, 244.

ORIGINAL BILL.

Where a bill does not relate to some matter already litigated in the same court by the same persons, and which is not either in addition to, or a continuance of, an original suit, it is an original bill, not an ancillary one. *Christmas* v. *Russell*, 69.

PARTIES. See *Libel in Admiralty.*

1. To a chancery proceeding. The rules laid down as to the necessary ones. *Traders' Bank* v. *Campbell*, 87; *French* v. *Shoemaker*, 315.
2. In a suit in the Circuit Court of the United States by a distributee of the estate of a decedent to recover a distributive share, the mere fact that the administrator is ordered to account before a master does not make parties all who were entitled to distribution, nor authorize a decree in their favor. *Hook* v. *Payne*, 252.
3. If such persons do not appear before the master no decree can be made for or against them, because they would not be bound thereby. *Ib.*
4. If they should appear and claim an interest, if there are controverted matters between them and the administrator outside of the mere accounting to be made by him, this can only be decided on proper pleadings and regular hearing by the court. *Ib.*
5. A bill which seeks to set aside a fraudulent receipt obtained by an administrator from one distributee, and to recover the amount coming to that distributee, is not a suit in which all other persons interested in the estate can be heard unless they are made parties, or make themselves parties to the suit in some appropriate mode. *Ib.*
6. A mortgagor who, on a revived bill against the personal representatives, attempted to charge his mortgagee's estate with profits because of a foreclosure which, though really void, had been gone through with in form (the mortgagee being the supposed purchaser), and has had his bill dismissed, with a decree that *he* is still owner and liable for unpaid mortgage-money, cannot object, on error, that the decree did not order the heirs of the formal purchaser (the purchaser himself being dead) to convey, if the bill have not made such heirs parties, or if they have not been called in. *Bigler* v. *Waller*, 298.

PARTNERSHIP. See *Evidence*, 10; *Insurance*, 4, 5, 6.

Where one partner, R. M., affixed his name and seal to an instrument whose *testatum* set forth that "R. M. & Sons, by R. M., one of the firm, had thereto set their hands and seals," the instrument may be regarded as the deed of all the partners on proof that prior to the execution the others had authorized R. M. to execute the instrument, and after execution, with full knowledge acquiesced in what he had done. *Gibson* v. *Warden*, 244.

PATENTS.

I. General Principles relating to.

1. In patents for *design*, the thing patented is the peculiar and distinctive *appearance* of an article to which the appearance is given; the sameness of effect upon the eye. *Gorham Company* v. *White*, 511.
2. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same,—if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other,—the one first patented is infringed by the other. *Ib.*
3. Where in a patent for an improvement in the process of manufacturing cast-iron railroad-wheels, only vague and uncertain directions could

PATENTS (*continued*).

be given as to the degree of foreign heat to be applied in any particular case, there, when a patentee in his specification establishes a *maximum* and a *minimum*, the ascertainment of the proper intermediate degree may be left to the skill and judgment of the operator practicing the process. *Mowry* v. *Whitney*, 620.

4. It is as true of a process, invented as an improvement in a manufacture, as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. *Ib.*
5. In such a case the question to be determined is, what advantage did the infringer derive from using the invention, over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits, and that advantage is the measure of profits to be accounted for. *Ib.*
6. When a patent is for an entire process made up of several constituent steps or stages, the patentee not pretending to be the inventor of those constituents, his claim to the process as an entirety does not secure to him the exclusive use of the constituents singly. What is secured is their use when arranged in the process. *Ib.*
7. The profits recoverable from an infringer are the measure of the patentee's damages, and though called *profits* are really *damages;* and unliquidated until a final decree is made. *Ib.*
8. Interest upon unliquidated damages is not generally allowable, and should not be allowed before a final decree for profits. *Ib.*
9. What language will transfer an extension and renewal of a patent made under the acts of July 4th, 1836, and May 27th, 1846. *Nicolson Pavement Company* v. *Jenkins*, 452.

II. Mode of Vacating.

10. The ancient mode of annulling or repealing the king's patent was by *scire facias* generally brought in the chancery where the record of the instrument was found. *Mowry* v. *Whitney*, 434.
11. In modern times the court of chancery, sitting in equity, entertained a similar jurisdiction by bill when the ground of relief is fraud in obtaining the patent, and in this country it is the usual mode in all cases, because better adapted to the investigation and to the relief to be administered. *Ib.*
12. But *scire facias* could only be sued out in the English courts by the king or his attorney-general, except in cases where two patents had been granted for the same thing to different individuals, and the sixteenth section of the act of July 4th, 1836, concerning patents for inventions, is based upon analogous principles. *Ib.*
13. Both upon this authority and upon sound principle no suit can be brought to set aside, annul, or declare void, a patent issued by the government, except in the class of cases above mentioned, unless brought in the name of the government or by the authority or permission of the Attorney-General, so as to be under his control. *Ib.*

III. Construction of Particular.

14. Asa Whitney's patent of April 25th, 1848, for an "improvement in the

PATENTS (*continued*).

process of manufacturing cast-iron railroad-wheels," was for a process, not for a combination. *Mowry* v. *Whitney*, 620.

PENNSYLVANIA LAND LAW.

1. By the settled land laws of Pennsylvania no title can exist under a second survey, unless such second survey have been ordered by the board of property. *Improvement Company* v. *Munson*, 442.
2. The mere fact that a second survey was made is not evidence, even after a long time, as against another confessedly first, that an order for the second was made by the board of property, and that the order has been lost. And although the loss of such an order may be presumed after a lapse of time, yet the presumption can be made only where the order is shown by some kind of competent proof to have once existed. *Ib.*

PERFORMANCE. See *Equity*, 3.

PLEADING.

1. Judgment in ejectment, in favor of a single plaintiff, sustained, where some counts in the declaration alleged a possession in himself alone, at the time of the ouster, though other counts alleged the possession to have been in him jointly with others; there having been no motion in arrest of judgment or other objection made below to the judgment in the form mentioned, which was one upon a verdict thus finding. *Armstrong* v. *Morrill*, 120.
2. Where a demurrer to a special plea which is a complete avoidance of the whole cause of action is overruled and the plaintiff suffers judgment to be entered against him on the plea, the court may enter judgment on the whole case, though another plea (that of the general issue) had (against the rules of good pleading) been filed, on which issue was taken; provided the issue thus raised on the last plea have by the judgment on the demurrer been in fact disposed of and so rendered immaterial. *United States* v. *Ballard*, 457.
3. The effect of the replication *de injuriâ* considered on the authorities. *Erskine* v. *Hohnbach*, 613.
4. When to a declaration two special pleas are interposed, each setting up substantially the same defence, and by the replication to one issue is joined on the merits, and by the replication to the other an immaterial issue is formed, and upon the trial all the issues are found for the plaintiff, it is a matter of discretion in the court whether to arrest the judgment for the verdict on the immaterial issue and award a repleader with which this court will not interfere. *Ib.*

POLICY.

What representations or concealment do not avoid a policy of insurance. *Phœnix Insurance Company* v. *Hamilton*, 504.

POSSESSION

And actual reception of profits necessary to charge a mortgagee buying on a supposed foreclosure, but one really void. *Bigler* v. *Waller*, 298.

PRACTICE. See *Answer; Bankrupt Act*, 7; *Bill of Review; Parties, Supersedeas.*

1. In the Supreme Court.

(*a*) *In cases generally.*

1. The refusal of the court below to admit further proof of a fact already well established, and which this court can see from the record was not disputed at the trial, is not ground for reversing the judgment, though the evidence offered might have been competent; because the party was not injured by the ruling of the court. *Gregg* v. *Moss*, 564.
2. The incorporation of all the testimony given to a jury, and the consequent attempt of counsel to reargue here, matters of fact decided by the jury, reprehended again, as it has been before. *Ib.*
3. The granting or refusal by the highest court of a State of a motion for the rehearing of an equity suit is not a subject for review by the Supreme Court of the United States; in fact not being within its jurisdiction. *Steines* v. *Franklin County*, 15.
4. When a Supreme Court of a State is composed of a chief justice and several associates, writs of error to the court under the 25th section of the Judiciary Act must be signed by the chief justice. *Bartemeyer* v. *Iowa*, 26.
5. A notice by one of three defendants to his co-defendants of his intention to prosecute a writ of error, and a refusal by them to co-operate, is equivalent to the old proceeding of summons and severance, and the one defendant can take his writ accordingly. *O'Dowd* v. *Russell*, 402.
6. The Supreme Court will not reverse a decree because a deposition showing the amount of damages has been improperly received; there being other evidence that the damages were as great as this court finally awarded. *The Steamer Webb*, 406.
7. Cannot pass on the weight of evidence on error to the Circuit Courts, when acting under the act of March 3d, 1865, as a jury. *Dirst* v. *Morris*, 484.
8. A failure of the Court of Claims to find a fact as a party alleges it to be will not justify the bringing of all the evidence on the subject to the Supreme Court; though on a refusal of the Court of Claims to make any finding on the subject, the Supreme Court may remand the case for such finding. *Mahan* v. *United States*, 109.
9. Though error may have been committed by a court below on the then state of statutory law, yet where a statute has been passed since that court gave their judgment, changing the then existing law, so that if the judgment were reversed and the case sent back, the court would now and in virtue of the new statute have to rightly give the same judgment, that they gave before erroneously, this court will affirm. *Pugh* v. *McCormick*, 361.

(*b*) In *admiralty.*

10. Although the general rule is that a party who does not appeal cannot be heard in opposition to the decree, still where it appeared—the suit below being a libel for collision against a tug and her tow—that an

PRACTICE (*continued*).

appeal from the District Court to the Circuit Court had been taken from the entire decree, by the owners of the tow, who had ordered the tug, and who had undertaken her defence as well as their own, and thus represented the entire interest of the losing party in the suit, an appeal by the tug from the Circuit Court to this court was entertained here, though the tug had not in form appealed from the decree of the District Court. *The Mabey and Cooper*, 204.

11. A decree in admiralty in the District and Circuit Courts for a greater amount than the sum for which the sureties were bound on their bond to release the vessel, reformed by the Supreme Court so as not to exceed that sum. *The Steamer Webb*, 406.

12. Where exceptions of form are taken on a libel in admiralty in the District Court, but are not found in the record of an appeal to the Circuit Court, or from the Circuit Court to the Supreme Court, and do not appear to have been brought to the attention of the Circuit Court, or acted on in any manner by it, they must be held in the Supreme Court to have been waived. *The Vaughan and Telegraph*, 258.

II. In Circuit and District Courts.

13. Where a mortgagor has filed a bill of revivor against the personal representatives and not including the heirs of a mortgagee who had bought the mortgaged property under a proceeding *supposed* to be a valid sale of foreclosure, but which was, in fact, a proceeding wholly void, and has had the bill dismissed and a decree that he is himself still owner, and that he pay the balance unpaid of the mortgage-money, though the fact that the decree did not order the *heirs* of the mortgagee purchaser to convey, cannot be taken advantage of on error, yet the execution of the decree for payment may be stayed until the outstanding title have been brought back. *Bigler* v. *Waller*, 297.

14. Where a charge is merely ambiguous, a party dissatisfied with it ought, before the jury leave the bar, to ask the court to make it clear. He should not take his chance with a jury, and then, after the verdict is against him, claim the benefit of the ambiguity on error. *Improvement Company* v. *Munson*, 442.

15. The rule as to necessary parties in a chancery proceeding, stated. *Traders' Bank* v. *Campbell*, 87.

III. In District Courts.

16. Decrees in admiralty *in rem* should not exceed the amount for which the sureties were bound on stipulations for a discharge of the vessel from the marshal's custody. *The Steamer Webb*, 406.

IV. In the Court of Claims. See *supra*, 8; *Court of Claims*.

PREFERENCE, FRAUDULENT. See *Bankrupt Act*, 1, 4, 5.

PRESUMPTION.

A *primâ facie* exists that the military and fiscal officers of the United States have done their duty. *United States* v. *Crusell*, 1.

PROBATE OF WILL. See *Purchaser without Notice*, 2.

PROCESS. See *Patents*, 4–7.

PROFITS. See *Patents*, 7, 8, 9; *Rents and Profits.*

PUBLIC LANDS. See *Auction Sales.*

PURCHASER WITHOUT NOTICE. See *Corporate Securities.*

1. When two corporations united their vessels and other property used in navigation, and formed a new corporation, in which no money was paid by either party, and in the contract of consolidation made arrangements for the payment of the debts of one or both before any dividends should be declared in the new stock, the new corporation cannot avail itself of the doctrine applicable to such a purchaser without notice; and a lien, three years and a half old, will be enforced against one of the vessels so transferred to the new corporation. *The Key City*, 653.
2. A person purchasing for value in one State under a will probated in it, on a surrogate's order of another State, where the decedent died, admitting the will to probate there, will be protected in his purchase against heirs-at-law, though after the purchase the surrogate's order have been reversed by the highest court of the State where the order was made, and the supposed will declared null; the reversal having been made after the sale and after the devisee in the will had sold out all his interest under it to the heirs-at-law; and the purchaser from the devisee not having been made a party to the proceedings setting the surrogate's order aside. *Foulke* v. *Zimmerman*, 113.

RANK IN THE ARMY.

In construing the third section of the act of March 3d, 1865, increasing the commutation price of officers' subsistence, by fixing it at fifty cents per ration, "provided that said increase shall not apply to the commutation price of the rations of any officer above the *rank* of *brevet* brigadier-general"—a brigadier-general is to be regarded as above the rank specified. *United States* v. *Hunt*, 550.

RECEIPT IN FULL.

Not necessary to satisfaction of a disputed claim of a contractor with the government, referred to a commission when *any* sum found by the commission as due has been accepted. *United States* v. *Justice*, 535.

RECEIVER. See *National Banks*, 3, 4.

RENT CHARGE.

Is cut off by a sale for taxes under the act of February 6th, 1863, and the act of June 7th, for the collection of taxes in insurrectionary districts. *Turner* v. *Smith*, 553.

RENTS AND PROFITS.

An actual pernancy of, necessary to charge one who claims only through a proceeding supposed to be a valid foreclosure, but which in fact is wholly void, and therefore no sale at all. *Bigler* v. *Waller*, 297.

RENUNCIATION OF TRUST. See *Trust.*

REPLICATION DE INJURIA.

Effect of, considered on the authorities. *Erskine* v. *Hohnback*, 613.

REPRESENTATIONS. See *Insurance*, 5.

RESTITUTIO IN INTEGRAM.

The rule applied in a case of a claim by a ferry-boat, for demurrage in getting repaired, where there was no charter rate *per day*, and where the rate was fixed by the superintendents of neighboring ferries. *The Cayuga*, 270.

RISKS.

1. War distinguished from marine. *Morgan* v. *United States*, 531.
2. Extraordinary marine from ordinary marine. *Leary* v. *United States*, 607.

SALVAGE. See *Derelict.*

A vessel undertaking in good faith to perform the office of salvor to a derelict vessel held not responsible for the latter having been wholly lost in the effort to save her. *The Laura*, 336.

SATISFACTION OF CLAIM.

Where a contractor with the United States and the United States disagree as to what is justly due to the contractor, and the question is referred to a commission constituted by proper authority to audit such claims as that of the contractor's, and the commission finds a certain sum as justly due, and the contractor receives that sum, he cannot sustain a claim in the Court of Claims for a further sum, even though he have given no receipt in full. *United States* v. *Justice*, 535.

SHIPS AT SEA. See *Judicial Notice; Laws of the Sea; Lights at Sea and on Rivers.*

SLAVE CONTRACTS. See *Jurisdiction*, 7.

SPECIE. See *Legal Tender.*

STAMPS. See *Internal Revenue*, 2.

1. Not required to an indorsement of a promissory note. *Pugh* v. *McCormick*, 361.
2. Nor to a waiver in writing, by an indorser, of demand and notice of dishonor. *Ib.*

STATUTES OF THE UNITED STATES.

The following, among others, referred to, commented on, and construed.

September 24, 1789. See *Jurisdiction.*
May 26, 1790. See *Jurisdiction*, 12.
July 4, 1836. See *Patents.*
August 29, 1842. See *Patents.*
May 27, 1845. See *Patents.*
August 30, 1852. See *Collector.*
June 7, 1862. See *Commissioner of Taxes.*
February 6, 1863. See *Commissioner of Taxes.*
March 12, 1863. See *Captured and Abandoned Property.*
April 29, 1864. See *Lights at Sea and on Rivers*, 2.
June 3, 1864. See *National Banks.*
July 2, 1864. See *Acts of Congress.*

STATUTES OF THE UNITED STATES (*continued*)
February 22, 1865. See *Washington City.*
March 3, 1865. See *Practice*, 7; *Rank in the Army.*
July 13, 1866. See *Internal Revenue*, 1; *Stamps.*
July 25, 1866. See *Lights at Sea and on Rivers*, 3.
July 13, 1866. See *Stamps.*
March 2, 1867. See *Bankrupt Act; Jurisdiction*, 5.
July 20, 1868. See *Internal Revenue*, 3.
July 14th, 1870. See *Stamps.*

STRANDING.
Under a charter to government agreeing "that the owners should bear marine risks and the government war risks," held to be a marine risk. *Morgan* v. *United States*, 531.

SUMMONS AND SEVERANCE. See *Practice*, 5.

SUNDAYS. See *Internal Revenue*, 5.

SUPERSEDEAS.
A writ of error cannot operate as a, when the record does not show that a copy of the writ was lodged within ten days in the clerk's office, nor that the bond was approved and filed within the same term. *O'Dowd* v. *Russell*, 402.

SUPREME COURT OF THE DISTRICT OF COLUMBIA. See *District of Columbia.*

SURVEY. See *Pennsylvania Land Law.*

TAX SALES. See *Commissioners of Taxes.*

TAXES. See *Washington City.*

TENDER. See *Legal Tender.*
To redeem property which has been sold under a mortgage (as is alleged irregularly) the whole mortgage-money must be tendered, or, if suit be brought, be paid into court. *Collins* v. *Riggs*, 491.

TOW AND TUG. See *Tug and Tow.*

TRANSFER OF PATENT. See *Patents*, 9.

TRUST. See *Evidence*, 3.
The mere making of a deed to one as trustee does not vest the party with title as trustee, if he never in any form have accepted the trust. *Armstrong* v. *Morrill*, 120.

TRUSTEE.
1. As *ex gr.*, the cashier of a bank, when made consignee of goods under a bill of lading, may libel a vessel for their non-delivery. *The Thames*, 98.
2. A person is not constituted a, by the mere making a deed to him in trust; he not, in any way, accepting the trust. *Armstrong* v. *Morrill*, 120.

TUG AND TOW.

A tug held responsible for bad towage much on the proof of a disaster; the court declaring that there may be cases where the result of an engagement to tow is a safe criterion to judge of the act which caused it. *The Steamer Webb*, 406.

VENDORS AND PURCHASERS. See *Auction Sales; Purchaser without Notice.*

VIGILANCE.

The measure of, required of vessels at sea to guard against collisions likely to happen through fault of other vessels, when they themselves are not, except by want of intelligent vigilance, in fault. *The Continental*, 345; *The Scotia*, 170.

VIRGINIA See *Adverse Possession, West Virginia.*

1. Construction given to its act of June 2d, 1788, authorizing the governor of the State to issue grants with reservation of claims to lands included within surveys then made. *Armstrong* v. *Morrill*, 120.
2. Also to its act of 27th of February, 1835, declaring forfeiture for non-payment of taxes, as affected by a subsequent private act allowing redemption. *Ib.*

WAR RISKS.

What, as distinguished from marine. *Morgan* v. *United States*, 531.

WASHINGTON CITY.

The authorities of, if authorized by Congress, may constitutionally assess upon the adjacent proprietors of lots the expense of repaving with a new and different pavement or of repaving an old pavement. The tax need not be a general one on the city. *Willard* v. *Presbury*, 676.

WEST VIRGINIA.

Her statutes of limitation of March 1st, 1865, and February 27th, 1866, remarked on. *Caperton* v. *Boyer*, 216.

WHITNEY'S PATENT. See *Patents*, 14.

WILL, PROBATE OF. See *Purchaser without Notice*, 2.

WITNESS. See *Evidence.*

WRIT OF ERROR. See *Jurisdiction*, 1–14; *Practice*, 3–5; *Supersedeas.*

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