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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF



THE UNITED STATES,

DECEMBER TERM, 1872.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XV.

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

ATTORNEY-GENERAL.

HON. GEORGE H. WILLIAMS.

SOLICITOR-GENERAL.

HON. SAMUEL FIELD PHILLIPS.
Appointed November 15th, 1872.

CLERK.

DANIEL WESLEY MIDDLETON, ESQUIRE.

ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

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

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.	FOURTH.	1864.
HON. S. P. CHASE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	December 6th. PRESIDENT LINCOLN.
ASSOCIATES.	SECOND.	1873.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	December 11th. PRESIDENT GRANT.
	THIRD.	1870.
HON. WM. STRONG, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	February 18th. PRESIDENT GRANT.
	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	January 12th. PRESIDENT BUCHANAN.
	FIFTH.	1870.
HON. J. P. BRADLEY, New Jersey.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	March 21st. PRESIDENT GRANT.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	January 24th. PRESIDENT LINCOLN.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, AND NEBRASKA.	July 16th. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	December 8th. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10th. PRESIDENT LINCOLN.

GENERAL RULE.

AMENDMENT TO THE 8TH RULE.

THAT hereafter in all cases brought to this court, by writ of error, or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to, and transmit with the record a copy of the opinion or opinions filed in the case.

[Promulgated April 28th, 1873.]

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

DECEMBER TERM, 1872.

PORTLAND COMPANY *v.* UNITED STATES.

A case dismissed, January 8th, 1873, because the counsel for the appellant did not file a brief in the form required by the amendment to the 21st rule, promulgated November 16th, 1872, and to be seen at large in 14 Wallace, p. ix.

PROPERTY OF THE UNITED STATES SUPREME COURT

APPEAL from the Court of Claims.

The Portland Company, a corporation of Maine, filed a petition in the court just named to recover the drawback allowed by the 17th section of the act of June 30th, 1864,* on certain locomotive-engines exported by them. The engines were manufactured by the company under a contract with the United States, and the internal revenue tax thereon was paid. Afterwards the engines were sold by the government at public auction, and the company bought them. The Court of Claims dismissed the petition, and the claimants appealed.

On the case being called, January 8th, 1872, it was submitted by the appellants *on the record, no brief being filed in their behalf.*

For the United States, a brief was submitted by Mr. C. H. Hill, Assistant Attorney-General.

The CHIEF JUSTICE, January 20th, 1873, delivering the judgment of the court, said:

From time to time, the court has adopted rules of practice

* 13 Stat. at Large, 302, 303.

intended to facilitate the presentation of causes by counsel and their consideration by the court. Finding that these rules, through the inattention of the bar, had failed in a great degree of their intended effect, we promulgated at the last term and for the same end, an amended twenty-first rule, the fourth section of which required that the brief should contain, *in the order there stated:*

First, a concise abstract or statement presenting succinctly the questions involved, and the manner in which they were raised;

Second, an assignment of the errors relied upon, setting out, in cases brought up by writ of error, separately and specifically each error asserted and intended to be urged, and in cases brought up by appeal, as specifically as may be, the error alleged to exist in the decree; or, if the error be alleged in a ruling upon the report of a master, stating the exception to the report and the action of the court upon it;

Third, 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 authorities relied upon in support of each point, and containing, when a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case, printed at length.

The fifth section of the rule also required that when the error allowed 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.

And the sixth section required that when the error alleged is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected.

The necessity of strict compliance with these rules, especially in view of the greatly augmented business of the court, is evident. It will facilitate as much the labors of the bar as those of the bench. That counsel might have full notice of the rule, it was required to take effect on the first day of the present month of January, and the clerk was directed to have printed copies made of the rule as amended, and send one

copy to each of the counsel in all cases pending and not yet argued. In the case before us, this rule has been totally disregarded on the part of the appellant.

We shall, therefore, in this case

DISMISS THE APPEAL.

RAILROADS *v.* RICHMOND.

A case will fall within the 25th section of the Judiciary Act where the record shows that on a suit on a contract the defendants set up that the contract had been rendered void and of no force and effect by provisions of the Constitution of the United States and of certain acts of Congress, and shows also that the decision of the highest court of the State was against the right, title, privilege, or exemption thus specially set up.

MOTION to dismiss a writ of error to the Supreme Court of Iowa, which had been sued out on the assumption that the case came within the third clause of the 25th section of the Judiciary Act. That act thus enacts:

"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,

"(1st.) 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;

"(2d.) 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;

"(3d.) 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:

This statute being in force, the Sioux City and Dubuque Railroad, beginning on the Missouri, the western boundary of Iowa, runs eastwardly across the State till it reaches Dubuque on the Mississippi, its eastern boundary. On this road quantities of grain are carried from the West to Chicago and other eastern towns. Arriving at Dubuque, the grain, bound eastward, or as it was called "*through* grain," was formerly taken from the railcars, put on a ferry-boat, carried thus across the Mississippi to Dunlieth (a town in Illinois directly opposite Dubuque), and there put upon cars of the Illinois Central Railroad and sent forward, east. Dubuque was thus a point for transshipment. In this state of things the Sioux City and Dubuque Railroad made a contract with Richmond and another, owners of an elevator at Dubuque, beside the road and near the river, that they, the owners of this elevator, should have the handling of all the "through grain;" and that the railroad company would pay them a certain price per bushel for receiving and discharging it, and would pay also for storage of it when exceeding ten days.

With this contract in force Congress in 1866 passed two acts, one of June 15th,* entitled "An act to facilitate commercial, postal, and military communications among the several States," which enacted:

"That every railroad company in the United States, &c., be, and is hereby, authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, troops, government supplies, freight, and property on their way from any State to another State, and to receive compensation therefor, *and to connect with roads of other States so as to form continuous lines for the transportation of the same to the place of destination.*"

The other, an act of July 25th,† entitled "An act to authorize the construction of certain bridges, and establish them as post roads." This act provided for the construction of certain bridges across the Mississippi River, including one at Dubuque, and declared that they shall be

* 14 Stat. at Large, 66. † Ib. 244.

Statement of the case.

"For the more perfect connection of any railroads that are or shall be constructed to the said river at or opposite said points, and that, when constructed, all trains of all roads terminating at said river, at or opposite said point, shall be allowed to cross said bridge," &c.

In pursuance of this second act a bridge was built over the river; and in virtue of the first one the two roads were connected by the Dubuque bridge, so as to form a continuous line of roads, and put under one management and control, that of the Illinois Central Railroad, which agreed to assume the contract about the elevator.

Neither road having, however, any further occasion to transfer at Dubuque anything passing over the road, the elevator was no longer used. The grain passed continuously on. Thereupon, Richmond, and the other owners of the elevator, brought suit against the companies, alleging that they, the companies, were

"Daily receiving through grain as aforesaid, and passing the same through Dubuque, without permitting the plaintiffs to have the handling of the same at their elevator as aforesaid, and without paying the plaintiffs therefor."

The petition asked for damages, and prayed for an injunction to restrain the companies from delivering grain otherwise than through their elevator.

The defendants denied every allegation in the petition, and averred that the plaintiffs had been paid in full for all of the grain which they were entitled to handle under and by virtue of the said contract. They did not, however, plead specially the Constitution of the United States, nor the acts of Congress hereinbefore named, as a defence to the demand.

The case was heard in the Supreme Court of Iowa, where a final decree was rendered, giving the plaintiffs in the case $73,186 damages, and concluding thus:

"And it is further ordered, adjudged, and decreed that the claim of the said defendants, that the Constitution of the United States, and certain acts of the Congress of the United States,

one entitled, &c., approved July 25th, 1866, and another entitled, &c., and approved June 15th, 1866, renders void and of no force and effect the covenants sued on in this action by the said plaintiffs in the contract and supplemental contract, which are the subjects of this action, be and the same is hereby denied, and it is adjudged that the said Constitution and the said acts of Congress do not in any manner affect the validity or force and effect of either or any of said covenants, or of either of said contracts."

From this decree it was that the present writ was taken, under the assumption, as already stated, that the case came within the third clause of the 25th section of the Judiciary Act.

The motion to dismiss was made on the ground that "the record did not show a state of facts that made any act of Congress apply to the case."

Mr. Platt Smith, in support of the motion:

Although the acts authorize the connection of the tracks so as to form continuous lines of transportation to the place of destination; and though the tracks are connected and the lines formed, the acts do not say that the grain once loaded and on the line shall in no case change cars or break bulk short of the ultimate destination.

The contract provides that the owners of the elevator shall have the handling of all through grain, and shall have one cent per bushel for the service. The Supreme Court of Iowa says that they will not compel the railroad company to perform this contract specifically, but that they will give damages in lieu if the grain goes on the continuous line without breaking bulk, and the plaintiffs get judgment for the breach of contract. These acts do not in terms nor can they in spirit be stretched to reach the contracts.

Mr. J. E. Wilson, contra:

The final decree rendered by the Supreme Court of Iowa shows:

1. That a question was presented to that court, consid-

ered, and decided, involving the commercial power of Congress, and the construction of two acts of that department of the government, and the exemption set up by the defendants from liability to discharge the covenants, contained in the contracts sued on, because of the exercise of the said power in the passage of the acts named.

2. That the said court did construe the provisions of the Constitution conferring the said power, and did construe the said acts of Congress, and thereupon did adjudge "that said Constitution and said acts of Congress do not in any manner affect the validity or force and effect of either or any of said covenants, or either of said contracts."

3. That the several contracts, and the several covenants therein contained, were considered in their relations to the Constitution, and said several acts of Congress, and severally held to be valid and of force and effect, because of the construction given to the Constitution and acts by the said court; thereby denying the right of the defendants to carry grain passing from one State to another State without delivering the same to the plaintiffs, and denying the exemption claimed from the covenant of said contract to deliver said grain, and pay one cent a bushel therefor.

Certainly a Federal question is thus presented under the third clause of the 25th section.

The CHIEF JUSTICE delivered the opinion of the court.

The defendants in error move to dismiss the writ of error on the ground that the "record does not show a state of facts, that makes any act of Congress apply to the case." The record does show, however, that the present plaintiffs in error claimed in the State court, that contracts made with the defendants in error had been rendered void and of no force and effect by provisions of the Constitution of the United States, and of certain acts of Congress, approved June 15th, 1866, and July 25th, 1866, and also that the decision of the Supreme Court of Iowa, denied this claim. The motion to dismiss must, therefore, be

DENIED.

RAILROAD *v.* JOHNSON.

Where a mortgagee on a bill of foreclosure filed in an inferior State court against his mortgagor and certain trustees holding collateral securities, obtains in that court a decree against the mortgagor personally and against the trustees as trustees, and the mortgagor alone appeals to the Supreme Court of the State, to which, on affirmance of the decree, he alone takes a writ of error here, it is no ground to dismiss the writ that the trustees are not joined with him as plaintiffs in error in this court.

ON motion to dismiss a writ of error to the Supreme Court of Errors of the State of Connecticut.

Johnson held bonds of the Norwich and Worcester Railroad Company, secured by mortgage on the road and by the transfer of certain stock to Huntington and Nichols, as trustees. The bonds were not paid at maturity, and Johnson filed a petition in equity in the Superior Court of New London County, Connecticut, praying that the mortgage be foreclosed, and sale ordered of the stock. In that suit Huntington and Nichols were summoned, and a decree was given against them *as trustees*, as well as against the railroad company as mortgagors. From that decree the company alone appealed to the Supreme Court of the State. The decree below having been affirmed in that court, the railroad company alone brought the case here by writ of error.

Johnson now moved to dismiss the writ on the ground that Huntington and Nichols were not joined with the railroad company as plaintiffs.

Mr. George Pratt, in support of the motion:

A writ of error must be brought in the names of all the parties against whom the judgment to be reviewed is given.* This is a substantial defect in the appeal, and can be taken advantage of at any time before judgment.

Mr. J. Halsey, contra.

* Owings *v.* Kincamson, 7 Peters, 399; Deneall *v.* Stump, 8 Id. 526; Wilson *v.* Life and Fire Insurance Co. of N. Y., 12 Id. 140; Williams *v.* Bank of United States, 11 Wheaton, 414.

Statement of the case.

The CHIEF JUSTICE:

Huntington and Nichols had no interest in the controversy, and did not appeal to the Supreme Court. The only party to the decree of that court was the railroad company, and it is the decree of that court which the writ of error seeks to review. It was, therefore, properly brought in the name of the railroad company alone. The motion to dismiss must be

DENIED.

DEXTER *v.* HALL.

1. The power of attorney of a lunatic, or of one *non compos mentis*, is void.
2. When evidence has been given tending to show the insanity of a grantor, and other evidence tending to show his sanity, a medical expert cannot be asked his opinion respecting that person's sanity or insanity, forming his opinion from the facts and symptoms detailed in the evidence.
3. Such a witness may be asked his opinion upon a case hypothetically stated, or upon a case where the facts are certain and found; but he will not be allowed to determine from the evidence what the facts are, and to give his opinion upon them.
4. Under the California statutes of limitations, a plaintiff in ejectment who has established a legal title in himself, is presumed to have had actual possession of the land within five years next prior to the commencement of his suit, unless an actual adverse possession by another is affirmatively proved.

ERROR to the Circuit Court for the District of California, in which court Mary Hall and her four children brought ejectment against Henry Dexter; both parties claiming under John Hall, who died intestate; the plaintiffs as his widow and children; the defendant as his grantee. The case was thus:

On the 30th of December, 1848, T. W. Leavenworth, then alcalde of San Francisco, granted to Hall, a lieutenant of our navy who happened to be in service off San Francisco, a piece of land, part of the pueblo lands situate within the corporate limits of the city as defined in 1851, east of Larkin and north of Johnson Street. The deed was duly recorded before April

3d, 1850, in a proper book deposited in the office of the recorder of the county of San Francisco.

Hall afterwards was sent to a lunatic asylum near Philadelphia. While there he executed, on the 27th of December, 1852, a power of attorney to one Harris, his brother-in-law, to sell this land. The power was acknowledged in the usual form before one Broadhead, a commissioner for California, resident in Philadelphia, who went to the asylum, saw Hall, read the power of attorney to him, asked him if he understood it, which he said he did, and that he desired the land sold for the benefit of his wife and children. Under this power the land was conveyed to persons, who afterwards conveyed to Dexter, the defendant.

Subsequently to the grant made by the Alcalde Leavenworth to Hall, the claim of San Francisco to her pueblo lands was submitted to the United States Board of Land Commissioners, and on the 3d of October, 1854, confirmed. An appeal was taken to the District Court, and thence transferred to the Circuit Court, where, on the 18th of May, 1865, the claim of the city to the lands, including the lot now in controversy, was confirmed. And this decree of the Circuit Court was affirmed by this court, the mandate having been sent down and filed February 4th, 1867. On the 20th of June, 1855, a city ordinance, known as the Van Ness ordinance, was passed, by which the city relinquished and granted all her right and claim to the lands within her corporate limits, as defined by the charter of 1851, to the parties in actual possession thereof, by themselves or tenants, on or before January 1st, 1855, provided such possession was kept up until the introduction of the ordinance into the common councils, or, if interrupted by an intruder, had been, or might be recovered by legal process. The ordinance also declared that all persons who held title to lands within said charter limits, lying east of Larkin Street, and northeast of Johnson Street, by virtue of any grant by any ayuntamiento, town council, or alcalde of the pueblo after the 7th of July, 1846, and before the incorporation of the city, which grant, or a material portion of which, was recorded in a proper book of

records, deposited in the office of the recorder of the county of San Francisco on or before April 3d, 1850, should, for all purposes contemplated by the ordinance, be decreed to be the possessors of the land granted, although it might be in the actual occupancy of persons holding the same adverse to the grantees. As the lot granted to Hall was within this description, the ordinance assured to him whatever right and title the city then had, and confirmed, so far as the city could confirm it, the alcalde's grant.

Subsequently, on the 11th of March, 1858, the legislature of the State passed an act ratifying and confirming what the city councils had done by the Van Ness ordinance, and on the 1st of July, 1864, Congress enacted that all the right and title of the United States to the lands within the corporate limits of the city of San Francisco, as defined in the act incorporating the city, passed by the legislature of California April 15th, 1851, were thereby relinquished and granted to the city for the uses and purposes specified in the ordinance thereof, ratified by an act of the legislature of the State, approved on the 11th of March, 1858, excepting, however, from the relinquishment certain parcels not included in the grant to Hall.

Hall died in 1860 in the asylum, leaving his widow already mentioned, and four children; all minors at that time, the eldest being twenty years old, the next seventeen, the next fifteen, and the youngest nine.

In 1866 Mrs. Hall and these children (the youngest not yet being of age, and suing by a guardian), brought the ejectment mentioned as this suit.

At the time of the suit there were certain acts of California in force, as follows:

1st. An act of April 22d, 1850,* "defining the time for commencing civil actions." The 9th section of this act read thus:

"In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the

* Statutes of California, A.D. 1850, p. 343.

premises shall be presumed to have been possessed thereof within the time prescribed by law, and the occupation of such premises by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that such premises have been held and possessed adversely to such legal title, for five years before the commencement of such action."

2d. An act of March 5th, 1864,* "to limit the time for the commencement of civil actions in certain cases." This act read as follows:

"In any action which shall be commenced, more than one year after this act takes effect, for the recovery of real property situated in the city and county of San Francisco, or for the recovery of the possession thereof, none of the provisions of the act entitled, &c., passed March 11th, 1858 [the act already referred to,† as of that date.—REP.], and none of the provisions of either of the orders or ordinances therein recited or referred to, shall be deemed to give, confirm, or otherwise aid the right or title set up or claimed by any party, unless such party, his ancestor, predecessor, or grantor shall have had actual possession of the land in dispute within five years next before the commencement of such action, the time already elapsed when this act takes effect to be included in the computation."

In this act there was no provision saving the rights of minors or persons otherwise under disabilities. However, an act passed April 4th, 1864,‡ supplementary to the original act, did make an exception in favor of such persons, including persons "within the age of majority," and enacted that "the time during which such inability shall have continued shall not be deemed any portion of the period of limitation, established in the said act, to which this is supplementary."

Intermediate between these acts was a third one, that of April 11th, 1855,§ to amend an act entitled "An act defin-

* Statutes of California, A.D. 1863-4, p. 149.

† *Supra*, p. 11.

‡ Statutes of California, A.D. 1863-4, p. 435.

§ Id., A.D. 1855, p. 109.

ing the time for commencing civil actions," passed April 22d, 1850. This intermediate act provided that

"No action for the recovery of real property, or for the recovery of the possession thereof, shall be maintained unless it appear that the plaintiff, his ancestor, or grantor, was seized or possessed of the premises in question, within five years before the commencement of such action; provided, however, that an action may be maintained by a party claiming such real estate, or the possession thereof, under title derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years after final confirmation of such title by the United States or its legally constituted authorities."

The plaintiffs having shown Hall's paper title, including the Van Ness ordinance, and the statutes of California, and of the United States in aid thereof, having shown also the death of Hall, and their own heirship under the laws of California, rested.

The defendant then requested the court to charge the jury that upon these facts he was entitled to a verdict upon the following grounds:

"That the plaintiffs relied on the grant from Leavenworth, alcalde, upon the Van Ness ordinance, and the laws of California, and of the United States in aid thereof. That having commenced their action more than one year after the act of California, approved March 5th, 1864, and entitled 'An act to limit the time for the commencement of civil actions in certain cases,' took effect, they must show an actual possession of the premises in themselves or their ancestors, within five years next before the commencement of this action, which they had failed to do."

The court, however, refused so to charge, and the case, under exception to the refusal, proceeded.

In this further progress of it, certain depositions of persons resident at Philadelphia (in an asylum near which city it will be remembered that Hall had been confined), were read; some tending to show that on the 27th December, 1857 (the date of execution of the power of attorney under

which the land had been sold to the defendants or his grantors), Hall was sane, and others tending to show that he was insane. All these depositions being read the defendants called Dr. Elliot, a physician of San Francisco, who had been long in practice, and was still in practice, and asked him this question (he having read carefully *all* the testimony in the case relating to Hall's sanity and insanity):

"From the facts stated in these depositions and the symptoms stated, what, in your opinion, was the state of Hall's mind December 27th, 1852, as to sanity or insanity?"

The plaintiffs objected to the witness expressing any opinion founded on the testimony adduced on *both* sides, and the court sustained the objection; permitting the witness, however, to give his opinion upon the testimony adduced by the plaintiffs. The witness then stated, under the defendant's exception to the ruling, that in his opinion as a medical man of large experience, from the facts and symptoms detailed by the *plaintiffs'* witnesses, Hall was capable of doing business, and of executing a power of attorney before, at, and after December 27th, 1852, and that such a case of insanity as his appeared to have been, rarely occurred without lucid intervals.

The defendant in rebuttal offered to prove that he had purchased the premises in good faith, for a full consideration, and without notice of the alleged insanity of Hall. But the court rejected the testimony.

The great questions in the case were:

1st. Of fact. Whether Hall was sane or insane, when he executed the power of attorney.

2d. Of law. If he was insane, whether the instrument was void or voidable only.

On this last point the court below, having stated that the presumption of law, generally speaking, was in favor of sanity, and that whoever set up insanity was bound to prove it, said:

"If, at the time Hall executed the power in question, he was insane, and his insanity was general, *the instrument was a nullity,*

and no title could be transferred under it. In that case the plaintiffs are entitled to a verdict. It matters not, if such were the case, what consideration may have been paid to the attorney, or with what good faith the parties may have purchased. The instrument, in such case, is no more to be regarded as the act of Hall than if he was dead at the time of its execution."

The jury found for the plaintiffs; thus finding that Hall was insane.

The case was now here on error, the charge, as just mentioned, as to the effect of insanity, if found, on the power of attorney, being the great question in the case; assignments of error being also made in regard to the question which the court allowed to be put to Dr. Elliot, the medical expert, and to other matters of evidence, and to the refusal of the court to direct the jury when the plaintiffs first rested, that the verdict should be for the defendants.

The case, on the great point of it—the effect of an insanity, which, after the verdict of the jury, was to be regarded, of course, as admitted—was interestingly argued, and with a close examination of the authorities.

Mr. Roscoe Conkling, for the plaintiff in error, and Mr. P. G. Galpin, contra.

For the plaintiff in error, reference was made to certain expressions in *Beverly's Case*, reported by Lord Coke,* but more especially to what is stated by Sir W. Blackstone in his Commentaries,† thus:

"Idiots and persons of non-sane memory . . . are not totally disabled either to convey or purchase, but *sub modo* only; for their conveyances and purchases are voidable, but not actually void"

Thus the law, as laid down by the great teacher of elementary law, both in England and here, for more than a hundred years, showed (it was said), that, assuming Hall to have been insane when he executed the power, the power

* 4 Reports, 123, *b*.

† Vol. 2. p. 291.

may have been voidable, but was not void. Suppose (it was argued) that instead of a power, the instrument had been a contract for the sale of the land, acknowledged by Hall and wife, and that the contract had been assigned through Page to Dexter for value; the same objection would lie against it as against the power of attorney. But, the consideration being adequate, and the transaction being free from fraud and without notice, a court of equity would enforce it against both. This is the law as it is to be gathered from *Jackson* v. *Gumaer*,* and *Ingraham* v. *Baldwin*,† with other cases, in New York; from *Somers* v. *Pumphrey*,‡ *Crouse* v. *Holman*,§ in Indiana; *Chew* v. *Bank of Baltimore*,‖ in Maryland, and from decisions elsewhere in the United States.¶

Then, there are certain facts which should be remembered.

1. There was no proof that Hall and Dexter or Hall and Page ever met, or that Page or Dexter knew of or suspected the insanity of Hall, nor is there any evidence of unfairness, fraud, or inadequacy of price. In that case the transaction stands.**

2. The attorney of Hall was his brother-in-law. No motive is shown for any fraud or deception by him or by those who acted in obtaining the power. They were his relatives and friends.

3. So far as appeared, Hall had not been placed under a committee, nor had he been pronounced insane by judicial decision, and if that had not been done, his contracts are valid, no undue advantage having been taken of him in obtaining them.††

4. No complaint was made that the consideration was in-

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* 2 Cowen, 552. † 12 Barbour, 9; S. C., 9 New York, 45.

‡ 24 Indiana, 231. § 19 Id. 30. ‖ 14 Maryland, 299.

¶ Williston *v.* Williston, 41 Barbour, 635; Kerr *v.* Purdy, 50 Id. 25; Cuff *v.* Dorland, 50 Id. 438; Freeman *v.* Freeman, 51 Id. 306; Bruce *v.* Tilson, 25 New York, 194; Lobdell *v.* Lobdell, 36 Id. 327; Story *v.* Conger, 36 Id. 673.

** Yauger *v.* Skinner, 1 McCarter, 389.

†† Sims *v.* McLure, 8 Richardson's Equity, 286; Hovey *v.* Chase, 52 Maine, 304; Parker *v.* Davis, 8 Jones's Law (N. C.), 460.

adequate, or that it was not fully paid by the purchaser. And there was no allegation of fraud in obtaining the power, or in executing the grant.

[The other points of the case were also argued, but being comparatively unimportant, the argument, in the reporter's limited space, is not presented.]

For the defendant in error.—Some confusion exists, perhaps, at this day in the American decisions as to the effect of a deed of a bargain and sale made by a person *non compos mentis*. So far as it does exist, it has arisen from a passage in Blackstone's Commentaries, quoted on the other side; one of the very few errors to be found in that excellent book; but an error, certainly, nevertheless. The statement of the law made by Sir W. Blackstone, in the passage quoted, cannot be reconciled with what is affirmed in *Thompson* v. *Leach*, a solemn adjudication, made before his time, but of binding authority in it; reported alike by Salkeld, Carthew, and Comberback.* That precedent was followed, before Blackstone's time, by *Yates* v. *Boen*, reported by Sir John Strange,† a reporter of high character; and the statement of the great English commentator was not a true presentation of the law even in his day. His error has been pointed out in our own time, by Sir Edward Sugden, in his most accurate and masterly work on Powers;‡ and though some American judges, as we have said, have been confused (as was not unnatural in view of the great and generally just respect paid to anything in the Commentaries of Blackstone), we find that when the point was raised in the Supreme Court of Pennsylvania,§ Chief Justice GIBSON, one of the vigorous judicial minds of America, took the distinction at once between a feoffment and a deed of bargain and sale; holding the latter absolutely void. He said:

"The authorities show distinctly that the feoffment and livery of a lunatic or madman are not void, but voidable. . . .

* 3 Salkeld, 300; Carthew, 435; Comberback, 469.

† Vol. 2, 1104. ‡ Vol. 1, 179.

§ Estate of Sarah De Silver, 5 Rawle, 111.

So far the argument made for the defendant in error seems unassailable. The defect in it is that it fails to prove the deed of bargain and sale, by which he holds, to be equivalent in *all* respects to a feoffment. . . . At common law the feoffment of a madman, as shown by the argument, is only voidable. But his deed is absolutely void."

But though Sir William misconceived the law as to the ability of a person who made a deed while in a state of lunacy, *himself* to set it aside, upon the recovery of his reason, he did not at all misconceive it, so far as related to the person's heirs or other persons interested after his death. For after stating that the *old* law had been that the lunatic, on recovery of his reason, might set up his former lunacy to avoid his acts, but that this, as respected the lunatic's ability himself to avoid his acts, had been apparently changed by later views (though not, as he intimates, upon very sensible reasons), he adds:

"And clearly the next heir or other person interested may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant."

Our case is exactly this one, where Sir William says that the lunatic's grant *may* be avoided.

Again.—If Blackstone's statement of the law were true, there is a distinction to be drawn between a deed and a power of attorney. The latter will be void when the former is not. Thus the deeds of infants are not void, but voidable. If the infant do not dissent within a reasonable time after coming of age the deed cannot be avoided. A warrant of attorney has, however, always been held absolutely void.* The reason is stated in the first volume of the American Leading Cases.†

As to the authorities cited on the other side, while we contend that the deed of a lunatic is absolutely void, we also admit that the privilege of asserting that it is void, is, like

* Thompson *v.* Leach, 3 Modern, 302; Zouch *v.* Parsons, 3 Burrow, 1804; Pyle *v.* Cravens, 4 Littell, 17; Lawrence *v.* McArter, 10 Ohio, 37.

† Page 254.

infancy, a personal privilege, and can only be enjoyed by the lunatic and those who claim under him. This distinction alone is sufficient to have decided the cases of *Jackson* v. *Gumaer* and of *Ingraham* v. *Baldwin*.

Chew v. *Bank of Baltimore* was a case of a bill filed in equity to set aside the power of attorney of a lunatic, and to declare certain sales of bank stock made under it fraudulent and void, and this case certainly shows that if we had brought an action in equity we might have succeeded.* Here, as there, it is not shown that the heirs ever received any portion of the money arising from the sale.

Somers v. *Pumphrey*, in Indiana, is decided on the case of *Crouse* v. *Holman*, in the same State, and the latter evidently stands on the mistake of Blackstone, corrected by Sugden, as before shown.

The remaining cases cited are cases where a court of equity has decreed the specific performance of contracts notwithstanding great lapse of time. We do not dispute the law contained in them.

It is argued that prior to the issuing of a commission *de lunatico*, the acts of a lunatic are binding upon him, though it seems to be conceded that after that they are not. But the commission has no effect to render the madman more mad than he was before. It is his insanity that renders the act void. The commission may be *primâ facie* evidence of madness, sufficient to put one dealing with a lunatic upon his guard, and it might well be held that a commission issued was notice to all the world, and thereafter every act of a lunatic was void. But confinement within the walls of a madhouse, and chains, and uncontrollable frenzy, are notices equally clear and equally conclusive to every one doing business with such a lunatic, and shall he be bound by his acts because he has not the sanity required to procure the issuing of the commission?

If a man has no reason, there can be no "assent of two or more minds," which is essential to every contract. The

* See the remarks on pp. 318 and 319.

act performed by a person having no reason is absolutely void. It may not be apparent that the act was void until the lunacy is proved, but when it is proved to have existed when the act was done, then the act was void *ab initio*.

This observation, it may be added, if true, disposes of the suggestion, made below as here, that we should have proceeded in equity.

[The other assignments of error were then discussed in behalf of the defendant in error.]

Mr. Justice STRONG delivered the opinion of the court.

The prominent question in this case is, whether a power of attorney executed by a lunatic is void, or whether it is only voidable. The Circuit Court instructed the jury that a lunatic, or insane person, being of unsound mind, was incapable of executing a contract, deed, power of attorney, or other instrument requiring volition and understanding, and that a power of attorney executed by an insane person, or one of unsound mind, was absolutely void. To this instruction the defendant below excepted, and he has now assigned it for error.

Looking at the subject in the light of reason, it is difficult to perceive how one incapable of understanding, and of acting in the ordinary affairs of life, can make an instrument the efficacy of which consists in the fact that it expresses his intention, or, more properly, his mental conclusions. The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic, or a person *non compos mentis*, has nothing which the law recognizes as a mind, and it would seem, therefore, upon principle, that he cannot make a contract which may have any efficacy as such. He is not amenable to the criminal laws, because he is incapable of discriminating between that which is right and that which is wrong. The government does not hold him responsible for acts injurious to itself. Why, then, should one who has obtained from him that which purports to be a contract be permitted to hold him bound by its provisions, even until he

may choose to avoid it? If this may be, efficacy is given to a form to which there has been no mental assent. A contract is made without any agreement of minds. And as it plainly requires the possession and exercise of reason quite as much to avoid a contract as to make it, the contract of a person without mind has the same effect as it would have had he been in full possession of ordinary understanding. While he continues insane he cannot avoid it; and if, therefore, it is operative until avoided, the law affords a lunatic no protection against himself. Yet a lunatic, equally with an infant, is confessedly under the protection of courts of law as well as courts of equity. The contracts of the latter, it is true, are generally held to be only voidable (his power of attorney being an exception). Unlike a lunatic, he is not destitute of reason. He has mind, but it is immature, insufficient to justify his assuming a binding obligation. And he may deny or avoid his contract at any time, either during his minority or after he comes of age. This is for him a sufficient protection. But as a lunatic cannot avoid a contract, for want of mental capacity, he has no protection if his contract is only voidable.

It must be admitted, however, that there are decisions which have treated deeds and conveyances of idiots and lunatics as merely voidable, and not void. In *Beverly's Case*,* which was a bill for relief against a bond made by Snow, a lunatic, it was resolved that every deed, feoffment, or grant, which any man *non compos mentis* makes, is avoidable, and yet shall not be avoided by himself, because it is a maxim of law that no man of full age shall be, in any plea to be pleaded by him, received by the law to stultify himself and disable his own person. A second reason given for the rule was, "because when he recovers his memory he cannot know what he did when he was *non compos mentis*." Neither of these reasons are now accepted, and the maxim no longer exists. There were other things ruled in Beverly's case, among which were these: that the disability of a lunatic is

* 4 Reports, 123, *b*.

personal, extending only to the party himself, except that it extends to privies in tenure, as lord by escheat, and privies in estate, as tenant in tail; but that privies in blood, as heirs, or privies in representation, as executors or administrators, might show the disability of the ancestor, or testator, or intestate. It was also resolved that acts done in a court of record were not avoidable even in equity. Lord Coke, in commenting on the case, remarked that "as to others there is a great difference between an estate made in person and by attorney; for if an idiot, or *non compos mentis*, makes a feoffment in fee in person, and dies, his heir within age, he shall not be in ward, or if he dies without heir the land shall not escheat; . . . but if the feoffment is made by letter of attorney, although the feoffor shall never avoid it, yet after his death, as to all others, in judgment of law, the estate is void, and therefore in such case, if his heir is within age, he shall be in ward; or, if he dies without heir, the land shall escheat." Such also is the rule as stated in Fitz Herbert's *Natura Brevium*.* This is plainly a recognition of the principle that the letter of attorney of an idiot or lunatic is void, though he may not be permitted himself to assert its nullity. His heir, and all others, may. The doctrine is also asserted that as against the heirs of a lunatic his deed is invalid, and this, we think, has been steadily maintained in England.

In *Thompson* v. *Leach*, reported in Carthew,† and in Comberbach,‡ a clear distinction was taken between the feoffment of a lunatic taking effect by livery of seizin, and his deed of bargain and sale, his surrender, or grant. The former was held to be voidable only because of the solemnity of the livery, while the latter were held to be void. The case was ejectment brought by a lunatic's heirs, and the controlling question was whether his deed was only voidable, or whether it was absolutely void. The grantor had a life estate upon which were dependent contingent remainders, and he made a deed of surrender. If his deed was at any time effective before the contingency happened, it merged

* 202, *c.* † Page 435. ‡ Page 469.

the tenancy for life, and destroyed the contingent remainders, and though the deed might afterwards be avoided by any means in law, yet the contingent remainders, being once extinct, could not be revived by any matter *ex post facto*. It was necessary, therefore, to determine whether the deed was a nullity or whether it was good until avoided. The court resolved that the deed was void, *ab initio*, because of the grantor's lunacy. It was said that "there is a difference between a feoffment and livery made *propriis manibus* of an infant, and the bare execution of a deed by sealing and delivery thereof, as in cases of grants, surrenders, releases, &c., which have their strength only by executing them, and in which the formality of livery of seizin is not so much regarded in the law, and, therefore, the feoffment is not void, but voidable; but surrenders, grants, &c., of an idiot are void *ab initio*." The case is a leading one, and it is in some respects more fully reported in Salkeld.* There it appears not only that the distinction mentioned is recognized, but that Holt, C.J., declared the deed of a person *non compos mentis* to be void; that if he grants a rent, and the grantee distrains for arrears, he may bring trespass; that his letter of attorney, or his bond, are void, because, as he stated, the law had appointed no act to be done for avoiding them. *Thompson* v. *Leach* has never been disturbed, and, so far as we know, has never been doubted. It was followed by the case of *Yates* v. *Boen*, in Strange,† which was an action of debt upon articles. The defendant pleaded "*non est factum*," and offered to give lunacy in evidence. Upon the authority of *Thompson* v. *Leach*, and *Smith* v. *Carr*, decided in 1728, the evidence was received.

The doctrine of *Thompson* v. *Leach* was asserted also in *Ball* v. *Mannin*,‡ decided in the House of Lords in 1829. In that case the sole question presented was, by agreement of counsel, whether the deed of a person *non compos mentis* was *invalid at law*. In the inferior court the judge had charged the jury

* Vol. 3, page 300; see also 2 Ventris, 198.

† Vol. 2, p. 1104.

‡ 1 Dow & Clark, 380.

that "to constitute such unsoundness of mind as should avoid a deed *at law*, the person executing such deed must be incapable of understanding and acting in the ordinary affairs of life," and refused to charge that the unsoundness of mind must amount to idiocy. The ruling was sustained by the Court of King's Bench in Ireland, and, on writ of error, by the Exchequer Chamber. The case was then removed to the House of Lords, and the judgment was affirmed. It is, therefore, the settled law of England, and it has been since the decision in *Thompson* v. *Leach*, that while the feoffment of an idiot, or lunatic, is only voidable, his deed, and especially his power of attorney, are wholly void. And now by act of Parliament, 7th and 8th Vict., ch. 76, § 7, his conveyance by feoffment, or other assurance, is placed on the same footing with his release or grant.

Sir William Blackstone, it is true, appears to have overlooked the distinction made in *Thompson* v. *Leach;* and in his Commentaries,* while admitting that the law was otherwise prior to the reign of Henry VI, asserted the doctrine that the conveyances of idiots and persons of non sane memory, as well as of infants and persons under duress, are voidable, but not actually void. But Sir Edward Sugden† notices this statement with disapproval. His remarks are as follows: "When Beverly's case was decided it was holden that deeds executed by lunatics were voidable only, but not actually void, and therefore they could only be set aside by special pleading, and by the rule of law the party could not stultify himself. And Mr. Justice Blackstone, following the old rule, has laid down that deeds of lunatics are avoidable only, and not actually void. But in *Thompson* v. *Leach* the distinction was solemnly established that a feoffment with livery of seizin of a lunatic, because of the solemnity of the livery, was voidable only; but that a bargain and sale, or surrender, &c., was actually void. This, therefore, was the ground of the decision in *Yates* v. *Boen*. When the Chief

* Book 2, page 291.

† 1 Sugden on Powers, 179; see also Shelford on Lunatics, 257-8-9.

Justice remembered that an innocent conveyance, or a deed, by a lunatic, was merely void, he instantly said, that *non est factum* might be pleaded to it and the special matter be given in evidence."

In this country there has been inconsistency of decision. Some courts have followed Mr. Justice Blackstone, and *Beverly's Case*, without noticing the distinction made in *Leach* v. *Thompson*, *Yates* v. *Boen*, and other English cases. Such are the decisions cited from New York, beginning with *Jackson* v. *Gumaer*,* and those relied upon made in other States. Nowhere, however, is it held that the power of attorney of a lunatic, or any deed of his which delegates authority but conveys no interest, is not wholly void. And in Pennsylvania, in the *Estate of Sarah De Silver*,† it was directly ruled that a lunatic's deed of bargain and sale is absolutely null and void, and the distinction between his feoffment and his deed was recognized. So also in *Rogers* v. *Walker*,‡ which was an ejectment by a lunatic, it was held that a purchaser from her had no equity to be reimbursed his purchase-money, or the cost of improvements, and Chief Justice Gibson said: "Since the time of *Thompson* v. *Leach*,§ it has been held that a lunatic's conveyance executed by sealing and delivery only is absolutely void as to third parties, and why not void as to the grantor? It was said to be so for the very unphilosophical reason, that the law does not allow him to stultify himself,—an early absurdity of the common law, which was exploded with us by *Bensell* v. *Chancellor*."‖

The doctrine that a lunatic's power of attorney is void finds confirmation in the analogy there is between the situation and acts of infants and lunatics. Both such classes of persons are regarded as under the protection of the law. But, as already remarked, a lunatic needs more protection than a minor. The latter is presumed to lack sufficient discretion. Reason is wanting in degree. With a lunatic it is wanting altogether. Yet it is universally held, as laid down by Lord Mansfield, in *Zouch* v. *Parsons*,¶ that deeds of an infant

* 2 Cowen, 552. † 5 Rawle, 111. ‡ 6 Pennsylvania State, 371.
§ Carthew, 435. ‖ 5 Wharton, 371. ¶ 3 Burrow, 1805.

which do not take effect by delivery of his hand (in which class he places a letter of attorney), are void. We are not aware that any different rule exists in England or in this country. It has repeatedly been determined that a power of attorney made by an infant is void.* So it has been decided in Ohio,† in Kentucky,‡ in Massachusetts,§ and in New York.‖ In fact we know no case of authority in which the letter of attorney of either an infant or a lunatic has been held merely voidable.

It must, therefore, be concluded that the Circuit Court was not in error in instructing the jury that a power of attorney executed by an insane person, or one of unsound mind, is absolutely void.

This disposes of the only serious question in the case. There are other assignments of error, but they may be dismissed with brief notice. The only one which has any plausibility, and which needs particular notice, is that which complains of the refusal of the court to permit a medical witness to give his opinion respecting the sanity of John Hall at the time when he signed the power of attorney, basing his opinion upon the facts and symptoms stated in the depositions read at the trial. The witness was, however, allowed to give his opinion upon the testimony adduced by the plaintiffs. The record does not show fully what were the facts stated in the depositions, nor whether they were established by uncontradicted evidence. It may be, therefore, that, by the form in which the question was put, the witness was required not merely to give his opinion upon facts, but to ascertain and determine what the facts were. This of course was inadmissible. The rule is, as laid down in Greenleaf's Evidence,¶ "If the facts are doubtful and remain to be found by the jury, it has been held improper to ask an expert who has heard the evidence what is his opinion

* Saunderson *v.* Marr, 1 Henry Blackstone, 75; 2 Lilly, Abridgment, 69; 1 American Leading Cases, 248-9.

† Lawrence *v.* McArter, 10 Ohio, 37. ‡ Pyle *v.* Cravens, 4 Littell, 17.

§ Whitney *v.* Dutch, 14 Massachusetts, 462.

‖ Fonda *v.* Van Horne, 15 Wendell, 636. ¶ § 440.

upon the case on trial; though he may be asked his opinion upon a similar case hypothetically stated."* The question asked was: "From the facts stated in these depositions, and the symptoms stated, what, in your opinion, was the state of John Hall's mind on December 27th, 1852, as to sanity or insanity?" It was to this the plaintiffs objected. But the witness gave his opinion, founded on all the testimony adduced by the plaintiffs tending to show insanity, and that opinion was that Hall was capable of doing business and of executing a power of attorney. He could have said no more had he been allowed to consider the evidence given by the defendants as well as that given by the plaintiffs. The defendants, therefore, received no possible injury from the ruling of the court. Hence this assignment cannot be sustained.

There remains one other exception to be considered, for the proper understanding of which reference must be made to the plaintiffs' title.†

That the grants and confirmations relied on by the plaintiffs were effectual to vest in Hall the title to the land in dispute admits of no question, and it is not denied by the plaintiff in error. He claimed under Hall. But when this title had been given in evidence by the plaintiffs below, with proof that they were the children and heirs of Hall, and when they had rested in chief, the defendants asked the court to direct a verdict in their favor for the reason, among others, that under the State statute of March 5th, 1864, it was incumbent upon the plaintiffs, inasmuch as their action had not been commenced within a year after its passage, to show an actual possession in themselves or their ancestors within five years next before the commencement of the action, which they had failed to do. The court refused the direction, and correctly. At the time when the request was made it did not appear that the actual possession of the land had

* Sills *v.* Brown, 9 Carrington & Payne, 601.

† See the statement of the title, *supra*, pp. 10, 11. The learned judge recapitulated it in nearly the same words as there given.

not been enjoyed by the plaintiffs within five years next before the action was brought, and, therefore, they were presumed to have had such possession, in the absence of evidence of an adverse possession, and no such evidence has been given. The 9th section of the act of April 22d, 1850, which defined the time for commencing civil actions, expressly declares that in every action for the recovery of real property such a presumption shall be made in favor of one establishing a legal title. In addition to this three of the plaintiffs were minors when the title descended to them, and continued minors until within less than five years before the suit was brought, and one was a minor until 1872. The period of their disability was, therefore, not to be included in the statutory period of limitation.

It is probable that when the request to direct a verdict for the defendants was made, the supplementary act of April 4th, 1864, was overlooked. Certainly it has not been argued here that the plaintiffs below were affected by the act of March 5th of that year. But it is claimed the plaintiffs were barred by the statute of limitations of 1855. That, however, is not before us. The Circuit Court was asked to give no instruction in regard to it, and none was given. Besides, so far as the record exhibits, there was no evidence of continued adverse possession during the five years next preceding the commencement of the suit.

There is nothing more in the case that requires particular notice; nothing which would justify our awarding a new trial.

JUDGMENT AFFIRMED.

THE JOHN GRIFFIN.

A vessel condemned for violation of the revenue laws on a clear *primâ facie* case made out against her by the government and not rebutted by the claimants.

APPEAL from the Circuit Court for the Eastern District of New York; the case being thus:

The act of Congress of March 2d, 1799, "to regulate the collection of duties on imposts and tonnage,"* enacts by its 50th section, "that no merchandise shall be unladen from vessels coming from any foreign port but in open day; that any person who shall be concerned in thus unlading them, shall forfeit and pay severally, for each offence, $400, and be disabled from holding any office of trust or profit under the United States for a term not exceeding seven years, and that when the value of the goods unladed exceed $400, the vessel, tackle, apparel, and furniture shall be subject to seizure and condemnation."

The same statute, after directing how seizures for violations of it shall be made, enacts:

"SECTION 71. That in actions, suits, or informations to be brought where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the *onus probandi* shall be upon the claimant."

With this statute in force, the United States libelled in the District Court at New York the bark John Griffin, owned by one W. Downey and three other persons, on an allegation that her officers had aided in introducing segars of the value of more than $400 into New York City, from Cuba, A.D. 1868, in violation of the law.

There did not seem to be any reason to doubt that the segars were brought into the city by night from Cuba without paying duty, and that this was done with intent to defraud the government. And the only question in the case was

* 1 Stat. at Large, 665.

whether Downey, the master and part owner of the vessel, had participated in this fraud by bringing the segars on his vessel.

The segars were seized in a room where they were stored in New York, and the owner of the segars, one Albren, was the principal witness for the government. His testimony amounted to this: that being in Havana, and desiring to get a large lot of segars through to New York without payment of duty, he met in that city Captain Downey, whose vessel, the John Griffin, was then lying at Matanzas taking in or waiting for cargo; that he suggested the matter to Downey, who neither accepted nor declined, but that a few days afterwards he received a letter from a carman at Matanzas saying if he would send the segars down, the carman would see them all right, which was done; that in a very few days after this he received in Havana a letter in these words,—the letter itself, which had been found by the custom-house officers in Albren's writing-desk before they made the seizure of the segars, being produced by them in evidence,—

MATANZAS, September 23d, 1868.

MR. JOHN ALBREN.

DEAR SIR: Your twenty-two boxes, trunk, and barrel package are all on board safe. I wish your boxes were all hid'en, the same as my sugar boxes. They are too easily distinguished, but I think they will be all right.

Yours, respectfully,

W. DOWNEY.

Albren further testified that shortly after the vessel arrived in New York the segars were delivered at a place designated or agreed on between him and Downey, and that he paid Downey over $3000 for his services in the matter. He mentioned the place where he met and paid Downey, and stated that a man named Morlina was present when this payment was made.

Morlina's testimony corroborated that of Albren as to the receipt of the money by Downey. He testified that he went with Albren and was present when Downey, whom he knew,

and Albren met on the street and retired to an office in South Street; that he saw Albren hand Captain Downey a bundle of money, but did not know how much; that it was a bundle of paper money.

To rebut this apparently good case against the vessel, Downey himself came forward. Efforts were also made to impeach the veracity of Albren.

Downey swore positively that the segars were never on board his vessel with his knowledge or consent, and to his *belief* that they were not there at all. He admitted an interview with Albren in Havana, or somewhere else, in regard to a trunk and barrel package. He equivocated about the authorship of the letter produced by Albren, saying that he "could not say that it was written by him," "that it might have been written by him," "that it looked like his handwriting." He nowhere denied that he wrote it. He attempted to explain it by saying that it might possibly have referred to his having seen these things on board *another* vessel, not his, as a service to Albren, to let him know they were there, but with no knowledge that they were to be landed without paying duty. But he did not speak of this with certainty, nor did he give the name of the other vessel on which he might have seen the segars. The receipt of the money from Albren he wholly denied.

As to Albren's character for truth and veracity, four witnesses swore that his reputation was bad; but against two of these, proceedings had been begun for frauds on the revenue, and Albren was to be a witness in them. Several other persons testified that they had known and dealt with him, and that, so far as they knew, his character for truth and veracity was good.

A more striking evidence, perhaps, against him on this point, consisted in the fact that after these segars had been seized by the custom-house officers, and proceedings of condemnation had been begun against the vessel, Albren went with Downey to the office of one McGowan, proctor of the claimants, to make an affidavit to subserve their case. Being questioned by the proctor as to whether he had shipped or

received any goods by the John Griffin, he said that he had not. The statement was then reduced to writing by McGowan thus, it not, however, having been sworn to nor signed by Albren:

"Deponent further says that he did not receive from on board the said bark John Griffin, at any time during the year 1868, any segars whatever; and that no segars whatever came consigned to deponent in said vessel at any time during the year 1868."

McGowan's draft of the intended affidavit being produced on the hearing of the present suit, and he having testified to its being what was said, Albren was called on to explain it. And this was the explanation:

"When I visited McGowan's office, I went first time with the captain. He questioned me whether I shipped or received any goods by the John Griffin. I told him not. He continued writing, and after he got through he read it to me—the statement which he wanted me to sign—and I refused to sign. Then he told me that he would give me $500 himself; not the captain, but himself, after the trial was over. I told him these $500, I should like to have them before the trial, and for my evidence of not having shipped or received any goods by the bark John Griffin only."

The District Court rendered a decree of condemnation, which was reversed in the Circuit Court; and the United States, dissatisfied with this latter decree, appealed to this court.

Mr. Donohue, *for the appellant*, argued that this attempt to confiscate a valuable vessel rested wholly on the testimony of a convicted smuggler, a man so base that he now unblushingly avows that for $500 he was, a short time since, ready to swear to what he declares was a gross lie. Such testimony, the learned counsel contended, was not fit to be received in any court.

Mr. C. H. Hill, *Assistant Attorney-General*, *contra*, contended that the evidence offered in behalf of the govern-

ment presented a *primâ facie* case, which the testimony of the claimants had failed to overcome; and that in such a case sentence of condemnation necessarily followed.

Mr. Justice MILLER delivered the opinion of the court.

Upon the case as made out by the government, in the absence of any rebutting evidence, no court or jury, we think, could hesitate in finding that Downey had been guilty of aiding in the fraudulent introduction of the cigars without payment of duty. The case as thus made amounts to something more than the probable cause, which, by section seventy-one of the act of 1799, throws the *onus probandi* on the claimant of the vessel. It is a clear *primâ facie* case, and both by the statutes and the ordinary rules of evidence required of the claimant such testimony as should satisfactorily rebut the presumption of guilt which it raised.

The principal reliance of the claimants for this is upon the testimony of Downey, who attempts to explain his letter, and upon an effort to impeach the character of Albren for veracity. But the whole of his explanation and account of the letter and its purpose is vague, unreasonable, and altogether unsupported by any other testimony, or by reference to anything which would confirm it. While every word and line of the letter is in exact harmony with Albren's account of the transaction, and must be regarded as decisive as to the relative credibility of the two stories told by the witnesses.

In reference to the receipt of the money also, while Downey flatly denies it, and thus is in direct conflict with Albren, the latter is supported by Morlina, who tells a consistent story, and whose veracity is unimpeached.

It is not unimportant in this connection to consider also that Downey swears under the influence of being owner to the extent of one-fourth of the vessel, and that the charge against which he testifies is an implication of bad faith in him towards the other joint owners, and a fraud and a crime against the government, for which, if guilty, he is liable to severe punishment.

Statement of the case.

The attempt to impeach Albren's character rests on the testimony of four witnesses. Two of these were parties to judicial proceedings alleging against them similar acts of fraud on the revenue, and Albren had been, or was expected to be, a witness against them. On the other hand, several witnesses are called who testify to his general good character for truth and veracity. In this respect we do not think he has been successfully impeached.

As to the statement introduced in evidence, as taken down in the office of the claimants' attorney, purporting to be made by Albren, though not signed or sworn to, it seems to us that his own account of it is probably correct, namely, that it was an attempt to commit him before the trial to a statement which would exonerate Captain Downey, and that the offered bribe failed, probably because neither party would trust the other by signing the paper or paying down the money first.

We think that a case is made out against the vessel, and that the decree of the Circuit Court must be REVERSED, and a judgment rendered in favor of the United States in that court.

DECREE ACCORDINGLY.

UNITED STATES *v.* KELLY.

A soldier, who had deserted, but was restored to duty by order of his department commander, without trial, on condition that he make good the time lost (about two months), and who complied with the condition, and was honorably discharged at the expiration of his term of service, *held* entitled to bounty money, notwithstanding his desertion.

THIS was an appeal by the United States from a judgment of the Court of Claims, in favor of one Kelly, lately a soldier in the army of the United States, for an unpaid balance of bounty money.

The claim was denied by the pay department, on the ground that the bounty had been forfeited by desertion.

The case as found by the court was, that the petitioner had deserted, but was restored to duty by order of his department commander, without trial, on condition that he make good the time lost, about two months; that he complied with the condition, and was honorably discharged at the expiration of his term of service.

Upon this case, *Mr. N. P. Chipman, for the soldier, and in support of the ruling below*, made a very full examination of the acts of Congress, and on an exhibit of their provisions, argued that there was nothing in any of them prohibiting the payment of bounty money to a soldier who had deserted, irrespectively of the circumstances of his desertion; that desertion, being sometimes a mere technical desertion, and without cowardice or disaffection to the service, did not *per se* so taint the *status* of the soldier, as to render him necessarily and without any judicial proceedings absolutely disqualified to receive bounty; nor was it under every circumstance such an act that his contract with the government was wholly and *ipso facto* dissolved, and that he could never return, and by performance of service properly thereafter—which service should be accepted—set up a condonation of his offence. The counsel argued that any other view would lead to the worst consequences in an army of a million of troops, called out as our troops were during the rebellion; troops comprising officers and men of inexperienced years; both officers and soldiers unacquainted with the laws of war; the soldiers especially unacquainted with the rigors of discipline, unused to the restraints which capricious or incompetent superior officers could enforce; not schooled nor proof against the evil influences of depraved associates, and liable, under some physical suffering or discouragement, or inadvertence, to commit an offence the gravity of which was not comprehended, and the penalty for which had not been understood or appreciated. The counsel fortified his views as to the effect of desertion in such a case as the one before the court by references to the third edition, published in 1868, of the Digest of the present Judge Advocate

General of the United States, the Hon. Joseph Holt, Esq.,* whom he characterized as "the most eminent and able writer on military law that this country had ever produced."

Mr. C. H. Hill, *Assistant Attorney-General*, *contra*, submitted the case on the record.

The CHIEF JUSTICE delivered the opinion of the court.

We do not think that, under the circumstances of the present case, the bounty was forfeited. The able lawyer who fills at present the post of Judge Advocate General, in a case similar to the present, held that "the honorable discharge of the deserter was a formal final judgment passed by the government upon the entire military record of the soldier, and an authoritative declaration by it that he had left the service in a *status* of honor; that as such, it dispensed altogether with the supposed necessity that the soldier must obtain bounty by removal, by order, of the charge of desertion from the rolls, and amounted of itself to the removal of any charge or impediment in the way of his receiving bounty." With this opinion we entirely concur.

JUDGMENT AFFIRMED.

SMOOT'S CASE.

1. The court calls attention to the efforts frequently made by contractors and by their counsel to construe contracts made with the government by appeals to its power, its magnanimity, and generosity.
2. Such appeals, it declares, can properly be presented to Congress alone; for the jurisdiction of the Court of Claims is of contracts express or implied.
3. In the construction and enforcement of these contracts, the Court of Claims is bound to apply the ordinary principles which govern such contracts between individuals.

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* Digest of the Opinions of the Judge Advocate General of the Army; published by the War Department, Bureau of Military Justice; p. 146, paragraph 7, title "Discharge."

Statement of the case.

4. A. contracted with the bureau of cavalry during the late rebellion, to furnish to it, within a time specified, a large number of cavalry horses, sound, and of specified size, age, &c. A. had no horses at this time; but meant to get them from other persons, their owners, who would send them through him for inspection, &c., so that he might fulfil his contract. At the time of the contract, horses furnished under contracts to the department were, by its rules, to be examined and inspected without unnecessary delay, and if the animals were not satisfactory to the inspecting officer the owner took them away in the same state that he brought them. Before the time that the horses in this case were deliverable, the bureau of cavalry adopted a regulation that horses presented for inspection should remain at the expense of the contractor one day in the inspection yard, and that horses presented for inspection which were a manifest fraud on the government should be branded with the letter **R**. Under this new rule, the owners of the horses would not furnish them to A. to be sent forward and inspected. Whereupon A., without delivering, buying, or tendering any horses to be inspected, under *any* rules, even the old, abandoned his contract and sued the government for what profits he *might* have made had the old rules remained, and had he bought and delivered the horses under them. *Held* that he could recover nothing.
5. The adoption by the bureau of cavalry of the new regulation did not render it impossible for the contractor to purchase and deliver the number of horses which he had agreed to deliver.
6. Nor did the adoption of those rules, after the contract was made, authorize the contractor to abandon his contract and sue for the profits which he might have made, though he neither bought, nor delivered, nor tendered any horses, as he had agreed to do.
7. Such new rules did not disable the government from receiving and paying for the horses, nor was it a notification that the government would not have them.
8. A party binding himself to deliver personal property can only be relieved in this respect on the ground of clear refusal of the other party to receive or becoming disabled to perform his part of the contract.

APPEAL and cross-appeal from the Court of Claims; the case being thus:

On the 5th of February, 1864, Smoot entered into two contracts with the War Department through Eakin, quartermaster; one to deliver within forty days 2500 cavalry horses *at St. Louis*, and the other to deliver within fifty days 2000 like horses at Chicago, at the government stables in each place; of certain qualifications set forth in the contracts, and subject to the inspection provided for in one article of the contract, which was as follows:

Statement of the case.

"It is agreed that the horses, upon being delivered, shall be examined and inspected without unnecessary delay, by a person or persons appointed by the United States, and after such inspector shall have certified that they are in all respects as contracted for, and fully equal to the specifications aforesaid, they shall be received and become the property of the United States; and all such horses as may be condemned and rejected by said inspectors, shall be removed from the government stables within *one day* after the contractor shall have been notified of said rejection."

Payment for the horses was to be made on completion of the contract, should Congress have made an appropriation for that purpose; otherwise as soon thereafter as funds might be appropriated.

During the existence of the contracts Smoot was possessed of means and credit to comply with the stipulations on his part, and he and his agents went to Chicago and other parts of the West to make, and did make, all necessary arrangements to carry them out, except the actual procuring of the horses.

At the time the contracts were entered into, and long prior thereto, the mode of inspection of horses purchased by the government had been for horses to be presented and immediately examined in the presence of the owner, and if satisfactory, they were accepted, and if unsatisfactory, they were rejected and returned to the owner without delay, expense, or blemish.

By an order, however, dated on the same day as these contracts, but not promulgated in Chicago or St. Louis until the 1st of March, or known to the defendant till then, the government ordered another and different mode of inspection from what had been the practice and custom of the government theretofore. This new order ran thus:

"Each horse shall be placed in the inspection yard twenty-four hours before inspection, after which time, every person, except the inspector and his assistants, are to leave the yard, not to re-enter it or handle the horses until the inspection and branding has been completed.

Statement of the case.

"All horses presented that are manifestly an attempt at fraud on the government because of any incurable disease or any distemper whatever, shall be branded on the left shoulder with the letter **R**.

"Horses that are rejected for being under age, in poor condition, or temporarily injured by transportation or otherwise, shall be lightly branded on the front hoof, near the coronet, with the letter **R**, not to exceed three-quarters of an inch.

"Any horse once rejected, that is presented to the government without notice of that fact, shall be considered and deemed fraud upon the government, and branded on the left shoulder as fraud.

"When horses are doubtful before branding, they may be kept three or four days under guard, *at the expense of the contractor*, and then disposed of by branding or otherwise, as the inspector may determine.

"No mares will be accepted."

At the time the contracts were entered into, and for a long time prior thereto, the usual course of business in filling contracts of this kind, had been for the contractor to buy his horses subject to government inspection, and one effect of the order of the new rules of inspection was to create a change in this course of business, and, therefore, no horses could be purchased by contracts subject to the new inspection.

Another effect was to impose upon the contractors considerable risk, in consequence of the horses being injured by kicks and bruises; by contagious diseases; by loss of identity, in putting the animals with other parcels of horses, so that in the event of rejection the same animals could not be returned; by the expense of keeping the animals during the four days; by injury which might occur to them from being branded by hot iron; the branding of a rejected horse in the manner prescribed by the new order greatly lessening his market value.

Upon ascertaining the effect produced by the new order of inspection, Smoot caused application to be made at the office of the bureau of cavalry, in Washington, for a modifi-

cation of it, and repeatedly offered to go on and fill the contracts if the objectionable features of the order should be removed. The chief of the bureau was then absent. The next officer in rank referred the matter to the chief, who was expected to be in Chicago soon to decide the matter there. The chief of the cavalry did soon after arrive in Chicago, and the matter was presented to him by *several other contractors* who were in the same position as Smoot, but the chief decided not to revoke or modify the order. Neither Smoot nor his agent saw the chief of the cavalry in Chicago, but his decision was communicated to Smoot.

Smoot was able and willing to perform his contract by delivering the horses within the time prescribed by it, subject to the inspection prescribed by the contract, but was unwilling to deliver any horses subject to the inspection required by the new order. *He did not possess any horses in Chicago, nor tender any to the government* at that place, nor apply there to the chief of the cavalry bureau to waive the inspection ordered; but he possessed ample time and means for procuring horses, and he regarded the order as a renunciation by the government of its agreement.

So far in regard to the horses deliverable at Chicago.

The same facts existed as to the contract for St. Louis as to the contract for Chicago, except that the new order was not enforced at St. Louis as against contracts dated prior to its promulgation. Of this fact, however, Smoot had no knowledge, but believed that the order was enforced there, as well as in Chicago. He did not ask the inspecting officers in St. Louis anything about the matter, and did not attempt to transport horses to St. Louis, in accordance with his contract.

Smoot not fulfilling his contract was arrested by the government, under an act of Congress passed in the exigencies of the rebellion,* fined $10,000, and put into Fort Delaware for a wilful neglect of duty. He was afterwards, however, on an examination of the case by the Judge Advocate General released.

* Act of July 17th, 1862.

Argument for the contractor.

The Court of Claims having found a case essentially as above, and that the fair profits which Smoot would have made on the 2000 horses to be delivered at Chicago, if he had been allowed to perform his contract according to its terms, would have been $10 a horse, gave him on that contract $20,000.

On the St. Louis contract, the court decided in favor of the government. In the Chicago contract the government appealed; in the St. Louis one, Smoot.

Mr. B. F. Butler, for the claimant, Smoot:

The findings in this case are so far different from those in *United States* v. *Wormer*,* as to warrant us bringing it before the court for consideration.

1st. *In regard to the contract for Chicago; the appeal by the United States.* The question is whether the new order of the government, so onerous and impracticable of execution as to have rendered the performance of the contract impossible by Smoot, is, in law, a breach of the contract on the part of the government, so as to render the United States liable for such damages as may be proved to be sustained by the contractor; damages which the court below have found to be $20,000.

There needs neither citation of authorities nor argument to prove, if one party to a contract, by his own act, interposes and enforces onerous conditions upon the manner of the performance of a contract not contemplated by the other party thereto at its inception, and refuses to permit its performance unless those conditions are complied with, that a breach of the contract is thus made by the party so refusing, and he is liable to the party capable and willing to perform on his part, not only for all that he has lost in attempting to perform, but for all the fair profits he would have made in its performance.

Neither the government nor an individual can be permitted to alter any essential element of a contract after it

* 13 Wallace, 25.

has been entered into *a fortiori*, when, as in the case at bar, the conditions so imposed render the performance of the contract impossible.

In Wormer's case but two facts were found bearing on this point: *first*, the contract; *second*, the order of inspection; and the court was asked, as a matter of law, to infer, as did the court below, that the regulations of the inspection were "*unreasonable*." This clearly was a matter of *fact*, and not of *law*. The order of inspection could not be known to the court to be unreasonable as a matter of fact. The case was silent on that subject. It did not appear in that case even that, by the new order, there had been any substantial change from the former custom and practice of the government in the inspection of horses, or that the changes, if any had been made, bore onerously on the contractors.

Now, in this present case, the order of inspection was found to be impracticable of execution, so that at St. Louis it was not enforced. It was relaxed as to the only other contractor who did perform his contracts.

2d. *As to the contract for St. Louis; or the appeal by Smoot.* This stands upon a precisely similar contract in all material provisions as the other. The distinguishing fact, upon which it would seem that the court below must have found against Smoot, was, that he did not apply at St. Louis for *a modification of the order of inspection*, nor buy and transport to St. Louis any horses in fulfilment of the contract. The only question of law, if the court sustain our views in the case of the contract at Chicago, which can arise here, is whether, under the facts stated, Smoot was bound to tender horses at St. Louis, or apply there for the disobedience of the order of inspection. The case shows that the order was suspended by the subordinate officers there as to another contractor; but it also shows that Smoot applied to the War Department for its relaxation, and was referred to the chief of the cavalry bureau at Chicago for his answer, and there learned that it would not be modified or relaxed. And no reason, in fact or law, is found why it should be suspended at St. Louis if not in Chicago. Was Smoot, then, bound to apply

at St. Louis in expectation that the order would be there disobeyed? This was an order from the War Department, solemnly promulgated for the direction of the whole government in this regard. He had applied to that department, been referred to the chief officer of the proper bureau for his answer, and had received it. Could he then, in law, be compelled to apply at St. Louis for a suspension of the order by the subordinates there? Had he not a right to suppose that the order, being a general one, would be generally enforced where no reason appeared for the exception?

If, then, he was not obliged to apply for a modification of the order at St. Louis, would the law compel him to put himself to great expense to attempt the impossibility of performing his contract there?

Mr. G. H. Williams, Attorney-General, Mr. C. H. Hill, and Mr. W. McMichael, Assistant Attorneys-General, for the United States, argued that the case was not distinguishable from *United States* v. *Wormer;* which might have been decided on the ground that there was no tender, nor any evidence even that Wormer had any horses; a position which certainly disposed of Smoot's claims in both cases here.*

Reply. Of what use was an actual tender? If A. contract to build a brick house for B., and B., when A. is getting ready to build it, gives him notice that he will not have any such house on his ground, nor any house but a stone one, is A. bound to cart bricks to B.'s land and insist on putting up the brick house? In the present case the refusal to modify the government order was a sufficient refusal. After this refusal, why was Smoot bound to put himself to the trouble and expense of driving 2000 horses from all parts of the West to the city of Chicago, only to be there turned away, *ad vana lex neminem cogit?*

Mr. Justice MILLER delivered the opinion of the court.

Mr. Smoot claims of the United States a large sum of

* Smith's Leading Cases, 7th American edition, 42, 43; note to Cutter *v.* Powell; Benjamin on Sales, 423.

money for the profits which he might have made out of two contracts with Quartermaster Eakin, for delivering cavalry horses for the use of the army—two thousand five hundred at St. Louis and two thousand at Chicago. It is neither alleged nor proved that he ever tendered a horse at either place, or attempted otherwise to perform his contract, or that he was ready to do so, or that he owned any horses, or had expended a dollar in preparing to fulfil his contract. The proposition on which the claimant rests his right to these speculative profits is not on account of anything he had done, or offered to do towards performance, or any actual loss suffered, but that after the contract was made, the cavalry bureau of the War Department adopted and published rules governing the inspection of horses purchased for that service, differing from those in use at the time the contract was made. It is not asserted that these rules required a higher or more difficult standard of quality in the horses, but that the mode in which that standard was to be ascertained was so changed as to impose a greater hardship, or burden, upon the contractor. Nor is it claimed that these new regulations were adopted with special reference to their application to Smoot's contracts. They were a new regulation of the business of inspection of a general character. The contracts sued on, which are identical, except in the number of horses and the place of delivery, provided for an inspection. But it is argued that the new regulations were not only a departure from those in use when the contracts were made, and imposed an additional burden on the contractor, but that conceding the right of the bureau to make proper and reasonable regulations for inspection, these were unreasonable and improper. The two points of difference in the new and the old mode of inspection most earnestly pressed in the argument are:

1. That by the new regulations the horses offered must remain at the expense of the contractor twenty-four hours in the inspection yard, into which no other person than the inspector and his assistants shall be permitted to enter until the inspection is completed.

2. That all horses presented for inspection that are manifestly an attempt at fraud on the government, because of incurable disease, or any purposely concealed defect whatever, shall be branded on the left shoulder with the letter **R.**

The argument founded on these rules is presented under two propositions:

1. That the adoption of them by the cavalry bureau rendered it impossible for the contractor to perform his contract, because no owner of horses would sell to him subject to have them branded as a fraud by inspectors of whom he knew nothing, and who might be incompetent or oppressive.

2. That the application of these rules to horses tendered under claimant's contract absolved him from the obligation of performance, or tender, or offer to perform, and left him at full liberty to sue for the profits which he had done nothing to earn beyond making the contract.

There is in a large class of cases coming before us from the Court of Claims a constant and ever recurring attempt to apply to contracts made by the government, and to give to its action under such contracts, a construction and an effect quite different from those which courts of justice are accustomed to apply to contracts between individuals. There arises in the mind of parties and counsel interested for the individual against the United States a sense of the power and resources of this great government, prompting appeals to its magnanimity and generosity, to abstract ideas of equity, coloring even the closest legal argument. These are addressed in vain to this court. Their proper theatre is the halls of Congress, for that branch of the government has limited the jurisdiction of the Court of Claims to cases arising out of contracts express or implied—contracts to which the United States is a party in the same sense in which an individual might be, and to which the ordinary principles of contracts must and should apply.

It would be very dangerous, indeed, to the best interests of the government—it would probably lead to the speedy abolition of the Court of Claims itself—if, adopting the views so eloquently urged by counsel, that court, or this, should

depart from the plain rule laid down above, and render decrees on the crude notions of the judges of what is or would be morally right between the government and the individual.

In illustration of this course of observation the proposition that the regulation concerning branding the horses fraudulently presented for inspection made it impossible for the contractor to perform his contract, may be well cited.

As between individuals, the impossibility which releases a man from the obligation to perform his contract must be a real impossibility, and not a mere inconvenience. And while such an impossibility may release the party from liability to suit for non-performance, it does not stand for performance so as to enable the party to sue and recover as if he had performed.

The argument on this branch of the subject in the case before us loses sight of these principles.

There was no impossibility. It is a mere inconvenience. If the contractor has the money and purchases his horses before he offers them for inspection, there is presented no obstruction whatever, by the rules of inspection, in obtaining the required number of horses. It is only because he desires to transfer the risk and loss of rejection from himself to the parties of whom he purchases, that he has difficulty. The government made no agreement with him to protect him in this way. His ability to buy horses that would pass inspection was a part of the responsibility that he assumed, and which it was by no means impossible to perform, if he had the money and was ready to pay when he bought the horses of their original owners. Certainly no such circumstance as this would be set up for a moment in an ordinary suit between individuals as an impossibility, which released the party from his contract.

But suppose the contract had been between private parties, and an epidemic had prostrated every horse in the country with disease for the forty days allowed to buy and deliver sound horses by this contract. Will any one assert that this would authorize the contractor to sue for the profits he could

have made, if no epidemic had occurred, though he neither then nor afterwards bought, or delivered, or tendered a horse? While such a public misfortune might possibly (we do not say it would) have been a defence to a suit against him for non-performance, it could be the foundation of no claim on his part to recover as if he had performed.

Perhaps no class of contracts has been more frequently the subject of judicial consideration than those for the future delivery of personal chattels. Such a contract is this. A contract in which the delivery is a condition precedent to payment; for the provision is that the delivery is to be at Chicago and St. Louis, and the payment made afterwards at Washington; and the time of payment is expressly made dependent upon appropriations made or to be made by Congress.

In approaching the inquiry into the effect which the action of the bureau of cavalry, in adopting these new rules for inspection, had upon the rights of the parties to this contract, let us endeavor to free ourselves from the consideration that the government was one party to the contract, and that it was for a large number of horses; for we hold it to be clear that the principles which must govern the inquiry are the same as if the contract were between individuals, and the number of horses one or a dozen instead of four thousand. The increased difficulty arising from the number to be delivered in a given time was voluntarily assumed by the contractor, and he had the right, during the forty or fifty days allowed him, to deliver any number, smaller or greater, at one time.

We are also to remember that the question to be considered is not whether the action of the cavalry bureau would have been a defence if the claimant had been sued for a failure to perform his part of the contract, but whether it was sufficient to authorize him to abandon the contract himself, and as a plaintiff recover against the other party the profits which he would have made if it had been fully performed.

With these views before us the regulations adopted can only have the effect claimed upon one or two grounds;

namely, as a notification by the government that it refused to receive the horses according to the terms of the contract, by which refusal the other party was released from his obligation to tender; or that the government had disabled itself from complying, and therefore the other party was not bound to tender. The most recent work, and a very able one, on "The law of sales of personal property," lays down the rule on this subject as follows: "A mere assertion that the party will be unable, or will refuse to perform his contract, is not sufficient; it must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made; for if he afterwards continue to urge or demand a compliance with the contract, it is plain that he does not understand it to be at an end."* The English cases cited abundantly sustain the proposition. *Avery* v. *Bowden*, in the Court of Exchequer,† affirmed in the Exchequer Chamber,‡ is very much in point. It was an action arising out of a charter-party, one of the covenants in which was that the vessel should be at Odessa, and lay there forty running days, within which time the shipper was to furnish her cargo, unless war should be sooner declared between Russia and Great Britain. The vessel came to Odessa on the 11th March, and sailed away in ballast on the 17th April. It was proved that at four different times during this period the officers of the ship applied to the agent of the charterer for cargo, who said, "We have none for you," and at last said, "I have no cargo for you; you had better go away."

On this testimony a verdict was taken for the plaintiff, the ship-owner, subject to the judgment of the court on the law of the case. The judges, both in the Exchequer Court and in the Exchequer Chamber, were unanimous in the opinion that this conduct of the agent did not relieve the plaintiff from the obligation to remain the forty days, and that on that count he could not recover.

In the case of *Phillpotts* v. *Evans*,§ the defendant, who had

* Benjamin on Sales, 424.

† 5 Ellis and Blackburn, 714.

‡ 6 Id. 953.

§ 5 Meeson and Welsby, 475.

agreed to receive and pay for wheat, notified the plaintiff, before the time of delivery, that he would not receive it. The plaintiff tendered the wheat at the proper time, and the only question raised was, whether the measure of damages should be governed by the price of wheat at the time of the notice or at the time of the tender. Baron Park said: "I think no action would have lain for the breach of the contract at the time of the notice, but that plaintiff was bound to wait until the time of delivery to see whether the defendant would then receive it. The defendant might have chosen to take it and would have been guilty of no breach of contract. His contract was not broken by his previous declaration that he would not accept."

And though some of the judges in the subsequent case of *Hochsteer* v. *De La Tour** disapprove very properly of the extreme ground taken by Baron Park, they all agree that the refusal to accept, on the part of the defendant, in such case, must be absolute and unequivocal, and must have been acted on by the plaintiff.

In the case before us there was no such refusal. The officers of the government required of the plaintiff at all times the delivery of the horses of the kind and quality which he had agreed to deliver. And so far from refusing to accept, or intending to release the plaintiff from his obligation to deliver, it is found as a fact in the case that he was arrested and imprisoned by the military authorities for refusing to deliver the horses.

Nor can it be maintained that those regulations disabled the government from performing its contract. They were just as ready to accept and as able to pay for the horses, notwithstanding the regulation. It may be said that the regulation tied the hands of the government officers so that they could only accept horses inspected under it, and that to such inspection the plaintiff was not bound to submit. But to this proposition the remark of Baron Park is peculiarly applicable. The government was not bound to apply to

* 2 Ellis and Blackburn, 678.

horses furnished under a previous contract these subsequent regulations. They were general in their terms and were not adopted with a special view to these contracts. And the declarations of certain officers that they would be governed by them bound nobody. The correctness of this view is strikingly illustrated in this case, for the Court of Claims finds that the officers receiving cavalry horses at St. Louis did receive horses on all contracts made previous to the adoption of the new regulations under the old mode of inspection, and did not apply to them the objectionable rules, and for that reason they reject Smoot's claim as to the contract to deliver at St. Louis.

We think it was equally his duty to have tendered horses at Chicago, and if the new regulations would have relieved him at all from that duty, it would have been after he had made a tender, and objected to the application of the new rule of inspection, and the proper officer had refused to receive the horses without subjecting them to those rules. Until then he could not justly claim that the government had violated its contract.

In Mr. Smoot's case, he never had any declaration made to him or his agent from any one in charge of the execution of those contracts on the part of the government, that the rule would be applied to him or his contract. He accepted and acted upon declarations made to other parties and not to himself.

We do not, however, believe that this would have varied the matter. It would have been no great hardship for him to have so far attempted compliance with his contract as to have tendered twenty or fifty horses under it, and tested the action which the government officers would take when he was thus attempting to fulfil his contract and objecting to the application of the new rule. Then the officers of the government would have been legally called on to determine whether they would apply them or not. Until that time they were under no obligation and had no right to commit themselves or others irrevocably on that subject.

On these grounds we think that the claimant had no right

to recover on either of the contracts sued on. It follows that the judgment of the Court of Claims in favor of Smoot on the Chicago contract is REVERSED, and the case remanded for judgment in favor of the United States; and the judgment of that court on the St. Louis contract, the subject of the appeal by Smoot, is

AFFIRMED.

NOTE.

AT the same time was adjudged—it having been previously argued by *Mr. C. H. Hill, Assistant Attorney-General, for the United States, and by Mr. James Hughes, contra*—the case of the

UNITED STATES *v.* SPICER,

the facts of which were very similar to those of Smoot's case, above reported. Judgment had been given below in favor of Spicer. The court now announced that the principles set forth in Smoot's case, which they had just decided, must govern Spicer's case also. The judgment in it was accordingly reversed, with directions to the Court of Claims to render judgment

IN FAVOR OF THE UNITED STATES.

KEARNEY *v.* DENN.

1. A suit was brought in a Circuit Court; properly as regarded the citizenship of the parties. The defendant died, and his representatives were made defendants; nothing being said as to their citizenship. On motion to dismiss because the plaintiff and defendants were citizens of the same State, the Circuit Court refused the motion, but on what ground did not appear; the record not showing whether any evidence had been taken on the matter, and recording only that the defendants "reserved their exception to the decision of the court." *Held*, that as the record stood, there was no case that this court could examine.
2. A judgment of an Orphans' Court of Maryland (affirmed in the Court of Appeals), passing directly on the legitimacy of a son who was applying

Statement of the case.

for administration to his father's estate, *held* to be inadmissible to show the illegitimacy of his sisters by the same connection, though the judgment was entered only after an issue directed to ascertain whether the father was *ever* lawfully married to the admitted mother of the children, either before or subsequently to the birth of the son, and after a verdict in the negative.

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

Dr. David Crawford, of Prince George's County, Maryland, died there in 1859, a bachelor, leaving a large personal and real estate, but neither father or mother, brother or sister, or the descendants of either to inherit it. A first cousin named Blackburne, who was in possession of his realty, applied for administration on the personalty. A counter application was made by one George T. Crawford, of Maryland, son of Thomas B. Crawford, a brother of the intestate, who had died before him. The application of George T. Crawford was opposed by Blackburne, on the ground that he, the said George, was not a legitimate child of the said Thomas; but with three other children, his illegitimate offspring from a connection with one Elizabeth Taylor.

Thereupon the Orphans' Court of Prince George's County, where the application of both parties was made and the contest was pending, directed an issue to settle the question,

"Whether the said Thomas was *ever* lawfully married to Elizabeth Taylor, either before or after the birth of the said George."

The jury found a verdict against the legitimacy; and judgment was entered accordingly; a judgment afterwards affirmed in the Court of Appeals of Maryland.

In this state of things George T. Crawford, who had lost the administration, and his three sisters, *all of Maryland*, brought ejectment in the court below against Blackburne for the real estate. On that trial Blackburne offered in evidence as proof of the illegitimacy of the plaintiffs, a transcript of the record of the Orphans' Court of Prince George's County,

on the application for administration, and the Circuit Court rejected it. Verdict and judgment having been given for the Crawfords, the defendant, Blackburne, brought the case here on error,* where the ruling was declared to have been in part errroneous. This court then said:

"The transcript was competent evidence against George T. Crawford. As to him it was an estoppel and barred his right of action. But it did not affect the other defendants in error, who were not parties to the proceedings."

The judgment was accordingly reversed, and a *venire de novo* ordered.

George T. Crawford, one of the plaintiffs, now *died*. He had children, but they were not made parties to the case; which went on in the names of the other plaintiffs. After some continuances and before the case came on to be retried, the attorneys of the plaintiffs suggested to the court, that since the last continuance, Blackburne, the defendant, had died, and they, therefore, moved for leave, which was granted, to let new parties, to wit, Mary Kearney, and J. L. Henry, and Kate Kearney Henry, his wife (*nothing being said about their citizenship*), appear and defend; these three persons, as was admitted by an agreement of counsel on both sides, filed, being "alone interested as defendants;" and it being further agreed by the counsel that "the original pleadings shall stand *mutatis mutandis*."

The cause was then continued till the next term, when the defendants filed a motion in writing to dismiss the case, for the reason that Mary Kearney was, at the time of the commencement of the suit, and had been ever since, a resident and citizen of the District of Columbia, and that J. L. Henry, and Kate Kearney Henry, his wife, had been during the same period, citizens and residents of the State of Maryland, and that the court had, therefore, no jurisdiction to hear and decide the cause. No proof appeared to have been offered of these facts. The court overruled the motion, but

* Blackburne *v.* Crawfords, 3 Wallace, 190.

upon what ground did not appear. It was noted on the record that the defendants "reserve their exception to the decision of the court." This was all that the record contains on the matter.

The cause was then afterwards tried on its merits, when the defendants offered a transcript of the record of the Orphans' Court to show the illegitimacy of all the new plaintiffs, the sisters of George T. Crawford as well as of himself The court below refused to receive it, and the defendants excepted. Verdict and judgment having again gone for the plaintiffs the defendants brought the case here, the two questions now being,

1st. Had the court below jurisdiction; in other words was the suit after the substitution of the new defendants an original suit, or merely a continuation of the old one?

2d. Was the rejection of the transcript of the record of the Orphans' Court, which had been offered to show the illegitimacy of the now plaintiffs, the sisters of George T. Crawford, rightly rejected?

Mr. T. J. Durant, for the plaintiff in error; a brief of the late Mr. William Schley having been filed:

1. The new defendants, when they appeared to the suit, did not come in *under* Blackburne, as successors to his rights; but came in professing to be next of kin and heirs of the intestate, Dr. David Crawford. In some senses it was a right *adverse* to Blackburne's.

Now if, on the day when these new defendants appeared to this suit, an original suit had been begun against them by the plaintiffs in that suit, the Circuit Court would have had no jurisdiction; because all the plaintiffs and two of the defendants are citizens of Maryland, and the other defendant is a citizen of the District of Columbia.

But the court below disposed of the motion by the remark, that the question of jurisdiction related to the state of case which existed at the commencement of the suit. This supposed rule, however, is not sanctioned by the decisions of this court; it is qualified by the condition that the parties

Recapitulation of facts in the opinion.

remain the same. Subsequent change of domicile does not, *per se*, take away jurisdiction rightfully acquired.*

2. The transcript of the record of the Orphans' Court should have been admitted, for the sisters of G. T. Crawford were virtually parties to the suit in the Orphans' Court in which he claimed the administration. The same *right* was in question in the two cases.

In addition, the verdict and judgment in the record offered in evidence was directly upon the *status* of the immediate ancestor of all the plaintiffs in this suit.

Messrs. T. T. Crittenden (with whom had been the late Mr. R. J. Brent) and D. Clarke, contra.

Mr. Justice SWAYNE recapitulated certain parts of the case and delivered the opinion of the court.

In this case our attention has been called to two alleged errors:

I. That the court below overruled the motion of the plaintiffs in error to dismiss the suit.

After the case was remanded from this court to the Circuit Court, the plaintiffs' lessors appeared in that court and suggested the death of Richard S. Blackburne, the original defendant, and prayed leave to make new defendants. Leave was given accordingly. This was done on the first Monday of April, 1868, and the cause was thereupon continued to the first Monday of November following. On the latter day a written agreement, signed by William Schley, Esq., as the counsel for the plaintiffs in error, and by R. J. Brent, Esq., as the counsel for the lessors of the plaintiffs, was filed in court. It was to the effect that the death of the defendant, Blackburne, having been suggested, and the plaintiffs in error (naming them) being interested on the part of the defendant, Blackburne, in the property mentioned in the declaration, the clerk was requested to enter their appearance by Mr. Schley, as their attorney, "they being alone interested

* Conolly *v.* Taylor, 2 Peters, 565.

as defendants in said property." A further agreement was signed and filed by the same counsel "that the original pleadings shall stand *mutatis mutandis*." The case was thereupon further continued to the first Monday of April, 1869, when it was again continued to the first Monday of November following. On that day the plaintiffs in error appeared by their counsel and filed a motion in writing to dismiss the case, for the reason that Mary Kearney was, at the time of the commencement of the suit, and had been ever since, a resident and citizen of the District of Columbia, and that J. L. Henry, and Kate Kearney Henry, his wife, had been during the same period, citizens and residents of the State of Maryland, and that the court had, therefore, no jurisdiction to hear and decide the cause. The court overruled the motion, but upon what ground does not appear. It is noted on the record that the plaintiffs in error "reserve their exception to the decision of the court." This is all that the record contains touching the motion. For aught that appears to the contrary, the court may have overruled it, because the facts of the residence of the defendants as stated in the motion were not proved, or because it was proved that they resided in a State or States other than Maryland. Error must be shown. It is never presumed. We cannot take cognizance of the exception reserved upon the record, any more than we could of an exception noted in like manner to the admission of improper testimony or misdirection by the judge to the jury, in the trial of a cause. In order to bring the facts properly before us a bill of exception, setting forth what was proved and the decision of the court, should have been taken. As the record stands we cannot examine the subject. We have, therefore, not had occasion to consider the learned arguments submitted by the counsel of the respective parties upon the merits of the motion.

We are all of the opinion that the introduction of the new defendants was an elongation of the original action, and not the institution of a new suit.

II. The second alleged error relates to the transcript of the record in the Orphans' Court of Prince George's County.

Opinion of the court.

It appeared by the transcript that Blackburne, as the next of kin to Thomas B. Crawford, deceased, applied to the court for letters of administration upon the estate of the decedent. George T. Crawford, claiming to be the son of the deceased, made a like application. The court ordered to be tried an issue involving the question whether Thomas B. Crawford and Elizabeth Taylor, the mother of George T. Crawford, were ever lawfully married. The jury found in the negative, and judgment was entered accordingly. The case was removed to the Court of Appeals of the State, and that court affirmed the judgment. When this case, as it is now before us, was tried in the court below, George T. Crawford had died, and his children were not made parties to the suit. Upon the trial the plaintiffs in error offered the transcript in evidence as bearing upon the question of the marriage of Elizabeth Taylor and the legitimacy of her other children. The court excluded it from going to the jury, and the plaintiffs in error excepted.

The effect of the verdict and judgment here in question were fully considered when this case was formerly before us. We then held that they were an estoppel as to George T. Crawford and barred his right of action, but that they did not in anywise affect the rights of the other children, because they were not parties to the proceeding.* We have no doubt of the soundness of these conclusions, and we feel no disposition to review or reverse them. It is unnecessary to pursue the subject further. No error was committed in rejecting the transcript.

JUDGMENT AFFIRMED.

* Blackburne *v.* Crawford, 3 Wallace, 190.

MADDOX *v.* UNITED STATES.

1. Under the statutory provisions, treasury regulations, and executive orders concerning the purchase of the products of insurrectionary States, a purchasing agent, acting on behalf of the United States, had no authority to negotiate with any one in relation to the purchase of such products, unless at the time of the negotiation the party either owned or controlled them.
2. Private citizens were prohibited from trading at all in the insurrectionary districts. The object of the law, and the regulations made to carry it into effect, was to encourage the insurgents themselves to bring their products to loyal people.
3. *United States* v. *Lane* (8th Wallace, 185), affirmed, on the two points above quoted.

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

H. A. Risley, treasury agent at Norfolk for the purchase of the products of insurrectionary States, in November, 1864, contracted in writing to purchase from Maddox and certain persons associated with him, loyal citizens of the United States, a large quantity of tobacco, rosin, and turpentine, situated in the States of Virginia and North Carolina, to be delivered in Norfolk or New York, and sold at certain points mentioned, under the same conditions as other sales of like public property.

With the contract Risley delivered to Maddox and his associates a request for safe-conduct and means of transportation.

This request was presented to the President of the United States, who indorsed on it that the property to be transported under the contract should be free from seizure or detention, and that the military and naval authorities be requested to furnish the necessary facilities for getting the products within our lines. These products, at the time the contract was made, and the military safe-conduct delivered, were not owned or controlled by Maddox and the others, but they expected to procure them in or about the city of Richmond, in the State of Virginia. In the months of January and February, 1865, they succeeded, in part perform-

ance of their contract, in purchasing a large number of boxes of tobacco—less, however, than they had agreed to do—which were subsequently either burned by our military forces, appropriated by them to the use of the United States, or destroyed in the fires in Richmond at the time it was captured, in April, 1865.

Hereupon Maddox and his associates filed a petition in the Court of Claims for an alleged breach of contract, and praying judgment for $735,644, with interest.

The United States demurred and the court sustained the demurrer. To reverse that decision this appeal was prosecuted.

Mr. C. H. Hill, Assistant Attorney-General, in support of the ruling below, argued that the case was similar to the *United States* v. *Lane*,* in which it was held, after a review of the statutory provisions and the treasury regulations concerning the purchase of products of insurrectionary States, that a purchasing agent, acting in behalf of the United States, had no authority to negotiate with any one in relation to the purchase of such products, unless at the time of the negotiation the party either owned or controlled them; in other words, that they were not designed to protect a speculation; that independently of this the petition did not allege, and the facts did not show, that the contractors were ready and willing, or were even in a condition to perform fully the contract on their part; that is to say, to deliver the *whole* of the products contracted for.

And, finally, that if the claim had any foundation at all, it was the damage sustained in consequence of the action of the military authorities; a claim not within the jurisdiction of the Court of Claims.†

Messrs. B. R. Curtis and James Hughes, contra, for the appellants, argued—

1st. That the *United States* v. *Lane* did not rule this case,

* 8 Wallace, 185. † See act of July 4, 1864, 13 Stat. at Large, 381.

because: 1st. The facts were different in this case, Lane in his case having had far greater facilities, and he having been allowed to carry an outward cargo. The point resolved in the case was that carrying an outgoing cargo was without authority of law or regulations pursuant to law.

2d. That all comments of the court made in the Lane case, which do not apply to this case, were *obiter dicta* and subject to be reviewed and reconsidered in this case.

Mr. Justice DAVIS delivered the opinion of the court.

The United States are called on to make good the loss caused by the alleged wrongful conduct of their military officers, and the inquiry is, can they be required to do it in this suit?

The main question involved in this inquiry is important, on account of the large pecuniary interests at stake, but is freed from all difficulty since the decision of this court in *United States* v. *Lane*. The cases are not distinguishable. In both the right to recover was based on contracts made by the same treasury agent with private citizens, for the purchase from them of products which were within the lines held by the insurrectionary forces. In each case the agent requested safe-conduct for the parties and their necessary means of transportation through the Federal military lines. In neither case were the products owned, or even under the control, of those who had contracted to sell them, but in each case the parties expected, after they had secured their contracts, to go within the rebel lines and obtain the products which they had agreed to deliver. It is true, in Lane's case there were greater facilities for the execution of the contract and better security for its performance, for Lane was allowed to take out a cargo of goods to exchange for the cotton to be purchased, and this cargo was in charge of a sub-agent, under instructions not to deliver it until treble its value in cotton should be put on board the vessel.

But these proceedings were intended only as a means to an end. The performance of the contract was the principal thing to be effected, and the license to take out a cargo of

goods, under certain restrictions, was, of necessity, given for the mere purpose of securing a desired result. If Maddox did not enjoy the advantage of a similar license, he had the use of other means not accorded to Lane, which were expected to accomplish a similar result. It is easy to see that he could have few things better adapted to fortify him against failure than the certificate of the President that the products moved by him should be free from seizure, accompanied by an order on the commandants of military districts and naval stations to aid him in his enterprise. Whether the facilities extended to Lane were more ample than those which Maddox possessed is an immaterial subject of inquiry. It is enough to say that the difference in the character of these facilities constitutes the only distinction between the cases, and that this difference is incidental merely — not necessary to the chief purpose in each, and in no wise affecting the validity of the contracts. If this be so, there is an end of this litigation, for the entire subject embraced in this contract was before us in Lane's case and passed on. Lane, in his petition to the Court of Claims, stated that he made a contract with Risley, the treasury agent, at Norfolk, similar to the one in controversy, and for the purpose of executing it purchased a steamer at great cost, with which he proceeded to Chowan River, North Carolina, and loaded with cotton procured there, and that on the return voyage the steamer and cargo were forcibly seized by the naval authorities, and the cotton appropriated to the use of the United States. For this alleged wrongful seizure of the vessel and appropriation of the cotton he claimed that his contract was violated, and that he was entitled to remuneration. Nothing is said in the petition about an outward cargo, but the Court of Claims found, as one of the facts of the case, that Lane had a license to take out in his steamer certain articles, a schedule of which was attached to the safe-conduct given by the military commander. Manifestly, from this statement of the case, the contract was the foundation of the whole proceeding, and if made without authority of law, the vessel

and cargo were not protected, but were subject to seizure and detention.

It was therefore necessary, in order to see whether the citizen had the privilege of trading with the enemy in the manner contemplated by this contract, to review the statutory provisions, treasury regulations, and executive orders concerning the purchase of the products of insurrectionary States. This was done, and after careful consideration we held that a purchasing agent, acting on behalf of the United States, had no authority to negotiate with any one in relation to the purchase of such products, unless at the time of the negotiation the party either owned or controlled them; that neither was the law nor were the regulations through which it was administered, designed to protect a speculation wherein the products contracted to be sold were to be procured by the contractor within the rebel lines after the contract was made. Besides this, we decided that private citizens were prohibited from trading at all in the insurrectionary districts; that the object of the law, and the regulations made to carry it into effect, was to encourage the insurgents themselves to bring their products to us.

There were other elements of decision, but as they are not applicable to this suit they will not be noticed. It is unnecessary to restate the argument in support of the judgment in Lane's case. At the time the subject received our best thoughts, and reflection has only served to confirm the correctness of the decision.

These claimants occupy exactly the *status* of Lane. Risley, therefore, in his character of treasury agent, had no power to deal with them at all; but if it were otherwise, the contract which he did make was unlawful, for they were not the owners of the tobacco in question, nor did they control it even at the time the contract was made, but purchased it long afterwards within the Confederate lines.

JUDGMENT AFFIRMED.

GRAY *v.* DARLINGTON.

The advance in the value of personal property during a series of years does not constitute the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. Accordingly, when bonds of the United States were sold by the owner, after being held by him four years, at an advance of $20,000 over their cost to him, it was *held* that this amount was not taxable as "gains, profits, or income" of the owner for the year in which the sale was made, under the amendatory internal revenue act of March 2d, 1867.

ERROR to the Circuit Court for the Eastern District of Pennsylvania.

An act of Congress of March 2d, 1867,* provides that

"There shall be levied, collected, and paid *annually* upon the gains, profits, and income of every person, . . . whether derived from any kind of property, rents, interest, dividends, or salaries, or from any profession, trade, employment, or vocation, . . . or from any other source whatever, . . . a tax of five per centum on the amount so derived over $1000. . . . And the tax herein provided for shall be assessed, collected, and paid upon the gains, profits, and income *for the year ending the* 31*st of December next preceding* the time for levying, collecting, and paying said tax."

The same section also provides (with some exceptions not important to be mentioned), that

"In estimating the gains, profits, and income of any person, there shall be included all incomes derived from interest upon notes, bonds, and other securities of the United States, profits realized within the year from sales of real estate purchased within the year, or within two years previous to the year for which income is estimated, . . . and all other gains, profits, and income derived from any source whatever."

In this state of statutory law, W. Darlington brought the present action against W. C. Gray, collector of internal

* 14 Stat. at Large, 477–8.

revenue, to recover the sum of $1000, alleged to have been illegally assessed and collected under the said law as gains, profits, and income of him, the said Darlington, for the year 1869. It appeared from the allegations of the declaration, that in 1865 the plaintiff, being then the owner of certain United States treasury notes, exchanged them for United States five-twenty bonds; that in 1869 he sold these bonds at an advance of $20,000 over the cost of the treasury notes, and that upon this amount the assistant assessor of the United States for the collection district in Pennsylvania within which the plaintiff resided, assessed a tax of five per cent., alleging it to be gains, profits, and income of the plaintiff for that year; that on appeal to the assessor of the district, and to the Commissioner of Internal Revenue, this assessment was affirmed, and was transmitted to the defendant, as collector of the district, for enforcement; and that upon the latter's demand, with notice that, unless paid, he would collect the same with penalty and interest, the tax was paid by the plaintiff under protest.

To the declaration, setting forth substantially the facts above stated, the defendant demurred. The demurrer was overruled by the Circuit Court, and judgment given in favor of the plaintiff for the amount paid by him, with interest and costs. The defendant brought the case to this court on writ of error, and assigned as error the overruling of the demurrer.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error; Messrs. Blair, Dick, and Darlington, propriâ personâ, contra.

Mr. Justice FIELD delivered the opinion of the court.

In 1865 the plaintiff, being the owner of certain United States treasury notes, exchanged them for United States five-twenty bonds. In 1869 he sold these bonds at an advance of twenty thousand dollars over the cost of the treasury notes, and upon this amount the assistant assessor of the United States for the collection district in Pennsylvania,

within which the plaintiff resided, assessed a tax of five per cent., alleging it to be gains, profits, and income of the plaintiff for that year. On appeal to the assessor of the district, and to the Commissioner of Internal Revenue, this assessment was affirmed, and it was transmitted to the defendant, as collector of the district, for enforcement. Upon the latter's demand the tax was paid by the plaintiff under protest, and the present action was brought to recover back the money.

The question presented is whether the advance in the value of the bonds, during this period of four years, over their cost, realized by their sale, was subject to taxation as gains, profits, or income of the plaintiff for the year in which the bonds were sold. The answer which should be given to this question does not, in our judgment, admit of any doubt. The advance in the value of property during a series of years can, in no just sense, be considered the gains, profits, or income of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. The statute looks, with some exceptions, for subjects of taxation only to annual gains, profits, and income. Its general language is "that there shall be levied, collected, and paid *annually* upon the gains, profits, and income of every person," derived from certain specified sources, a tax of five per cent., and that this tax shall be "assessed, collected, and paid upon the gains, profits, and income for the year ending the 31st of December next preceding the time for levying, collecting, and paying said tax."* This language has only one meaning, and that is that the assessment, collection, and payment prescribed are to be made upon the annual products or income of one's property or labor, or such gains or profits as may be realized from a business transaction begun and completed during the preceding year. There are exceptions, as already intimated, to the general rule of assessment thus prescribed. One of these exceptions is expressed in the

* 14 Stat. at Large, 477-8, § 13.

statute, and relates to profits upon sales of real property, requiring, in the estimation of gains, the profits of such sales to be included where the property has been purchased, not only within the preceding year, but within the two previous years. Another exception is implied from the provision of the statute which requires all gains, profits, and income derived from any source whatever, in addition to the sources enumerated, to be included in the estimation of the assessor. The estimation must, therefore, necessarily embrace gains and profits from trade and commerce, and these, for their successful prosecution, often require property to be held over a year. In the estimation of gains of any one year the trader and merchant will, in consequence, often be compelled to include the amount received upon goods sold over their cost, which were purchased in a previous year. Indeed, in the estimation of the gains and profits of a trading or commercial business for any one year, the result of many transactions have generally to be taken into account which originated previously. Except, however, in these and similar cases, and in cases of sales of real property, the statute only applies to such gains, profits, and income as are strictly acquisitions made during the year preceding that in which the assessment is levied and collected.

The mere fact that property has advanced in value between the date of its acquisition and sale does not authorize the imposition of the tax on the amount of the advance. Mere advance in value in no sense constitutes the gains, profits, or income specified by the statute. It constitutes and can be treated merely as increase of capital.

The rule adopted by the officers of the revenue in the present case would justify them in treating as gains of one year the increase in the value of property extending through any number of years, through even the entire century. The actual advance in value of property over its cost may, in fact, reach its height years before its sale; the value of the property may, in truth, be less at the time of the sale than at any previous period in ten years, yet, if the amount re-

ceived exceed the actual cost of the property, the excess is to be treated, according to their views, as gains of the owner for the year in which the sale takes place. We are satisfied that no such result was intended by the statute.

JUDGMENT AFFIRMED.

Dissenting: The CHIEF JUSTICE, and Justices CLIFFORD and BRADLEY.

[NOTE.—In view of the divided state of the court in giving judgment in the above case, it may not be uninteresting to the reader to know that from a letter, entitled to credit, in the possession of the Reporter, it appears that the point decided in the case, had been ruled in the same way in the Third Circuit, by the late Mr. Justice GRIER, in the case of *Bennet* v. *Baker*, *Collector*, tried on the 7th of April, 1865; the late honored Justice having been, says the letter, "very clear and emphatic in his opinion."]

TARVER *v.* KEACH.

When a decision holding a contract void is made by the highest court of a State upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one which this court is not authorized to review.

ON motion to dismiss a writ of error to the Supreme Court of the State of Texas.

The suit below was upon a note payable in common currency circulating in the State of Texas at its maturity, that is, on the 27th day of November, 1863. This common currency was Confederate notes, and the note in question was given for the purchase of land.

The Supreme Court of the State held that the transaction was a gambling one, and dismissed the suit on that ground. The case being then brought here under an assumption that it came within the 25th section of the Judiciary Act, quoted *supra*, p. 3, the present motion was made.

Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

In *Delmas* v. *The Insurance Company*,* decided at last term, we held that when "a decision holding a contract void is made by the highest court of a State upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one we are not authorized to review." We are entirely satisfied with that judgment and with the grounds assigned for it, and do not think it necessary to restate them. It follows that the writ of error to the Supreme Court of Texas must be

DISMISSED.

CHENEY *v.* VAN ARSDALE.

Under the act of Congress of July 13th, 1866, iron castings, cast for thimble-skeins and pipe-boxes, between the 1st of September, 1866, and the 1st of March, 1867, were subject to an internal revenue tax.

ERROR to the Circuit Court for the Eastern District of Wisconsin, in which court a certain Van Arsdale brought suit against Cheney, collector of internal revenue, to recover duties paid the said collector on certain iron castings, cast for thimble-skeins and pipe-boxes; matters used in the construction of the running-gear of vehicles for the road. The case was thus:

An act of June 30th, 1864,† to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes, amended by an act of March 3d, 1865,‡ laid duties on nearly every sort of manufacture, including pig iron, railroad iron, all iron advanced beyond blooms, slabs, or loops, on iron castings used for bridges or other permanent structures, on stoves and hollow-ware, on steel in ingots, bars, sheet, or wire, &c., &c.

An act of July 13th, 1866, entitled "An act to reduce in-

* 14 Wallace, 661. † 13 Stat. at Large, 223. ‡ Ib. 469.

ternal taxation and to amend an act entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes,' approved June 30th, 1864, and acts amendatory thereof," in its 9th section* imposes—

"On all *iron*, not otherwise provided for, advanced beyond muckbar, blooms, slabs, or loops, and not advanced beyond bars, and band, hoop, and sheet iron, &c., a tax of $3 per ton.

"On plate iron, &c., and cut nails and spikes, &c., a tax of $5 per ton.

"On *steel made directly from muckbar, blooms, slabs, or loops, a tax of* $3 *per ton.*

"On stoves and hollow castings in all conditions, whether rough, tinned, or enamelled, and on *castings of iron*, not otherwise provided for, a tax of $3 per ton."

The act in that same section† imposes—

"On all manufactures, not otherwise provided for, of cotton . . . wood . . . iron . . . steel, or of other materials, a tax of 5 *per cent. ad valorem.*"

The same act in a subsequent, its 10th, section‡ exempts—

"Castings for iron bridges, malleable iron castings unfinished, and castings of all descriptions made specially for locks, safes, looms, spinning machines, steam engines, hot air and hot water furnaces, and sewing machines, and not sold or used for any other purpose, and upon which a tax was assessed and paid on the article of which the casting was part.

"Steel made from iron *advanced beyond* muckbar, blooms, slabs, or loops in ingots, bars, rails made and fitted for railroads, sheet, plate, coil or wire, hoop-skirt wire, covered or uncovered; car-wheels, *thimble-skeins and pipe-boxes*, and springs, tire and axles *made of steel* used exclusively for vehicles, cars, or locomotives; and clock springs, faces, and hands."

We have thus far last spoken of an act of July 13th, 1866. By an act of March 2d, 1867, it was enacted,§

"That on and after March 1st, 1867, in addition to the articles

* 14 Stat. at Large, 130, 131.

† P. 132.

‡ Pp. 148, 149, 150.

§ 14 Stat. at Large, 477.

now exempt by law, the articles and products hereinafter enumerated shall be exempt from internal tax, namely, *thimble-skeins and pipe-boxes made of iron.*"

With these statutes on the statute-book Van Arsdale, a manufacturer of iron castings, &c., brought the suit already referred to. The question presented by the suit was whether iron castings, cast for thimble-skeins and pipe-boxes, between the first day of September, 1866, and the first day of March, 1867, were subject to an internal tax under the act of Congress of July 13th, 1866.

Evidence having been given tending to show that up to July, 1866, thimble-skeins and pipe-boxes had not been made of steel, but only of iron, the court instructed the jury that the act in question "exempted from taxation thimble-skeins and pipe-boxes, whether made of steel *or iron*, cast or wrought."

Verdict and judgment having been given for the plaintiff, the collector, whose counsel had contended that the exemption applied only when the articles were made of *steel*, brought the case here.

Mr. J. W. Cary, for the manufacturer, and in support of the charge:

To sustain the construction given by the government, the word "steel" at the beginning of the clause of the second paragraph of the 10th section of the act of July 13th, 1866, commencing "steel made from iron," &c., must necessarily operate upon and qualify every article specified in the clause.

Does it? We think not. First, observe the punctuation; after the word "uncovered," there is a semicolon, and then follows "car-wheels, thimble-skeins, and pipe-boxes," articles that are never made of steel, and then comes the following: "and springs, tire, and axles *made of steel.*" Now if the intention was to have the word "steel" at the beginning of the clause qualify every article named in the clause, why did Congress deem it necessary to again use the word "steel," so as to say that only "springs, tire, and axles *made of steel*" should be exempt? Is not this the explanation,—that having

exempted car-wheels, thimble-skeins, and pipe-boxes, articles never made of steel, and which were to be exempt without reference to the material of which they were made, that they deemed it necessary to subsequently use the word "steel" so as to confine the exemption of certain articles afterwards named to such only as should be made of steel.

Again, it must be presumed that Congress in exempting thimble-skeins and pipe-boxes, intended to exempt something which had an existence and was liable to taxation; otherwise, why the necessity of the exemption? It is a fact beyond question that these articles were never made of steel, but of iron. Then must we not necessarily come to the conclusion that it was the intention to exempt thimble-skeins and pipe-boxes made of iron?

The act of March 2d, 1867, exempting "thimble-skeins and pipe-boxes made of *iron*," is but to make more clear the exemption meant to be given by the 10th section of the act of July 13th, 1866.

Mr. G. H. Williams, Attorney-General, contra.

Mr. Justice STRONG delivered the opinion of the court.

The question in controversy arises under the act of July 13th, 1866. That was an act "to reduce internal taxation, and to amend an act entitled 'An act to provide internal revenue to support the government, to pay interest on the public debt, and for other purposes; approved June 30th, 1864, and acts amendatory thereof.'" By its ninth section it was enacted that there should be assessed, collected, and paid "on stoves and hollow ware in all conditions, whether rough, tinned, or enamelled, *and on castings of iron*, not otherwise provided for, a tax of three dollars per ton." This included iron castings of every kind, except castings for iron bridges, unfinished malleable iron castings, and castings made specially for locks, safes, looms, spinning machines, steam engines, hot air and hot water furnaces, and sewing machines, and not sold or used for any other purpose, and upon which a tax was assessed and paid on the article of

which the casting was a part. All these were exempted from tax by the tenth section, and special provision was therefore made for them. It is, therefore, clear that castings made for thimble-skeins and pipe-boxes, between September 1st, 1866, and March 1st, 1867, were subject to a tax of three dollars per ton, unless they were specially exempted. This we do not understand to be controverted. But it is insisted that they were exempted by the tenth section of the act. That section, it should be borne in mind, had reference to the provisions of the revenue act of June 30th, 1864, as amended by the act of March 3d, 1865, which imposed taxes upon most, if not all, of the articles which, in 1866, it was proposed to put upon the free list. It carried out the design avowed in the title, a reduction of taxation. It mentioned in detail and in alphabetical order certain products, articles, and classes of articles which had been previously taxed, and it declared that they should be exempt from internal taxation. Among these was "steel made from iron, advanced beyond muckbar, blooms, slabs, or loops, in ingots, bars, rails made and fitted for railroads, sheet, plate, coil or wire, hoop-skirt wire, covered or uncovered, car-wheels, thimble-skeins, and pipe-boxes, and springs, tires, axles made of steel used exclusively for vehicles, cars, or locomotives, and clock-springs, faces, and hands." But was this an exemption of all thimble-skeins and pipe-boxes, as ruled in the court below, or only of those articles when made of steel? Waiving consideration of the question whether the exempting clause did not refer to the ad valorem tax of five per cent., which the act imposed on all manufactures not otherwise provided for, wholly or in part of cotton, . . . wood, . . . iron, steel, . . . or other materials, rather than to the specific tax upon the materials of which those manufactures, when finished, were wholly or in part composed, we think the exemption cannot be construed beyond thimble-skeins and pipe-boxes made of steel and used for vehicles, cars, or locomotives, and, consequently, that it did not include thimble-skeins and pipe-boxes made of iron. It is quite evident to us that all the articles enumerated in this

clause of the exempting section were steel articles. If this is not so, the act is plainly self-contradictory. Its tenth section must be construed in connection with its other sections, and so construed, if possible, that effect shall be given to every part. But if we look at the ninth section it will be seen that the act imposed a specific tax upon bars, upon rails for railroads, upon sheet iron, plate iron, coil and wire, upon castings of iron for which no special provision was made, as also upon all steel made directly from muckbar, blooms, slabs, or loops. The act of 1864 had taxed all steel, but the act of 1866 was, in this particular, less comprehensive. It, however, imposed a tax upon all steel made directly from muckbar, blooms, slabs, or loops. It is in view of these provisions of the ninth section, and in harmony with them, that the exemptions made by the tenth section are to be construed. It cannot be admitted that the same act which taxed specifically certain varieties of iron in one section, expressly exempted them in the next. Such inconsistency is not to be attributed to Congress. Nor is it at all necessary. The imposition of taxes and the declared exemptions are perfectly consistent with each other if the exempting clause is construed, as it may be, to include only articles made of steel. Thus steel itself is taxed when made directly from muckbar, blooms, slabs, or loops, and exempt when made from more advanced iron. Bars and rails are taxed when made of iron, as are sheet iron, plate iron, iron coil and wire, but they are exempt when made of the described variety of steel. Such a construction, and such alone, preserves the consistency of the act and gives effect to every part. And it is the natural construction. The excepting clause includes three classes of articles. The first is steel made from iron in an advanced state, whether, when made, it be ingots, bars, rails for railroads, sheet, plate, coil, or wire, or hoop-skirt wire, whether covered or uncovered. The second class is car-wheels, thimble-skeins, and pipe-boxes, and springs, tires, and axles, made of steel, used exclusively for vehicles, cars, or locomotives. The third class is clock-springs, faces, and hands.

But why, it is asked, if only steel articles were intended to be embraced in the clause, repeat the qualification? Why add to the words "springs, tires, and axles," the superfluous words "made of steel?" The reason will be evident when the whole act is considered. It is to be observed that the articles mentioned in the first class are those made of a particular kind of steel, namely, that made of iron advanced *beyond* muckbar, blooms, slabs, or loops. Upon such steel no tax was imposed by the ninth section, though one had been by the act of 1864. It is true, as we have said, the ninth section levied a tax upon steel, but it was upon such steel only as was made directly from muckbar, blooms, slabs, or loops, not from iron in a higher state of advancement. The second class embraces articles made of steel generally, used exclusively for vehicles, cars, or locomotives. They are exempt, if made of steel, no matter what the kind of steel may be, whether made from muckbar, blooms, slabs, or loops, or from iron advanced beyond those stages. It was therefore necessary to repeat the qualification "made of steel," for had it not been repeated, only those car-wheels, thimble-skeins and pipe-boxes, and springs, tires, and axles, or the last three named of them, which were made of a particular kind of steel, would have been exempted. The repetition enlarged the list. Thus there is no force in the argument that the use of the words "made of steel" was superfluous and unmeaning, if the exempting clause was designed to include only steel articles.

It is further said that when the act was passed thimble-skeins and pipe-boxes were not made of steel, and witnesses testified that they never knew that material employed for such articles. From this it is argued that Congress must have intended to exempt them when made of iron, for they must be presumed to have intended an exemption of something that had an existence. There is some plausibility in the argument, but it is more specious than sound. Congress must have known that of late years the uses of steel as a substitute for iron had been rapidly increasing. It was but a short time before that steel rails, tires, and axles had come

into use. Thimble-skeins and pipe-boxes are used in connection with axles, and it would seem, therefore, to have been not an unreasonable presumption that Congress contemplated the probable substitution of steel in their manufacture, even if they were aware that the substitution had not already been made. The exemption itself was an encouragement to the use of steel.

It may be added that our opinion respecting the meaning of the exemption and its extent has some confirmation in the fact that in 1867 Congress, by a new enactment, expressly exempted thimble-skeins and pipe-boxes "*made of iron.*" Such legislation indicates, at least, a conviction on their part that those articles were not placed in the free list by the act of 1866.

We think, therefore, the Circuit Court erred in instructing the jury that the act of 1866 exempted from taxation thimble-skeins and pipe-boxes, whether made of steel or iron, cast or wrought, and that no taxation on them could be lawfully assessed.

JUDGMENT REVERSED, AND A VENIRE DE NOVO AWARDED.

NOTE.

AT the same time with the preceding case was adjudged another from the same circuit, on the same general subject, and depending on certain parts of the statute already quoted; the new case having, however, two additional questions. It was the case of

ERSKINE *v.* VAN ARSDALE.

1. Under the act of March 2d, 1867, thimble-skeins and pipe-boxes, made of iron, are exempt from duty, whether cast or wrought.
2. Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to recover them.

3. Where an illegal tax has been collected, the citizen who has paid it and has been obliged to bring suit against the collector is entitled to interest, in the event of recovery, from the time of the alleged exaction.

IN this suit Van Arsdale sued Erskine, a collector of internal revenue, to recover back certain taxes paid by him after March 2d, 1867, on thimble-skeins and pipe-boxes made of iron. Upon the trial—there having been evidence tending to show that thimble-skeins and pipe-boxes are made *from castings*, or, in other words, undergo a process of manufacture before they become these articles in a completed or finished state—the court instructed the jury that, "by the act approved March 2d, 1867, thimble-skeins and pipe-boxes made of iron are exempted; these articles are exempt, whether cast or wrought, and that no tax could be legally assessed after the date of that act."

Passing to another part of the case, the court also instructed the jury, that "if the collecting officer had notice at the time of payment from the taxed person that the tax was illegal, and that he would take measures to recover it back, the action may be maintained for all the taxes paid."

The court also instructed the jury, that if they found for the plaintiff they might add interest.

To these instructions exception was taken, and the question whether any of them were erroneous was now before this court by writ of error.

Mr. G. H. Williams, Attorney-General, for the plaintiff in error; Mr. J. W. Carey, contra.

The CHIEF JUSTICE delivered the opinion of the court.

In regard to the first instruction given, it is not denied that the act of March, 1867, did exempt thimble-skeins and pipe-boxes. But it is claimed that the taxes paid were assessed upon them as castings, and that the charge was calculated to mislead the jury.

We think otherwise. It is true that by the act of July 13th, 1866, a duty of three dollars a ton was imposed on castings of iron not otherwise provided for. By the same act, however, castings for iron bridges, malleable iron castings, and certain other castings, were exempt. Under this act, we have already decided that thimble-skeins and pipe-boxes of iron were subject

to duty; but by the act of March 2d, 1867, these articles were expressly exempted, and we think it would be too narrow a construction to say that the castings were liable, the articles themselves being exempt. This disposes of the first exception.

We think, as respects the second one, that there is no error in the charge prejudicial to the defendants. Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them.

The third exception is to the instruction, that if the jury found for the plaintiff they might add interest. This was not contested upon the argument, and we think it clearly correct. The ground for the refusal to allow interest is the presumption that the government is always ready and willing to pay its ordinary debts. Where an illegal tax has been collected, the citizen who has paid it, and has been obliged to bring suit against the collector, is, we think, entitled to interest in the event of recovery, from the time of the illegal exaction.

JUDGMENT AFFIRMED.

THE YOSEMITE VALLEY CASE.

[HUTCHINGS *v.* LOW.]

1. A party by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party.
2. The power of regulation and disposition over the lands of the United States conferred upon Congress by the Constitution, only ceases under the pre-emption laws when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. He then is entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the pre-emption laws give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others.

Statement of the case.

3. The United States by the pre-emption laws do not enter into any contract with the settler, or incur any obligation that the land occupied by him shall ever be put up for sale. They simply declare by those laws that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.
4. The case of *Frisbie* v. *Whitney* (9th Wallace, 187), affirmed.
5. The case of *Lytle* v. *The State of Arkansas* (9th Howard, 333), explained and distinguished from the present case.
6. The act of Congress of June 30th, 1864, granting the Yosemite Valley and the Mariposa Big Tree Grove to the State of California passed the title of those premises to the State, subject to the trust specified therein, that they should be held for public use, resort, and recreation, and be inalienable for all time.

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

On the 30th of June, 1864, Congress passed an act,* granting to the State of California the cleft, or gorge, in the Sierra Nevada Mountains, situated in the county of Mariposa in that State, known as the Yosemite Valley, with its branches and spurs, in estimated length fifteen miles, and in width one mile, with the stipulation that the State should accept the grant upon the express condition that the premises should be held for public use, resort, and recreation, and should be inalienable for all time, except that leases for portions of the premises for periods not exceeding ten years might be made, the income derived therefrom to be expended in the preservation and improvement of the premises, or the roads leading thereto. The act provided that the boundaries of the grant should be established, at the cost of the State, by the Surveyor-General of the United States for California, whose official plat, when affirmed by the Commissioner of the General Land Office, should constitute the evidence of the *locus*, extent, and limits of the cleft, or gorge; and that the premises should be managed by the governor of the State, with eight other commission-

* 13 Stat. at Large, 325.

ers to be appointed by him, who should receive no compensation for their services.

By the same act Congress also granted to the State the tract of land embracing the grove of mammoth trees in Mariposa, known as "the Mariposa Big Tree Grove," the grant to be accepted upon similar conditions as the grant of the Yosemite Valley, and the premises to be held for like public use, resort, and recreation, and to be also inalienable for all time, but with the same privilege as to leases.

At the first session of the legislature of California, subsequently held, an act was passed by which the State accepted the grant thus made of the Yosemite Valley and Big Tree Grove, upon "the conditions, reservations, and stipulations" contained in the act of Congress, and the governor and eight commissioners, who had previously been appointed by him during the recess of the legislature, were constituted a board of commissioners, "with full power to manage and administer the grant made, and the trust created by the act of Congress," and to make rules and regulations for the government, improvement, and preservation of the premises. The act also provided for the appointment by the commissioners of a guardian of the premises, and made it a penal offence in any one to commit wilfully any trespass thereon, to cut down or girdle the trees, to deface or injure the natural objects, to fire the wood or grass, or to destroy or injure any bridge or structure thereon, or other improvement.

On the 19th of May, 1864, six weeks previous to the passage of the act of Congress making the grant to the State, Hutchings entered the valley of the Yosemite and settled upon lands therein, with the intention, according to his declarations, and the findings of the court, to acquire the title to the same under the pre-emption laws of the United States. There were then on the premises a house, outhouses, and a fence inclosing about three acres. These improvements Hutchings purchased of the previous occupant, and he had ever since resided upon the premises, and had improved and cultivated them. The valley at the time was unsurveyed, and no other acts than the settlement thus

made and continued had ever been done by him to acquire the title, unless soliciting the State and Congress to recognize his claim can be called such acts. At the time of his settlement, Hutchings was possessed of all the qualifications required of settlers under the pre-emption laws of the United States.

The principal one of these laws, and the one to which all subsequent acts refer, is the act of September 4th, 1841,* entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights." The tenth section of this act provides that any person of the class designated therein, who shall make a settlement upon the public lands, to which the Indian title has been extinguished, and *which has been previously surveyed*, and shall inhabit and improve the same, and shall erect a dwelling thereon, shall be authorized to enter with the register of the proper land office, by legal subdivisions, one quarter section of land, to include the residence of the claimant, upon paying to the United States the *minimum price* of said land, subject to certain specified exceptions, among which is that no lands included in any reservation by any treaty, law, or proclamation of the President, or reserved for salines, or for the support of schools, or *for other purposes*, shall be liable to entry. By other sections various provisions are enacted for the determination of conflicting claims, and the preservation of proofs of settlement and improvement. When all the prerequisites are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver, and after a reasonable time to enable the land officers to ascertain whether there are any superior claims, and whether the claimant has complied, in all respects, with the law, he is entitled to a patent of the United States.†

By the sixth section of the act of Congress of March 3d, 1853, entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights there-

* 5 Stat. at Large, 453.

† See opinion of Mr. Justice Miller, 9 Wallace, 194.

in, and for other purposes,"* all the public lands of the United States in California, *whether surveyed or unsurveyed*, are made, with certain exceptions, subject to the above act of September 4th, 1841, "with all the exceptions, conditions, and limitations therein," with a proviso that when unsurveyed lands are claimed by pre-emption notice of the claim shall be filed within three months after the return of the plats of surveys to the land offices, and proof and payment shall be made prior to the day appointed by the President's proclamation for the commencement of the sale including such lands; the entry of such claims to be made by legal subdivisions according to the United States survey; and also that settlement on unsurveyed lands shall be authorized only where the settlement is made within one year after the passage of the act. This last limitation was subsequently extended by act of Congress two years from March 1st, 1854.†

In some of the States and Territories, by acts of Congress, settlements are authorized on unsurveyed lands, and by the 7th section of the act of May 30th, 1862, "to reduce the expenses of the survey and sale of the public lands of the United States,"‡ this privilege was extended to California.

Under this last act, Hutchings conceived that he had a right to settle upon the unsurveyed lands of the United States in the Yosemite Valley, and by the above acts of 1841 and 1853 could acquire and had acquired such a vested interest in the premises, to the extent of one hundred and sixty acres, that the United States could not transfer their title to the State, or dedicate the land to any public use. He therefore refused to surrender the possession to the commissioners appointed by the State. The defendant also refused to take a lease from the commissioners, though offered to him at a mere nominal rate for ten years. They accordingly, in November, 1867, brought the present action, alleging in their complaint that the State was owner in fee of the premises, and that they were entitled to the possession as commissioners of the State.

* 10 Stat. at Large, 246. † Ib. 268. ‡ 12 Id. 410.

Pending the action, and on the 20th of February, 1868, the legislature of California passed an act granting to the defendant and one Lamon, each, one hundred and sixty acres of land in the Yosemite Valley; the part granted to the defendant containing his improvements and the premises in controversy. The second section of the act provided that the act should take effect from and after its ratification by Congress. It had never been thus ratified. A bill to ratify it passed the House of Representatives, but failed in the Senate.

The District Court of the State, in which the action was commenced, adjudged that the defendant was right in his view of his interest, and accordingly gave judgment in his favor. The Supreme Court of the State reversed the judgment, and ordered judgment for the possession of the premises in favor of the commissioners. The defendant now brought the case here for review.

Mr. G. W. Julian, for the plaintiff in error:

The question is, whether Congress, in granting the valley to the State of California, could divest the right of Hutchings under the pre-emption laws? In other words, had Hutchings such a vested right or interest, that Congress could not divest it by the grant of it to another party?

The case of *Lytle* v. *The State of Arkansas** is in point. There Cloyes, the pre-emptor, selected his claim under the act of Congress of May 29th, 1830, authorizing and regulating pre-emptions. A later act, dated June 15th, 1832, granted to the Territory of Arkansas one thousand acres for a court-house and jail at Little Rock, including the tract claimed. Before this grant the pre-emption right of Cloyes had accrued under the act of 1830, and he had proved his right, and done everything he could do to perfect it. The court says:

"By this grant to Arkansas, Congress could not have intended to impair vested rights. The grants of the one thousand acres

* 9 Howard, 333.

and of the other tracts must be so construed as not to interfere with the pre-emption of Cloyes."

This case is referred to in the case of *Barnard* v. *Ashley*.* The court says:

"In Lytle's case we declared that the occupant was wrongfully deprived of his lawful rights of entry under the pre-emption laws, and the title set up under the selection of the governor of Arkansas was decreed to Cloyes, the claimant: this court holding his claim to the land to have been a legal right by virtue of the occupancy and cultivation, subject to be defeated only by a failure to perform the conditions of making proof and tendering the purchase-money."

This, it will be seen, deals with the right of pre-emption as "a legal right, by virtue of the occupancy and cultivation" of the pre-emptor, "subject to be defeated *only* by a failure to perform the conditions of making proof and tendering the purchase-money."

The court adds:

"The claim of pre-emption is not that shadowy thing which by some it is considered to be. Until sanctioned by law it has no existence as a substantive right; but when covered by the law, it becomes a legal right, subject to be defeated only by a failure to perform the conditions annexed to it."

If this is true of Cloyes, it must be equally true of Hutchings, and he can only lose his claim "by a failure to perform the conditions annexed to it," when those conditions shall be tendered for his performance. In giving the opinion in *Lytle* v. *The State of Arkansas*, the court says:

"The adventurous pioneer, who is found in advance of our settlements, encounters many hardships, and not unfrequently dangers from savage incursions. He is generally poor, and it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres. That this is the national feeling, is shown by the course of legislation for many years."

* 18 Howard, 43.

This expresses the spirit and policy of the pre-emption laws, as they have been understood by the whole country till quite recently. The pioneer settler has been treated as the favorite of the law. The court says further:

"It is a well-established principle, that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the pre-emptive right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than offer to enter the land, which the register would not permit him to do. This claim of pre-emption stands before us in a light not less favorable than it would have stood if Cloyes or his representatives had been permitted by the land officers to do what, in this respect, was offered to be done."

Cloyes was held excused, on the ground that he had done everything in his power to perfect his claim. Hutchings did the same. Cloyes had gone further in complying with the conditions of title than Hutchings has done, but each went as far as he could, and neither was in default. The good faith of the government is involved in both cases. There is no justice in the argument that the pre-emptor, after having made valuable improvements, and expended his money thereon, and complied with all the conditions of title which were within his power, may nevertheless be driven from his possession, his improvements confiscated, and the land conveyed to another, with notice of all the facts, who can hold it discharged from all the equities of the pre-emptor.

It is conceded on all hands, that if a pre-emptor, in addition to the other acts required of him, has *paid* for the land, he has acquired a vested right to it, and the government is bound to give him the title; but this concession yields the whole case. If the government is bound by its good faith

to protect the settler at one stage of his claim, and as to one condition of title, it is bound to protect him at all stages, and as to every condition. The condition of final payment is no more vital or sacred, either to the settler or the government, than any of those which precede it. In the language already quoted, "it is fit that his enterprise should be rewarded by the privilege of purchasing the favorite spot selected by him, not to exceed one hundred and sixty acres;" but of what value is this "privilege," if the settler holds it at the mere will of the government, which may cut it off at any moment? And what must be thought of a government which holds its individual citizens to perfect good faith, by compelling them to perform their engagements, and yet violates its own faith to the settler, that he should have a home on its lands on specified conditions, with which he is ready and willing to comply? Nor is this question answered by saying that the settler has the option to abandon his pre-emption at any time, and that the government, therefore, should be equally free. The option of the pre-emptor is properly given by the law; for if he abandons his claim, the land, with the improvements made upon it, reverts to the government, which loses nothing. The transaction has been likened to a contract for the sale of lands, in which the owner retains the title as security for the purchase-money. On the other hand, if the settler, after spending his money and his time in improving his pre-emption, and making for himself a home, as in the present case, is driven away by the government, without any default on his part, he loses all unjustly, and is without remedy.

This case of *Lytle* v. *The State of Arkansas* deserves particular regard, not only because the principles laid down in it settle the case under consideration in favor of Hutchings, but because it sustains the true land policy of the nation, as universally understood, till within a very recent period.

The counsel on the other side will rely on *Frisbie* v. *Whitney*;* the only authority of any Federal court which

* 9 Wallace, 187.

can be cited in favor of the doctrine now set up as to the rights of settlers under the pre-emption laws. The case is in the face of the explicit language of the court in the case of *Lytle* v. *The State of Arkansas*, of which, however, it takes no notice. It is against the current of authorities on the question in the Federal courts, and against the whole spirit and policy of our land laws. It refers to the different sections of the pre-emption act of 1841, but takes no notice of the judicial constructions of the act in favor of the rights of the settler under that act. It cites in support of the points affirmed sundry opinions of attorneys-general and decisions of State courts, which at best are not binding and conclusive authorities in this court; while it fails to discuss or scarcely to refer to the strong cases decided in the Federal courts in favor of an opposite interpretation of the right of pre-emption.

The facts also of the case of *Whitney* v. *Frisbie* are peculiar; and the claim of Hutchings cannot be held as conclusively settled adversely, to our view, by that single case.

Mr. E. L. Goold, contra.

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

The simple question presented for determination is whether a party, by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. If such be the effect of mere settlement, with a view to pre-emption, upon the power of Congress to grant the lands occupied to another party, it must operate equally to deprive Congress of the power to reserve such lands from sale for public uses of the United States, though needed for arsenals, fortifications, lighthouses, hospitals, custom-houses, court-houses, or for any other of the numerous public purposes for which property is used by the government. It would require very clear

language in the acts of Congress before any intention thus to place the public lands of the United States beyond its control by mere settlement of a party, with a declared intention to purchase, could be attributed to its legislation.

The question here presented was before this court, and was carefully considered, in the case of *Frisbie* v. *Whitney*, reported in the 9th of Wallace. And it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent for the land from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use.

The decision in *Frisbie* v. *Whitney* was pronounced by a unanimous court, and subsequent reflection has satisfied us of its entire soundness. The construction there given to the pre-emption laws is, as there stated, in accordance with the construction uniformly given by that department of the government, to which the administration of the land laws is confided, and by the chief law officers of the government to whom that department has applied for advice on the subject. It is the only construction which preserves a wise control in the government over the public lands, and prevents a general spoliation of them under the pretence of intended settlement and pre-emption. The settler being under no obligation to continue his settlement and acquire the title, would find the doctrine advanced by the defendant, if it could be maintained, that he was possessed by his settlement of an interest beyond the control of the government, a convenient protection for any trespass and waste, in the destruction of timber or removal of ores, which he might think proper to commit during his occupation of the premises.

The argument of the defendant's counsel, and his criticism upon the decision in *Frisbie* v. *Whitney* are founded upon a misapprehension of the language used in some previous opinions of this court, and particularly of language used in the opinion in the case of *Lytle* v. *The State of Arkansas*.* This last case and the language there used did not escape the attention of the court in the consideration of *Frisbie* v. *Whitney*. That and other cases, in which the equitable rights of persons claiming under the pre-emption laws had been protected against the legal title acquired by others in disregard of their rights, were cited by counsel and commented upon on the argument, as asserting principles inconsistent with the construction of those laws given by the court. But the court, without examining in the opinion the cases cited in detail, stated that in nearly all of them the party, whose equitable right was protected, had acquired a vested right by action of the land officers, and payment and

* 9 Howard, 333.

acceptance of the price of the land, which those officers had disregarded; and that in the other cases the successful party had established his legal right of preference of purchase over others under existing law; and that in these particulars those cases were widely different from that of *Frisbie* v. *Whitney*.

But inasmuch as counsel of the defendant,* who appeared also as one of the counsel in this last case, again urges upon our attention the case of *Lytle* v. *Arkansas*, and contends with much earnestness that it sustains principles in conflict with those expressed in *Frisbie* v. *Whitney*, and also settles the case at bar in favor of the defendant, we are induced to state at some length what that case was, and what it actually decided. In that case a pre-emptioner by the name of Cloyes claimed a right to make an entry of certain lands under the act of Congress of May 29th, 1830. That act gave to every occupant of the public lands prior to its date, who had cultivated any part thereof in the year 1829, a right to enter at the minimum price, by legal subdivisions, any number of acres not exceeding one hundred and sixty, including his improvements, provided the land was not reserved for the use of the United States, or either of the several States. It required, before any entries could be made, that proof of settlement or improvement by the claimant should be made to the satisfaction of the register and receiver of the land district, pursuant to rules prescribed by the Commissioner of the General Land Office. Under rules thus prescribed proof was made of the cultivation and improvement of Cloyes which was satisfactory to the register and receiver, and payment of the price was offered by him. Those officers held that he was entitled to enter one of the fractional sections claimed, the one upon which his improvement was made and not the others, and issued a certificate to him to that effect. The plats of the township

* Mr. Julian's name was printed as one of the counsel to the brief filed for the defendant in *Frisbie* v. *Whitney*, though his name is not given in the report of the case in 9th Wallace, he not having participated in the oral argument.—REP.

where the land was situated not having been furnished by the surveyor-general, as required, the formal entry with the register could not be made, but in lieu thereof, under instructions of the Commissioner of the General Land Office, proof identifying the land claimed was allowed to be filed. The act of 1830 expired in one year, and the public surveys of the land were not completed until December, 1833, and were not returned to the land office until the beginning of 1834. Cloyes had thus done all that he could do to perfect his right to the title of the United States under a law which opened the land for sale in limited quantities, at specified prices, to its occupants and cultivators.

Subsequently, in July, 1832, Congress passed an act giving to parties entitled to pre-emption under the act of 1830 one year from the time when the township plats should be returned, to enter the lands. Under this act the heirs of Cloyes, he having died, made payment to the receiver for the fractional section to which his pre-emption claim was allowed in 1830, as already stated, and also for the fractional sections to which his claim was rejected, and applied to the register to enter them, but that officer refused to allow the entry. The court held that, so far as the fractional quarter section to which the claim was allowed by the register and receiver in 1830 was concerned, the refusal did not affect the right of the claimant. And it is with respect to the inability of Cloyes to make the entry in 1830 for want of the township plats which the surveyor-general had failed to return, and the refusal of the register to allow the entry subsequently under the act of 1832, that the language cited by counsel was used by the court; namely, that, "It is a well-established principle that when an individual, in the prosecution of a right, does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him. In this case the pre-emption right of Cloyes having been proved, and an offer to pay the money for the land claimed by him, under the act of 1830, nothing more could be done by him, and nothing more could be required of him under that act. And subsequently, when

he paid the money to the receiver, under subsequent acts, the surveys being returned, he could do nothing more than to offer to enter the land, which the register would not permit him to do. This claim for pre-emption stands before us in a light not less favorable than it would if Cloyes or his representatives had been permitted by the land officers to do what in this respect was offered to be done."

There is no question about the correctness of the doctrine here announced; it is only a familiar principle which is stated, that where one offers to do everything upon which the acquisition of a right depends, and is prevented by fault of the other side, his right shall not be lost by his failure.

The principle only applies where, by law or contract, the acquisition of a right is made dependent upon the performance of certain specified acts. There can be no such thing as the acquisition of a right of pre-emption, that is of a right to be preferred in the purchase of property of the United States, until such property is open for sale. In the case from Arkansas the law of 1830 authorized the entry and sale of the land to the occupants and cultivators; it prescribed certain things to be done to entitle them to purchase; these things were done, or would have been done by Cloyes if the officers of the government, appointed to aid in their performance, had not failed in their duty. The hindrance to the complete performance of everything required of the claimant could not impair his rights. And it was immediately after affirming the validity of his claim, notwithstanding this hindrance, that the court used the language upon which so much stress is placed by the defendant's counsel, to the effect that a claim of pre-emption is not a "shadowy right," but when covered by the law is a legal right, subject to be defeated only by a failure to perform the conditions annexed to it. This language was undoubtedly correct as applied to the claim of Cloyes, as then situated, which gave occasion to it, and it is in a general sense correct as applied to every claim of pre-emption. Such claim, it must be remembered, is only a claim to be preferred in the purchase of lands of the United States in limited quantities, at fixed prices, when the lands

are offered for sale in the usual manner. When one has acquired this claim by complying with the conditions of the law for its acquisition he has a legal right to be thus preferred, when the sale is made, as against others asserting a similar right under the law, which the court will enforce in proper cases. But the claim of pre-emption, as already said, can never arise when the law does not provide for a sale of the property. Until thus sanctioned by the law the claim, as stated by the court in that case, has no existence as a substantive right.

There is nothing in the case of the defendant which is at all analogous to that of Cloyes. Here the land occupied by the defendant was never offered for sale, but was excluded from any possible sale by appropriation to perpetual public use, resort, and recreation. Nothing was therefore required or could be required of the defendant for the acquisition of the title, and nothing could be, or was done by him to that end.

In the case from Arkansas, the right of Cloyes had been defeated by the failure of the executive officers to perform their duty under the law, he having complied fully with its provisions, except so far as he was prevented by such failure, and having thus acquired a right to the title of the government. In the present case no default on the part of the executive officers is alleged or pretended. The ground of complaint is that the defendant could not acquire the title under the pre-emption laws, because Congress had granted the land to the State and thus withdrawn it from sale. In the one case it is the action of the executive officers which is the ground of complaint; in the other it is the action of Congress.

The court cannot assume, and then found a decree upon the truth of the assumption, that the defendant would have complied with the provisions of the pre-emption laws, had Congress never made the grant. Nor could it make any such assumption, even if it were held that those laws surrendered unconditionally the entire public lands to settlers, instead of allowing to them the privilege of pre-emption provided the lands are offered for sale in the usual manner.

Opinion of the court.

In June, 1832, Congress passed an act granting to the Territory of Arkansas one thousand acres of land contiguous to and adjoining the town of Little Rock, for the erection of a court-house and jail. The grant was not of any specific tract, but only of a specified quantity to be selected by the governor. Previous to the selection by him and previous to the grant, Cloyes had acquired a right, as already stated, to the title of the government. This was a vested right, and the court very properly held that Congress, in making the grant to Arkansas, did not intend to impair vested rights, and that the grant must be so construed as not to interfere with the pre-emption of Cloyes. No other ruling would have been consistent with settled principles. Had the lands in the Yosemite Valley been open for sale, and had Hutchings acquired a right to the title of the United States by complying with all the conditions upon which the acquisition of that title depended before the grant to the State, his position would have some analogy to that of Cloyes. His right to the title would then have been a vested right, and the grant to the State would have been construed so as not to interfere with his pre-emption. But his declarations as to what he would have done had the land not been withdrawn by Congress from the operation of the pre-emption laws, are unavailing for any purpose.

The case of *Lytle* v. *Arkansas* is confessedly the strongest case which counsel can cite in support of the anomalous views advanced by him. It is manifest from the statement we have made of the facts of that case, that neither the case itself nor the language used in the opinion of the court, when considered in connection with the facts, give the slightest countenance to those views; but that the decision of the court and the doctrines expressed in the opinion, are in entire harmony with the principles announced in *Frisbie* v. *Whitney*. The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of a *legal right to the land* occupied by him as against the owner, the United States;

and the acquisition by him of a *legal right as against other parties to be preferred in its purchase*, when the United States have determined to sell. It seems to us little less than absurd to say that a settler or any other person by acquiring a right to be preferred in the purchase of property, provided a sale is made by the owner, thereby acquires a right to compel the owner to sell, or such an interest in the property as to deprive the owner of the power to control its disposition.

The act of California, of February, 1868, attempting to grant the premises in controversy to the defendant is, by its own terms, inoperative until ratified by Congress. No such ratification has ever been made, and it is not believed that Congress will ever sanction such a perversion of the trust solemnly accepted by the State.

JUDGMENT AFFIRMED.

CANAL COMPANY *v.* HILL.

1. To ascertain the intent of the parties is the fundamental rule in the construction of agreements. When the substantial thing which they have in view can be gathered from the whole instrument, it will control mere formal provisions, which are intended only as a means of attaining the substance.
2. The state of things and surrounding circumstances in which an agreement is made will be looked at as a means of throwing light upon its meaning, especially for the purpose of ascertaining what is its true subject-matter.
3. A grant of a right to draw from a canal so much water as will pass through an aperture of given size and given position in the side of the canal is substantially a grant of a right to take a certain quantity of water in bulk or weight. What that quantity is may be ascertained from the character and depth of the canal, the circumstances under which the water is to be drawn, and the state of things existing at the time the grant is made.
4. The grantee will be entitled to draw this quantity even though it may be necessary to have the aperture enlarged, if it can be done without injury to the grantor.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

The Chesapeake and Ohio Canal Company were the pro-

prietors of a canal which, at its terminus in Georgetown, D. C., was much higher than the Potomac River, and so furnished by its surplus water a considerable water power. This power the company had for many years been in the habit of leasing out to the proprietors of various mills built not far from the side of the canal. The general form of lease used was that of a grant of the right, for a certain term of years, at a certain rent, and under certain restrictions, to draw from the canal so much water as would pass through an aperture of specified size (stated in square inches) in an iron plate fixed in the side of the canal. From this aperture the water was carried in a trunk, or forebay, to the premises of the lessee and discharged upon his water-wheel. The rent usually charged had been $2.50 or $3 per annum for every square inch contained in the aperture agreed upon.

In January, 1864, one Hill, proposing to build a paper-mill to be run by water from the canal, but not yet having built it, procured from the company a lease, by which they granted and agreed that he should have full right, for the term of twenty years from the first of July, 1864 (with privilege of renewal indefinitely), to draw off from the Chesapeake and Ohio Canal, at Georgetown, to be used at his property at the corner of Potomac and Water Streets (from the level between locks No. 4 and No. 5), so much water as would pass through an aperture of 200 square inches in an iron plate not exceeding half an inch in thickness, to be used solely for propelling the machinery of a paper-mill and appurtenant works; but on certain conditions, viz.: the aperture was to be of such height and length in the clear as to make just 200 square inches (which probably meant, as this court assumed, that it was to be rectangular); its lower edge not to be nearer the canal bottom than two feet; it was to be plain and square through the plate, with no attachment or contrivance to increase the quantity of water to be drawn, and to have a sliding gate in front, so that the water-power granted might be totally or partially stopped, as the provisions of the contract might require. The forebay, or trunk, for conducting the water through the canal-

bank, from the aperture, was to be covered or bridged; and said forebay, aperture, and gate were to be so constructed as not to interfere with the navigation of the canal or use of the tow-path; and to be of good and substantial construction, so as not to occasion any leakage; and *to be constructed* at the cost of the lessee, *under the direction and superintendence, and subject to the approval of, the proper officer of the company;* and, at like cost and *under like superintendence, to be altered from time to time, as might be considered necessary by the company or its proper officer*, to prevent or lessen the inconvenience to the navigation of the canal and use of the tow-path. It was also stipulated that the officers and servants of the company should at all times have free access to the lessee's premises to examine and repair the embankments of the canal, and the lessee's fixtures and works connected with drawing off the water, for the purpose of seeing whether the water was wasted by leakage, or whether more water was drawn off than was granted. Hill agreed to pay for the use of the water leased an annual rent of $500 for the first ten years, and $600 for the last ten; and it was made a condition that if the rent should not be paid, or if the other stipulations should not be complied with, or if he should alter or enlarge the forebay, or trunk, or aperture, or apply the water to other uses, without the consent of the company, they might cut off the water until he should make amends or satisfaction. It was also agreed that if the water should at any time be found deficient for the uses of navigation (which was declared to be the primary purpose of the canal), the supply to the mill might be diminished or stopped, as might be requisite for meeting the deficiency.

Having got his lease, Hill went to work and, at a cost of about $40,000, erected his mill; placing it at a distance of 350 or 450 feet away from the canal; a greater distance than were the other mills. This required a long forebay. Such a one he built, of solid masonry, giving to it, however, both less capacity and less pitch than marked those of the other mills, and adopting in his mill a turbine wheel instead of the ordinary overshot. The result of the whole was that

he received about half the quantity of water which commonly came to the other mills, through an aperture in the canal of 200 square inches.

In this state of things, Hill agreed with the company, in May and June, 1866, that he should have a lease for such additional quantity of *water-power* as was required for his mill, upon the usual terms, on payment of a bonus of $5 per inch for such additional quantity. Hereupon the engineer of the company and the superintendent of Hill's mill went to work to ascertain by actual experiment how much additional water was required. Their mode of operation was to *raise* the slide in the side of the canal through which the water flowed to the mill until a sufficient quantity to propel it flowed through. The mode in which the forebay to Hill's mill had been constructed allowed them no other mode. Accordingly, the head of water being weak, as the gauge was lifted *upwards* and the water flowed from towards the *top* of the canal, the operation brought the slide to a point only five inches below the surface of the canal, and no sufficiency of water could be had until an aperture of 700 inches—an aperture therefore of 500 inches more than the one originally agreed on—was made. This aperture was accordingly left, and the water that went through it was used by Hill.

At the next quarter-day the company required him to pay the bonus and quarter's rent upon the additional 500 inches, which he refused to do. They then were about to shut off the water when Hill filed this bill in the court below for an injunction. After answer, the court referred it to Mr. W. R. Hutton, engineer of the company, to report as a commissioner and expert upon certain matters concerning this and the other mills.

Mr. Hutton reported that the other mills discharged about $6\frac{2}{3}$ cubic feet per second for every 100 inches of aperture, while Hill's 200 discharged at only the rate of $6\frac{1}{2}$; though, with allowance for the location of the mill and other circumstances, he ought, through his 200 inches, to have received at least 11 cubic feet per second.

This question, also, was referred to him:

"How many square inches of aperture, situated at the distance of *two feet from the bottom of the canal*, and of the width of complainant's forebay, would furnish a flow of water equivalent in power and effect to the additional water received by the complainant under his new contract, over and above his original grant?"

Mr. Hutton reported that the additional 500 inches provided for by the contract were the equivalent of but 217 inches drawn *two feet from the bottom, and under the conditions of the lease.*

The court accordingly made the injunction perpetual, so long as Hill should pay rent on 217 inches.

From that decree it was that the company now appealed.

Mr. W. S. Cox, for the Company, appellant in the case:

The error of the decree is that it makes a new contract for the parties. As to the original contract, the canal company did not stipulate to furnish a certain quantity of water —so many inches of water—but so much water as will pass through an aperture of 200 square inches. It is obvious that the quantity that will pass through such an aperture will vary with different conditions. But the shape and location of the aperture itself were left entirely to the judgment and discretion of the lessee, with the single condition that the lower edge of the aperture be not nearer than two feet to the canal bottom. In this case Hill has the whole benefit of his grant. He could not, with an aperture of 200 square inches, receive water through the forebay constructed by himself under more favorable conditions than at present.

Then, in regard to the new contract. As to this, Hill pretends that in ascertaining the quantity of water, or the size of aperture necessary, the company's officers ought to have enlarged the aperture *horizontally*, more than *perpendicularly*, on the principle that the greater pressure at the lower depth would have made a smaller number of additional inches sufficient for a given work than would have to be

added perpendicularly. And this is the sole answer to their claim, that he was bound to pay according to the number of inches of aperture. But it was his own act that made the mode of measurement adopted the only one practicable. The forebay was of his own construction. The lease contemplated a construction of the forebay by the lessee, subject only to the approval of the officer of the company. The forebay, of course, was always constructed of such width as to be adapted to the machinery. It would not, for instance, be wider than the mill-wheel, for, as to the excess of width, the stream of water paid for would simply be wasted. Hill had made his forebay of solid stone, and in his lease stipulated that it should not be enlarged without the written consent of the company. It is not pretended that he ever applied for that consent, much less that it was granted. On the contrary, he expected to get the additional water by a vertical addition to the column of water, and his own foreman assisted in making the measurement in that way; nor did he ever dissent from it.

The only hardship in this case is the result of the appellee's own miscalculation. He obtained his water-grant first and then erected his mill, with such machinery that the water leased by him was insufficient to propel it. He then obtained all the water that he needed, on the same terms that were usual in all water leases, and found that those terms were onerous because his peculiar machinery required a more extended grant than usual, and therefore seeks to change the terms of his contract by the authority of the court.

Mr. W. D. Davidge, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The large investment of capital made by the appellee in sole reliance on the water-power which the lease secures, with the full knowledge which the appellants had of this reliance and intended investment, renders it necessary that we should look carefully to the substance of the original

agreement, of January, 1864, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties, which is the fundamental rule in the construction of all agreements. It is not to be presumed that they intended to provide for a certain aperture in the canal without respect to the amount of water it would discharge and the purpose which that water was to accomplish. What the appellee sought was *water-power* to drive the machinery of an expensive mill. The appellants knew this to be his object, and the thing leased or granted was intended to be, and in fact was, *water*, as the means of creating such power. It was not only water, but a *certain quantity* of water, namely (in the words of the lease), "so much water as will pass through an aperture of two hundred square inches," under certain conditions specified. The parties clearly had in view a fixed quantity of water to be received in a given time. In ascertaining their mutual rights under the lease, it is important to know how much this quantity was. When we know that, we know the substance of the agreement.

Now, in speaking of a certain quantity of water, we always have reference to its cubical contents, its bulk or weight. We mean so many gallons, or hogsheads, or cubic feet of water. We have no reference to surface or sectional measurement. A square foot, or a square inch of water, expresses no quantity at all. But when we speak of the quantity which will *pass through* a square foot, or square inch of aperture, in a certain time, then our words have meaning. The size and position of the aperture so carefully prescribed in the lease were intended merely as a means of measurement of the real thing granted, namely, that certain quantity of water per second, or per hour, which the parties had in mind, and about which they were dealing. If we can ascertain this, we can easily adjust the mutual rights of the parties. Can it be ascertained from the terms of the lease, aided by the light derived from the evidence in the cause? We think it can. And in making this inquiry we have a right to examine into the state of things existing at the time

and the circumstances in which the lease was made. This kind of evidence is especially pertinent when the inquiry is as to the subject-matter of the agreement.

The amount of water which will be discharged through an aperture of a given size will depend upon the form of the aperture, the head under which the water is drawn, and the freedom from obstruction with which it is permitted to flow away.

In this case the lessee is not restricted as to the form of the aperture, except, perhaps, that it shall be rectangular. So that it contains only the content of two hundred square inches he is at liberty to construct it of such relative dimensions as he sees fit. Of course it is his interest to give it the greatest length and the least height consistent with a free flow. Such a form gives the greatest head of water above the aperture and increases the discharge. The right of superintending and directing the construction of the works, reserved to the lessors, cannot be construed to restrict this discretion of the lessee. That right has more particular reference to the manner of the construction, and the solidity and safety of the work, in reference to the structure and uses of the canal. It cannot be allowed to annul the substantial rights of the lessee without becoming repugnant to the grant.

In the next place, as to the head of water under which the leased water is to be drawn, the only restriction imposed upon the lessee in this regard is that the lower edge of the aperture shall not be nearer to the canal bottom than two feet. Of course he is entitled to draw under the entire head of water above this two feet. What that head shall be will depend upon the usual depth or height of water in the canal. It is to be presumed that the parties contracted in reference to that. The lessors do not guarantee any particular head; but any alteration of their canal which would materially and permanently reduce it would abstract from the lessee a portion of the water, which he must be presumed to have stipulated for. The contract was made in reference to the state of things existing at the time it was made.

In the third place, as to the freedom from obstruction with which the water shall be permitted to flow off and be discharged: the lease imposes no restrictions upon the lessee on this point, except that he shall not affix to the aperture any attachments or contrivances for increasing the flow beyond what it would otherwise be. This restriction relates to the well-known law of practical hydraulics that an adjutage or nozzle attached to the outside of an aperture prevents the vein of water from contracting and increases the aggregate discharge. With this exception, however, the lessee is entitled to draw off from the canal as much water as the two-hundred-inch aperture will discharge when it flows free from any obstruction except that which may arise from the ordinary use of the water in milling operations. This is a very important and essential right of the lessee, and one of which the lessors cannot deprive him under any pretence of regulating and directing the mode of constructing his forebay and its appendages. If the water is discharged under a four-feet head (which is about what the evidence shows to be the fact), the practical rules of hydraulics determine exactly how much water will issue in each second of time from a rectangular aperture of two hundred square inches, provided it meets with no obstruction outside, as where it falls out freely into open space. Mr. Hutton, the commissioner, to whom, as an expert, certain important questions in the cause were referred by the court below, says that the other mills discharge about six and two-thirds cubic feet per second for every one hundred inches of aperture. This is probably a little less than the discharge would be in the open air, because there is undoubtedly some obstruction to the flow arising from the passage of the water through the flumes.

This rate of flow would give to the appellee, through his aperture of two hundred square inches, a discharge of thirteen and one-third cubic feet per second. Something like this amount of actual water must be considered as within the intent of the parties to give and receive.

But the fact became developed that, by the faulty con-

struction of the appellee's forebay or flume, arising from its small capacity, its great length, and its want of pitch or slope, he does not get but about one-half of the amount of water which is due to the aperture in the canal, and which he ought to receive. This fact is established beyond a question by the evidence.

Now, certainly, it is not equitable, even if it be in accordance with the strict letter of the lease, that the appellee should be compelled to pay full rent for half the quantity of water, which, according to the real intent of the parties, he stipulated for. True it may be said that it was his own fault, to construct the forebay in the disadvantageous manner which he has done, and that if he wants the full benefit of his lease he should tear it down and reconstruct it differently. This would require a great sacrifice on his part, and would not benefit the appellants. Surely, a court of equity cannot be compelled to consign a party to such a clumsy and ruinous remedy as this. The appellants can sustain no injury by allowing the lessee to take so much water as he supposed he was getting and as they supposed they were granting. This would be in accordance with the substance of the agreement. It would carry out the intent of the parties as gathered from the whole instrument and the state of affairs existing at the time it was made, and would save the lessee from a ruinous expenditure for alterations rendered necessary by his mistake.

It may be said that the location of the appellee's mill at a distance of 350 or 400 feet from the canal was a circumstance which the lessors had a right to take into account, and that by having to conduct the water such a long distance it could not be supposed that the lessee would be able to draw as much water through a given aperture as if his mill had been located nearer. This is true; and whatever is due to that circumstance the appellants are entitled to insist upon. But Mr. Hutton, the commissioner, says in his report that, making all allowance for the particular circumstances and location of the appellee's mill, he still ought to receive at least eleven cubic feet per second through the aperture named in

the lease; whereas, in fact, he receives only twenty-three cubic feet through an aperture of seven hundred inches, or at the rate of only about six and a half cubic feet per second for an aperture of two hundred inches.

But if the appellee should receive eleven cubic feet of water per second, to which his lease may justly entitle him, this is not sufficient to drive his mill; and the question then arises as to the additional quantity which he requires, and which, according to the witnesses, is about twelve cubic feet per second. It appears from the case that the appellants agreed to furnish him the additional amount required for his mill on the usual terms; and that the appellee accepted the offer; but, in consequence of the controversy which arose about the measurement of the water and his refusal to comply with their demands, they declined to carry out the agreement. Had the appellants been right in the position they assumed, they would have been justified in making this refusal. But we think that they were not right, and, therefore, that they are bound to carry the agreement into effect, and that the appellee is entitled to receive the additional amount required, at the same rate, and on the same terms at which he was to have the original two hundred square inches. And as eleven cubic feet of water per second are due to the original aperture named, the additional twelve cubic feet per second would require, according to the report of the commissioner, a corresponding aperture of two hundred and seventeen square inches. For this additional amount of aperture the appellee should be charged, making the total amount four hundred and seventeen square inches. But to get the water to which it entitles him, as his forebay and apparatus are at present constructed, he is obliged to have, in reality, at the canal, an aperture of seven hundred square inches. The appellants were willing that he should have this aperture by increasing the height of the original aperture, but insisted that he should pay for seven hundred inches, according to the terms of the lease. Under the peculiar exigencies of the case, obstructed as the flow now is, we think that for the aperture named he should be charged

for only four hundred and seventeen square inches. This is precisely the view on which the decree below is based, and we think it is correct. But as the difficulty between the parties originated from the mistake made by the appellee himself in the construction of his forebay and works, he ought not to recover any costs from the appellants, either in this court or the court below.

The result is that the decree must be

AFFIRMED, BUT WITHOUT COSTS IN EITHER COURT.

Mr. Justice STRONG, with whom concurred Mr. Justice DAVIS, dissenting:

I dissent from the judgment given in this case. In my opinion, it practically makes a new contract for the parties; a contract to which they never agreed. It holds that what, at most, was an expectation of results amounts to a binding obligation that they shall follow. To this I cannot agree.

MORGAN'S ASSIGNEES *v.* SHINN.

1. A bill of sale of a vessel, absolute in its terms, may be shown by parol evidence to be only a mortgage.
2. The facts that the bill of sale was recorded; that the vessel was re-enrolled in the name of the transferee; that a policy of insurance was taken out in his name as owner, and that no note or bond was taken by him, will not overcome positive evidence that the bill was taken as a mere security for a loan.
3. A mortgagee of an interest in a vessel, not in his possession, is under no obligation to contribute for repairs which he did not order. The ship's agents are not his agents, and they act under no authority from him. And it makes no difference though the vessel be registered in his name.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

The assignees of Morgan, Rhinehart & Co. filed a bill in the court below against one Shinn, to enforce contribution to the repayment of advances made by their assignors for

the repairs and expenses of a steamer called the Fairfax; the bill averring that Shinn was owner of one-fourth part of the vessel, and Shinn by his answer denying this averment of his ownership, and asserting a mere interest as mortgagee. The question of fact, and one preliminary to any other question, therefore, was, whether Shinn was in fact such a part owner? The evidence on the two sides of the case seemed thus:

1st. *Evidence to support the allegation of ownership.*

In September, 1855, Morgan, along with three other persons, named Comstock, Savage, and Kelly (Kelly being a resident of Philadelphia), became joint owners of the vessel by purchase from the government, and she was re-enrolled in their names as joint owners, on or about the 10th of October of that year, and made one of a line running between New York and Washington, called the "Atlantic Steamship Company." The shares of Morgan and of Comstock were held for the benefit of Morgan, Rhinehart & Co., a firm composed of Morgan, Comstock, and one Rhinehart. The firm was also the ship's husband, and as such they made advances for repairs and expenses.

On the 2d of October, 1865, Kelly made a bill of sale of one-fourth of the vessel to Shinn; and the bill, at the instance of Shinn, was forthwith recorded. On the 23d of October, the vessel was re-enrolled, Morgan now swearing that Shinn was owner of one-fourth of her. And on the 15th of February, 1866, Comstock having insured the vessel in his own name "for the benefit of all concerned," and the vessel having been destroyed by fire, Shinn, along with Morgan and Savage, signing themselves the three "owners of one-fourth each of the steamer Fairfax," ratified his act.

Of course, if unexplained, these facts would have been sufficient to prove the allegation of ownership. But there was—

2d. *Evidence to disprove the allegation.*

It was asserted in the answer that the bill of sale, though absolute in its terms, was in fact a mortgage given to secure

Shinn for a sum of money agreed to be lent by him to Kelly. Such was the positive testimony of Shinn himself. The scrivener, also, who prepared the instrument, testified that on or about the day of date of the bill of sale, both parties to it called at his office; that they stated Kelly wished to purchase an interest in a steamer, and that Shinn was willing to advance the necessary money. Some conversation then occurred respecting the security which should be taken by Shinn, and it was suggested by one of the parties that a regular bill of sale should be given to him by Kelly. The bill was accordingly prepared, together with a power of attorney from Kelly to Shinn, empowering him to receive all money due or that might become due to Kelly in the District of Columbia, and to attend to all matters in which Kelly might have an interest or concern. The amount of the consideration was left blank in the bill, for it was not then known how much might be required to be advanced. Shinn took no note from Kelly for the money advanced; though when the amount needed was ascertained, having paid it to Morgan, who was acting in the matter for Kelly, Shinn took Morgan's receipt as for money paid to Kelly.

But, admitting that Shinn might in fact have been but a mortgagee, there remained another question of fact. Did Morgan, Rhinehart & Co., when they advanced money for the vessel, *know* that Kelly was really the owner, and that Shinn was not? And if they did not so know, then had Shinn in any manner held himself out as owner, or authorized the advances, or had they been made on his credit?

Bearing on these points Morgan, one of the firm, testified that when Shinn paid the money he said "it was money advanced by him for Kelly to pay Kelly's share of the ship." Certain letters of Morgan and of Comstock to Kelly were produced, written in November, 1865, and in the spring of 1866, in which they both wrote to Kelly as owners with them of the vessel. One from Comstock to Kelly, dated November 7th, 1865, says:

"The steamer Fairfax is doing wonders, taking everything into consideration. She is called the flag-ship of the line. We

are now making preparations to organize the company, and we intend putting the Fairfax in at $50,000. *Will this meet your approval?*"

One by Morgan to him, March 24th, 1866, after the vessel had been burned, says:

"I must again appeal to you to remit me all the money you can command. I need it badly. We have had to pay all of the accounts against the Fairfax as well as the other boats, and have had but very small return."

After the steamer was burned, Comstock said she was insured for $15,000, and that none of them, and *especially Kelly*, would lose anything by the disaster. He also asked Shinn to sign a paper for Kelly respecting the ship, and to act for him by virtue of his power of attorney; and what perhaps seemed even more important, Morgan afterwards made an affidavit stating in effect that Kelly was the owner of one-fourth of the vessel.

The court below dismissed the bill, and from this decree the appeal was taken.

Messrs. J. M. Carlisle and J. D. McPherson, for the appellant:

The court erred in dismissing the bill, whether the defendant, Shinn, was part owner or merely mortgagee.

I. The defendant was owner and not mortgagee.

1. He took an absolute bill of sale.

2. He caused it to be recorded.

3. He joined as part owner in ratifying the act of another part owner who had insured the vessel.

4. In the transaction between him and Kelly no note was given—no agreement made for interest.

II. If the defendant was mortgagee—

1. He was a mortgagee in possession; for having derived his interest from a part owner, the possession of the other part owners was his possession.*

* 3 Kent, 132, part 5, § 45.

2. As mortgagee in possession he was liable. "The weight of our American decisions," says Kent,* "has been in favor of the position that a mortgagee of a ship *out of possession* is not liable for repairs or necessaries procured on the order of the master, and not on the particular credit of *the mortgagee who was not in the receipt of the freight;* though the rule is *otherwise when the mortgagee is in possession*, and the vessel employed in his service."

Mr. Justice STRONG delivered the opinion of the court.

We think the averment of the answer that the bill of sale was intended by the parties to be only a security, is sufficiently proved. The testimony of Shinn himself is positive. It is confirmed by that of the scrivener, and the testimony of both is entirely uncontradicted. The fact that a power of attorney was given at the same time with the bill is also significant. Why empower Shinn to collect money which might become due to him in the District of Columbia, and to attend to his interests, if Kelly then parted with all his ownership in the vessel? There is no evidence that he had any other interests in the District, and he was a resident of Philadelphia. It is true the bill of sale was recorded at the instance of Shinn; but that was necessary, whether it was a security or an absolute transfer. It is true also that the vessel was re-enrolled on the 23d of October, 1865 (Morgan having sworn that Shinn was then the owner of one-quarter), but the new enrolment did not negative the fact that Shinn was only a mortgagee. So also, Shinn joined with Savage and Morgan in ratifying the act of Comstock in taking out a policy of insurance on the vessel, but that was not inconsistent with his present assertion that he held the property as a security for a debt. He took no note for the money advanced by him for Kelly. He could not have taken one when the bill was made, for it was then not known how much he might be required to advance. But

* 3 Kent, 134, part 5, § 45, and numerous cases there cited; Flanders *v.* Merritt, 3 Barbour, 207.

when the money was advanced, he did take a receipt in Kelly's name. If in truth a debt was created, the fact that a bond or note was not taken does not make the bill of sale any the less a mortgage, though the absence of a bond or a note is to be considered in inquiring whether a debt was intended.* Nothing in all this, we think, overcomes the positive evidence that the arrangement was a loan rather than a purchase, and that the bill of sale was intended only as a hypothecation to secure the loan.

It is not questioned that an instrument absolute in its terms may be shown by parol evidence to be only a mortgage.† It is true that if trust and confidence have been reposed in it by third parties, with the honest belief that it was indefeasible, and such parties have been misled by its form, they have a right to insist that, as to them, it shall be what upon its face it purports to be. But there is not even an allegation in this case that Morgan, Rhinehart & Co. were misled. Much less is there any proof that Shinn held himself out to them as owner, or that he authorized the advances, or that they were made on his credit. On the contrary, the evidence, so far as it goes, tends strongly to show that the firm knew the real nature of the transaction, and that they believed Kelly remained an owner notwithstanding the bill of sale. There can, indeed, be no pretence that Morgan, Rhinehart & Co., did not know from the beginning that the bill of sale was a mere security for money advanced by Shinn.

If then Shinn was only a mortgagee of an undivided interest in the vessel, as we think he was, he is under no obligation to contribute for repairs which he did not order. A mortgagee out of possession is not liable for repairs.‡ The benefit of repairs enures primarily to the mortgagor. A mortgagee out of possession does not appoint the master, or the ship's agents. They do not act under authority from

* Hoyer *v.* Savington, 1 Peere Williams, 268; Russell *v.* Southard, 12 Howard, 139.

† Babcock *v.* Wyman, 19 Howard, 289.

‡ 1 Parsons on Shipping and Admiralty, 129, and cases collected in note 1.

him, and he is not entitled to the freight earned. Nor does it make any difference though the vessel be registered in his name.*

It certainly cannot be maintained that Shinn was in possession, or that he ever authorized the expenditure that was made. And as this is a bill, not by third parties who furnished the supplies, but in right of some joint owners, the ship's husband, against a mortgagee of another joint owner, authority from the mortgagee to contract for the supplies is indispensable to any liability on his part.

DECREE AFFIRMED.

UNITED STATES v. SINGER.

1. The 20th section of the act of Congress of July 20th, 1868, is as follows:

> "That on the receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of 50 cents for every proof gallon, together with the special tax of $4 for every cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery, as estimated under the provisions of this act."

Held, that the meaning of this section is, that in no case shall the distiller be assessed for a less amount of spirits than 80 per cent. of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent. he shall also be assessed upon the excess.

2. The law is constitutional. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be "uniform throughout the United States." The tax here is uniform in its

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* Howard v. Odell, 1 Allen, 85; Myers v. Willis, 17 C. B. 77; 18 Id. 886.

operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law establishes one rule for all distillers.

3. The 15th section of the act of Congress of July 20th, 1868, required every distiller to provide a warehouse for the storage of spirits manufactured by him, and declared that such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, should be a bonded warehouse of the United States, and should be under the direction and control of the collector of the district, and in charge of the internal revenue storekeeper assigned thereto by the commissioner. The 52d section of the same act enacted that the compensation of these storekeepers should be determined by the commissioner and be paid by the United States. The distillers in this case provided the warehouse directed, and the Commissioner of Internal Revenue assigned a storekeeper to take charge of it at a compensation of $5 a day, and he remained in charge of the warehouse from the 4th to the 25th of March, 1869, inclusive, for which service he was entitled to $110, and was paid that amount by the United States. Subsequently to this, and on the 29th of March, 1869, Congress passed a certain joint resolution to which was annexed a proviso that, after the passage of that act, the proprietors of all internal revenue bonded warehouses should "reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses," and that the same should be paid into the treasury and accounted for like other public moneys; *Held*, that the official bond of the distillers and their sureties, in this case executed in January, 1869, does not bind them to make reimbursement of this money expended by the United States before the joint resolution was passed: 1st, because the joint resolution only contemplates the reimbursement of expenses and salary paid after its passage; and, 2d, because the reimbursement to the United States of moneys paid by them to their own officers or agents, in pursuance of a law in existence when the bond was executed, is not a duty so connected with, or naturally belonging to, the business of a distiller as to be within the reasonable contemplation of the parties to the bond at the time of its execution.

4. The official bond of parties covers not merely duties imposed by existing law, but duties belonging to and naturally connected with their office or business imposed by subsequent law, but the new duties must have some relation to or connection with such office or business, and not be disconnected from and foreign to both.

5. This case distinguished from that of *United States* v. *Powell* (14 Wallace, 493), in this, that there the moneys were expended by the United States, and one of the bonds in suit was executed, after the passage of the joint resolution.

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

The 20th section of the act of July 20th, 1868, entitled

"An act imposing taxes on distilled spirits and tobacco, and for other purposes,"* enacts:

"That on the receipt of the distiller's first return in each month, the assessor shall inquire and determine whether said distiller has accounted in his returns for the preceding month for all the spirits produced by him; and to determine the quantity of spirits thus to be accounted for, the whole quantity of materials used for the production of spirits shall be ascertained; and forty-five gallons of mash or beer brewed or fermented from grain shall represent not less than one bushel of grain, and seven gallons of mash or beer brewed or fermented from molasses shall represent not less than one gallon of molasses. In case the return of the distiller shall have been less than the quantity thus ascertained, the distiller or other person liable shall be assessed for such deficiency at the rate of fifty cents for every proof gallon, together with the special tax of four dollars for every cask of forty proof gallons, and the collector shall proceed to collect the same as in cases of other assessments for deficiencies; but in no case shall the quantity of spirits returned by the distiller, together with the quantity so assessed, be for a less quantity of spirits than eighty per centum of the producing capacity of the distillery as estimated under the provisions of this act."

The 15th section of the same act required every distiller to provide a warehouse for the storage of spirits manufactured by him, and declared that such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, should be a bonded warehouse of the United States, and should be under the direction and control of the collector of the district, and in charge of the internal revenue storekeeper assigned thereto by the commissioner. The 52d section of the same act enacted that the compensation of these storekeepers should be determined by the commissioner and *be paid by the United States*. On the 29th of March, 1869, Congress passed a joint resolution,† supplying omissions in the enrolment of certain appropriation acts, to which was annexed a proviso that, after the

* 15 Stat. at Large, 133, 134. † 16 Ib. 52.

passage of the resolution, the proprietors of all internal revenue bonded warehouses should "*reimburse* to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses," and that the same should be paid into the treasury and accounted for like other public moneys.

In this state of the statutory law the United States brought suit against Singer and Bickerdike as principals, and certain other persons as sureties, on a distiller's bond which all the said parties had signed, and whereby they covenanted that the principals should "in all respects, faithfully comply with the provisions of the law in relation to the duties and business of distillers, and pay all penalties incurred or fines imposed upon them for violation of any of the said provisions."

The government assigned as a breach that the said Singer and Bickerdike, "during the month of November, 1868, manufactured spirits at their distillery, and made return for that month to the assessor of the first collection district of the State of Illinois, of spirits so manufactured, and the quantity of spirits so returned was less than 80 per cent. of the producing capacity of said distillery, as estimated under the provisions of the internal revenue law, and, that thereupon, the said assessor, to wit, on the 10th day of February, A.D. 1869, proceeded to make an assessment against the said Singer and Bickerdike, for the deficiency in said return, which assessment, amounting to $26,089.60, the said Singer and Bickerdike had refused to pay."

Plea, that the said Singer and Bickerdike, "before the commencement of this suit, fully paid and satisfied all assessments lawfully made against them *for spirits produced at their said distillery since the date of the said bond.*"

The plaintiffs demurred, and thus raised the first point in the case.

By a second count the plaintiffs assigned as another breach of the bond that "one C. W. Davis, an internal revenue storekeeper, appointed by the Secretary of the Treasury of the United States, and assigned by the Commissioner of In-

ternal Revenue to the distillery warehouse of which said Singer and Bickerdike were proprietors, established by law, in connection with the said distillery, at a salary of $5 per day, had charge, as such storekeeper, of the said warehouse from the 4th to the 25th days, inclusive, of March, A.D. 1869, and became thereby entitled to the sum of $110 for the said services; which said last-named sum had been paid by the United States to the said Davis for his said services, and that it thereupon became the duty of Singer and Bickerdike, as such distillers and proprietors, to reimburse to the United States said sum; yet that though often requested, they had never paid it or any part of it."

To this count also the defendants demurred.

Judgment was given by the Circuit Court of the United States for the defendants, and this writ of error was brought, the United States assigning as error:

1st. That by the already-quoted 20th section of the act of July 20th, 1868, the defendants, Singer and Bickerdike, were liable to be taxed for a quantity of spirits equal to 80 per cent. of the producing capacity of their distillery, whether the amount actually manufactured equalled that quantity or not.

2d. That by the resolution of March 29th, 1869, the defendants were bound to repay to the United States what the latter had paid to Davis as storekeeper.

Messrs. Edward Roby, and H. S. Monroe, in support of the rulings below:

I. The demurrer admits that Singer and Bickerdike have paid the tax upon every gallon of spirits manufactured by them, and the question thus is, whether under the law they can be compelled to pay a tax upon *what they have not manufactured, upon what in fact never had an existence.* Now

1. Congress cannot have intended, in this enactment, to enable the government to collect a tax upon property not existing within its jurisdiction, or to compel the citizen to pay a tax upon what he has not produced, and on what perhaps he could not produce. The object was to enable the

officers of the government to assess and collect a tax upon what should be actually produced, and *upon that alone*. And a careful inspection of the first nineteen and the last eighty-nine sections of this law will show that this was the real and only object.

2. If the construction above given to this section is not the true one, then it is void. 1st. Because Congress cannot levy a tax on nothing. 2d. Because the tax it seeks to levy is not and cannot be uniform. 3d. Because a deficiency is not a tax, but is a penalty, and cannot be enforced by an action upon the distiller's bond; and, 4th. Because the legislature attempted the exercise of a judicial power in excess of legislative authority.

1st. Congress cannot levy a tax upon nothing. It is admitted that this tax of $26,089.60 was levied upon nothing; for confessedly the spirits, upon which the assessor sought to impose it, never had an existence. Now a *tax* cannot exist without a subject. It cannot be imposed except upon person or property. Congress can no more tax nothing than it can create the subject of taxation out of nothing. This is not a tax upon the person. It is not a tax upon property, and it does not come within any legal definition of duty, impost, or excise.

2d. The Constitution requires that taxes shall be uniform. If the construction set up by the government is the true one, this is not and cannot be uniform. The tax on spirits is (say) 50 cents per gallon and $4 per barrel. Had the distiller in this case produced the full amount of 20 per cent. more than the estimated capacity of his distillery, his tax would have been 50 cents a gallon and $4 per barrel. He made say only 50 per cent. of the estimated capacity, and the tax he had to pay is $1 on every gallon and $8 on every barrel of what he actually manufactures. This result inevitably follows, if the imposition is considered as a tax.

3d. This imposition upon a deficiency is a penalty and not a tax within the meaning of the law. Congress, in effect says to the distiller, "You have a distillery here, with which, by proper care and skill, you ought to make say 2000

gallons of spirits per day. You can certainly make 1600 gallons. If you do not make but 1000 gallons, you shall be punished for your want of skill, and shall pay $300 on account of this 600 gallons you ought to have made, and $4 per barrel besides." Is it not the same as though Congress had in terms imposed a penalty upon the distiller who should not succeed in making 80 per cent. of what his distillery was, in the opinion of the officers of the government, capable of producing? If it is a penalty, it cannot be enforced against the distiller in this action. It can only be enforced, if at all, by information or some proper proceeding for its collection.

But can it, as a penalty or a tax, be sustained? Can Congress impose a penalty upon the citizen because he has not the same skill and knowledge that others have? Can it, by legislation, punish the citizen because he is unable to conduct his business with the same success that others do? If so, it has the power to destroy every interest of business in the nation, because it is safe to say that while one man may make large amounts yearly in carrying on his business, nine in the same business may make but little more than a living.

4th. If the section is to receive the construction set up by the government the legislature will exercise judicial power; for the assessor will have power to decide upon the rights of distillers without an opportunity on their part to be heard. The property of the citizen is forfeited and transferred without trial and judgment in the courts.

II. The second question arises upon the demurrer to the second count of the declaration, and is whether the defendants are liable under the bond sued on for the payment of the storekeeper's wages, amounting to $110.

We do not propose to discuss the question as to whether Singer and Bickerdike, in some other form of action, might not be liable for this sum, though it seems to us they would not. Our position, which is sufficient for this case, is that these sureties cannot by any possibility be held liable for it; that they cannot by an *ex post facto* resolution of Congress,

operating upon the condition of this bond executed before the date of this resolution, be held liable under it.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the United States, contra.

Mr. Justice FIELD delivered the opinion of the court.

Two questions are presented by the counsel of the government for our consideration in this case. One relates to the construction which should be given to the twentieth section of the act of July 20th, 1868, imposing taxes on distilled spirits; and the other relates to the liability of the defendants on the bond in suit to reimburse the United States the amount paid by them to the storekeeper placed in charge of the warehouse of the distillers.

Upon the construction which should be given to the twentieth section of the act of July, 1868, there appears to have been some conflict of opinion among different Circuit judges. The real or supposed hardship in particular cases of imposing a tax upon an amount of spirits equal to eighty per cent. of the producing capacity of the distillery, where a less quantity has been in fact manufactured by the distiller, has undoubtedly had much to do in inducing a construction leading to a different result. But the hardship of the operation of particular provisions of a statute has properly no place for consideration where the language is unambiguous and the legislative intent is clear. And reading the section in question by itself there does not appear to us to be any ambiguity in its language, or any doubt as to its meaning. Its meaning is that in no case shall the distiller be assessed for a less amount of spirits than eighty per cent. of the producing capacity of his distillery, and if the spirits actually produced by him exceed this eighty per cent., he shall also be assessed upon the excess.

The other sections of the act, instead of conflicting, agree with this construction. There are running through the act two classes of provisions, one of which looks to the ascertainment of the quantity of spirits distilled, and the other to

the ascertainment of the producing capacity of the distillery. Thus the first section has reference to the spirits actually produced, and provides for the tax thereon. The fifteenth section compels every distiller to provide a warehouse, to be situated on and constitute part of his distillery premises, to be used only for the storage of distilled spirits of his own manufacture. The nineteenth section requires the distiller to make daily entries in books, kept for that purpose, of the grain and other materials used in the manufacture of spirits, and to render a sworn account three times each month of the number of gallons produced by him and placed in his warehouse. And the twentieth section makes it the duty of the assessor to inquire into and determine whether the distiller has accounted in his returns for all the spirits produced by him. These provisions are intended to secure the ascertainment of the quantity actually manufactured by the distiller. On the other hand, the ninth section provides "that every distiller, or person intending to engage in the business of distilling, shall previous to the approval of his bond cause to be made, under the direction of the assessor of the district, an accurate plan and description, in triplicate, of the distillery and distilling apparatus, distinctly showing the location of every still, boiler, doubler, worm-tub, and receiving cistern, the course and construction of all fixed pipes used, or to be used in the distillery, and of every branch thereof, and of every cock or joint thereof, and of every valve therein, together with every place, vessel, tub, or utensil, from and to which any such pipe shall lead, or with which it communicates;" and also showing "the number and location, and cubic contents of every still, mash tub, and fermenting tub, together with the cubic contents of every receiving cistern, and the color of each fixed pipe." One copy of the plan and description is required to be kept displayed in some conspicuous place in the distillery, one is to be kept by the assessor, and one to be transmitted to the Commissioner of Internal Revenue. Their accuracy is to be verified by the assessor, the draughtsman, and distiller, and no alteration in the distillery can afterwards be made with-

out the consent of the assessor, and any alteration made must be shown on the original, or by a supplemental plan and description, which is to be preserved in the same manner as the original. The tenth section requires a survey to be made by the assessor, with the aid of a skilful and competent person to be designated by the Commissioner of Internal Revenue, of every distillery used, and its true producing capacity estimated and determined, and reports of the same to be made in triplicate, one to be furnished to the distiller, one to be retained by the assessor, and one to be transmitted to the Commissioner of Internal Revenue. These several provisions are intended to secure information as to the producing capacity of the distillery; and then we have the concluding clause of the section under consideration, that in no case shall the quantity returned by the distiller, with the quantity assessed as deficit, be less than eighty per cent. of such capacity.

The system thus adopted was designed to prevent the secret production of spirits and consequent evasion of the government tax. And it seems well suited to accomplish this purpose; it at least reduces the limits within which fraud can be practiced to twenty per cent. of the capacity of the distillery. In view of the enormous frauds previously practiced upon the government in rendering accounts, this system cannot be justly charged with unnecessary harshness. Every one is advised in advance of the amount he will be required to pay if he enters into the business of distilling spirits, and every distiller must know the producing capacity of his distillery. If he fail under these circumstances to produce the amount for which by the law he will in any event be taxed if he undertake to distil at all, he is not entitled to much consideration.

It is suggested that as the distiller is required to make a return of the spirits actually manufactured by him under oath, the provision for a return of an amount equal to eighty per cent. of the producing capacity of the distillery cannot be complied with where a less amount has been produced. But we do not perceive any difficulty in this respect, or any

difficulty in giving effect to both provisions. The distiller should, as required, return under oath the true amount produced by him, and where this is less than the eighty per cent. he should add the difference, so as to obtain the amount for which the assessment is to be made. He can state in his return both the actual product of his distillery and the deficiency between that and the assessable amount.

The law is not in our judgment subject to any constitutional objection. The tax imposed upon the distiller is in the nature of an excise, and the only limitation upon the power of Congress in the imposition of taxes of this character is that they shall be "uniform throughout the United States." The tax here is uniform in its operation; that is, it is assessed equally upon all manufacturers of spirits wherever they are. The law does not establish one rule for one distiller and a different rule for another, but the same rule for all alike.

It follows from these views that the court below erred in overruling the demurrer of the plaintiffs to the third amended plea of the defendants, which raised the question we have considered as to the proper construction of the twentieth section of the act of July, 1868.

Upon the second question presented, which relates to the liability of the defendants on the bond in suit to reimburse the United States the amount paid by them to the storekeeper placed in charge of the warehouse of the distillers, our judgment is with the defendants. The bond in suit was executed in January, 1869. The fifteenth section of the act of Congress of July 20th, 1868, then in force, required every distiller to provide a warehouse for the storage of spirits manufactured by him, and declared that such warehouse, when approved by the Commissioner of Internal Revenue, on report of the collector, should be a bonded warehouse of the United States, and should be under the direction and control of the collector of the district, and in charge of the internal revenue storekeeper assigned thereto by the commissioner. The fifty-second section of the same act enacted

that the compensation of these storekeepers should be determined by the commissioner and be paid by the United States. The distillers in this case provided the warehouse directed, and the Commissioner of Internal Revenue assigned a storekeeper to take charge of it at a compensation of five dollars a day, and he remained in charge of the warehouse from the 4th to the 25th of March, 1869, inclusive, for which service he was entitled to one hundred and ten dollars, and was paid that amount by the United States. Subsequently to this, and on the 29th of March, 1869, Congress passed a joint resolution supplying omissions in the enrolment of certain appropriation acts, to which was annexed a proviso that, after the passage of the resolution, the proprietors of all internal revenue bonded warehouses should "reimburse to the United States the expenses and salary of all storekeepers or other officers in charge of such warehouses," and that the same should be paid into the treasury and accounted for like other public moneys. The question is whether the official bond of the distillers and their sureties in this case binds them to make reimbursement of this money expended by the United States before the joint resolution was passed. We are clear that this question must be answered in the negative and on two grounds: 1st, because the joint resolution only contemplates, in our judgment, the reimbursement of expenses and salary paid after its passage; and, 2d, because if that be not the true construction of the resolution, the reimbursement to the United States of moneys paid by them to their own officers or agents, in pursuance of a law in existence when the bond was executed, is not a duty so connected with, or naturally belonging to, the business of a distiller as to be within the reasonable contemplation of the parties to the bond at the time of its execution. The official bond of parties undoubtedly covers not merely duties imposed by existing law, but duties belonging to, and naturally connected with their office or business imposed by subsequent law. But the new duties should have some relation to or connection with such office or business, and not be disconnected from and foreign to

both. It would be extending the liabilities of obligors on such bonds beyond principle and precedent to hold them responsible for the reimbursement of moneys paid by government to its own officers or agents, because, subsequent to their payment, government declares that such reimbursement shall be made.

This case is distinguished from that of *United States* v. *Powell*, decided at the last term.* There the moneys were expended by the United States, and one of the bonds in suit was executed, after the passage of the joint resolution.

It follows from these views that the ruling of the court below in sustaining the demurrer of the defendants to the second count of the declaration was correct.

JUDGMENT REVERSED, and the cause REMANDED FOR FURTHER PROCEEDINGS, with leave to the defendants to plead anew to the first count of the declaration.

NOTE.—At the same time, and in a similar way with the preceding case, was adjudged the case of *United States* v. *Van Buskirk*, in which the same points arose as in *United States* v. *Singer*.

HEDRICK *v.* HUGHES.

1. The act of Congress of March 6th, 1820, admitting Missouri into the Union, and the act of March 3d, 1823, respecting grants of land to that State, without further grant or patent, vested in the State the 16th section of each township for school purposes; but where this section had been sold or disposed of by the government, it required the selection of other lands in lieu thereof by the register and receiver of the proper land district, and such selection when made and entered in the register's books, vested the title of such substituted lands in the State.
2. In such case, where the register's book, or the leaf supposed to contain the entry, is lost or destroyed, the fact of such selection may be proved by other evidence,—as, that the lands claimed to have been so selected had been treated and sold as school lands by the proper State authorities

* 14 Wallace, 493.

Statement, in the opinion, of the first point of the case.

near to the period when the selection should have been made; also, that the original township plat kept in the register's office had a memorandum on the lot in question that it was "reserved for schools."

3. Where a county school commissioner in Missouri kept in a book a record of his transactions in selling the school lands in the county, which was deposited in the county clerk's office, and preserved as a public monument among the county archives, it is *de facto* a public record, and proper evidence of his official acts. It is also admissible as the entries of a deceased person, made in the course of his official duty, in a matter of public concern, to prove his official transactions.
4. If a township plat be lost or destroyed, it may be proved by a copy; and memoranda on such copy, not contained in the original, if accounted for and explained, will not exclude the copy as evidence of the contents of the original, even though such memoranda be a translation of corresponding memoranda in the original.

ERROR to the Circuit Court for the District of Missouri.

Messrs. Montgomery Blair and F. A. Dick, for the plaintiff in error; Mr. T. T. Gantt, contra.

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

This was an action of ejectment brought by the plaintiff in error to recover a certain quarter section of land in Howard County, Missouri. The plaintiff claimed the land under a patent of the United States, granted to one Widdicombe, June 1st, 1868, upon a scrip certificate issued to the State of Kentucky, under the act of July 2d, 1862, donating lands to the several States for the support of agricultural colleges. The defendant, who had been in possession of the land for more than thirty years, and had erected expensive improvements on it, claimed title under a grant from the State of Missouri, made in 1832. The title of the State was derived in the following manner. By the 6th section of the act of Congress, passed March 6th, 1820,* entitled, "An act to authorize the people of the Missouri Territory to form a constitution and State government, &c.," it was, amongst other things, proposed for the acceptance of the convention, and,

* 3 Stat. at Large, 545.

Statement, in the opinion, of the first point of the case.

if accepted, to be binding on the United States, that "section sixteen," in every township, and when such section had been sold, or otherwise disposed of, other lands equivalent thereto, and as contiguous as might be, should be granted to the State for the use of the inhabitants of the township for the use of schools; also, all salt springs, not exceeding twelve in number, and six sections of land contiguous to each, for the use of the State, with other concessions stated in the act. These proposals were accepted by the convention. For the purpose of carrying out this grant as to school lands, an act was passed on the 3d of March, 1823,* by which it was enacted that in all cases in which "section sixteen" had been sold or otherwise disposed of, it should be the duty of the register and receiver of the respective land offices in whose districts such land might be, to select the like quantity of other lands equivalent thereto, from any of the unappropriated lands of the United States in that State, as nearly contiguous to said "section sixteen" as might be; and a descriptive entry of such selected lands should be made on the books of the register, specifying as well the township in which, as that for the use of which, the selection should be made; and the lands thus selected and located were, by the act, granted to the State, for the use of the inhabitants of the respective townships for the use of schools, instead of the sixteenth section so sold or disposed of.

The defendant insisted that section sixteen, in the township in which the lot in question was situated, had been sold by the United States prior to March 6th, 1820; that the register and receiver of the land district had selected other lands for the use of the township for school purposes under the act of 1823, and had made a descriptive entry thereof in the register's books in pursuance of the act; and that the quarter section in question (which was a part of section seventeen) was one of the tracts so selected, and thereby became the property of the State, and had been sold as such

* 3 Stat. at Large, 787.

Statement, in the opinion, of the first point of the case.

by the school commissioner of the county in 1832; and that a patent had been duly granted by the State in pursuance of such sale, under which the title of the defendant was regularly derived.

All the parts of this defence were duly proved except one. This was the selection and entry of the lot in question by the register and receiver, in lieu of "section sixteen," disposed of. The register's book contained no descriptive entry as directed by the act. The leaf that should have contained it (if it was made) being missing; and the original township plat (which would probably have indicated the fact) being also lost.

This hiatus in his case the defendant endeavored to supply by proof *aliunde*. He adduced the testimony of several witnesses to show that the lot in question had been rented out as school lands for several years prior to 1832, and that in that year it was sold, with other school lands, by Owen Rawlins, the county school commissioner, being the sale upon which the State patent was based. He then produced and offered in evidence from the county archives, kept in the clerk's office, a certain book or record, kept by Rawlins, containing a copy of his commission as school commissioner, and a history of his proceedings in selling the school lands; together with a list, in the handwriting of one Boon, of all the school lands of the county, including the lot in question; which entries were made in 1831–2, and both Rawlins and Boon were shown to have been dead many years. The defendant also produced a book purporting to contain a copy of the original township plats in the register's office (including the township in question), showing the various sections of land, and memoranda written on each section as to the disposition thereof, in which the quarter section in question had the words "reserved for schools" written upon it. As to the origin of this book James L. McNair testified that it was made by him in 1853; that he was then deputy clerk of Howard County; that he had before that time been clerk in the office of the register whilst his father held that office; that an act of the Missouri legislature directed the county

clerk to procure a copy of the township plats in the register's office; and that the witness was employed by Mr. Harding, the then clerk of the county court, and by Judge Todd, then register of the land office, to make the copy; that he made it carefully, and was satisfied that the book produced was a true copy—not, however, a literal copy of any one book then in the register's office, in all particulars. As to entries, the plat-book in the register's office would contain on any particular subdivision of land the letters "A.," "P.," with a number; on another book would be seen the name corresponding to this number; and, in compiling this copy, the witness would write down the name instead of the number—thus translating it, and condensing two books into one. The letters "A.," "P." signified that the tract had been *applied* for and *paid* for. In respect of reservations for schools, the words, "reserved for schools," were written on the original plats in the register's office on the tracts so reserved. The writing on the plat of the township in question was all in the witness's handwriting as he made it in 1853. Herndon, who was for more than twenty-five years clerk of Howard County, corroborated McNair's testimony.

Upon this proof the defendant offered in evidence the said record of Owen Rawlins, and the copy of the plat of the township in question in the book made by McNair; and the court, against the objections of the plaintiff, admitted them in evidence; to which ruling the plaintiff excepted.

This is the first error assigned; and we have no hesitation in saying that the evidence was properly admitted. The book of Rawlins was *de facto* a county record, preserved as a public monument in the county archives. For the purpose of showing his acts as school commissioner in selling the land in question as school lands, it was undoubted evidence. It was such, not only as a public record, but as the entry of a deceased person made in the course of his official duty, in a matter of public concern, which clearly made it evidence of his public transactions. The list made by Boon

Statement, in the opinion, of the second point of the case

was evidently a part of the same record made under Rawlins's direction, and was admissible on the same grounds.

The plat made by McNair was competent secondary evidence of the contents of the original plat which was lost. The fact that it did not correspond in every particular with that original in respect of the memoranda written upon it, did not detract from its admissibility. Those memoranda, and the manner in which they were made, were sufficiently explained.

As to the bearing of this evidence upon the issues of the cause, it is sufficient at this point to say, that in view of the fact that the proper evidence with regard to the action of the register and receiver was entirely lost or destroyed, the fact that the land in question had been publicly treated and disposed of by the county authorities as school lands so near to the time when such lands were set apart for school purposes, had an important bearing on the question whether the register and receiver did, in fact, make the selection of the lot in question. We think that it was proper evidence to go to a jury on such a question. Without other corroborative circumstances, it might have had but slight weight. But on the principle involved in the maxim "*omnia præsumuntur rite esse acta*," as applied to the acts of public officers, we think it was clearly competent.

The bearing of the township plat will be discussed hereafter.

To rebut this defence the plaintiff offered evidence to show that neither the local land office nor the General Land Office at Washington contained any evidence whatever of the alleged selection of the lot in question as school lands, but that the only memorandum with regard to that lot was of the sale to Widdicombe, under which the plaintiff claimed title.

The plaintiff then called upon the court to declare, as law, that the United States did not part with its title to the land in question prior to the issuing of the patent to Widdicombe; and that neither the act of Congress of March 6th,

Opinion of the court on the second point.

1820, admitting Missouri into the Union, nor any subsequent act, operated as a grant *per se* to the State, or to any of the inhabitants thereof, of the lot in question; but that to divest the title of the United States, the lot should have been designated and set apart according to law, in lieu of a similar quantity of the sixteenth section sold or disposed of by the government prior to March 6th, 1820, and that no such designation or setting apart had been shown by the evidence. This was, in substance, asking the court to decide against the validity of the defence. The court refused so to declare, but on the contrary, at the request of the defendant, in substance, declared the law to be, that if, in fact, prior to 6th March, 1820, section sixteen had been disposed of and sold by the United States, and if the register and receiver of the proper land office, under the act of 1823, in lieu thereof, did reserve and select the lot in question, and did make a descriptive entry of said reservation and selection, which entry had been lost or destroyed by the loss of the leaf on which it was made, the claim of the plaintiff under the State of Missouri was valid.

To these rulings exceptions were taken.

It is certainly true that neither the act of 1820, nor that of 1823, of themselves, transferred the title of the lot in question from the government to the State of Missouri. The sixteenth section of land having been disposed of, it required a designation of some other lands, in the manner pointed out by the statute, to take its place. Until such designation was made it is evident no title could pass. But such designation and entry were all that the law required to be done. No patent was necessary for the substituted lots any more than for the sixteenth section itself, had that been undisposed of. The things to be done in order to vest title in the State were *certain acts* of the register and receiver. The essential thing was the selection of the land. The evidence of it, as prescribed by the statute, was the descriptive entry to be made in the register's book. If the essential thing were done the destruction of the evidence would not de-

stroy the title. The primary proof of the act done would, of course, be the record itself. That being lost or destroyed, the acts of the register and receiver could be substantiated by the next best evidence which the case admitted of. The question before us is whether the evidence adduced and received by the court was conducive to prove the fact, and was the next best evidence to be had on the subject.

In our judgment it was both. No record evidence of the fact in question was required except the entry in the register's book. The evidence adduced was, first, the plat of the township so carefully compiled by McNair. This showed that the lot in question was designated as "reserved for schools." This designation was copied from the original plat in the register's office. Here then was evidence of the most convincing character that the lot in question had been designated by the register and receiver as school lands. Here was a collateral and contemporaneous record containing evidence of the very fact respecting the existence or non-existence of which the parties and the court were in search. It was not, it is true, the primary proof required by the statute, but it was independent proof of the essential fact in issue, and was sufficient proof to raise the presumption that if those missing leaves could be produced the primary proof would be found thereon. It was not so satisfactory as a literal compared copy of those leaves, but more satisfactory than oral testimony depending on human memory as to their contents. The books are full of cases to the effect that if a judgment record, or other record, be lost, the judgment or other matter may be proved by collateral entries and memoranda. But, secondly, we have the corroborative evidence derived from the acts of the county school commissioner in selling the lands as school lands, as far back as 1832, and the renting of them as such even before that time, and the defendant's possession and claim of title of the land as reserved school lands for more than thirty years, all going to strengthen the other proof and presumptions in the case.

It would be strange, indeed, if men's possessions could be

disturbed by the burning of a court-house, or the loss, destruction, or theft of a public record, when evidence, such as was adduced in this case, could be supplied to show that the acts upon which their titles depended had been duly performed by the proper public officers. And courts would be derelict in their duty to the community if they did not sternly rebuke speculative attempts to rob people of their just inheritances under such circumstances. Mere lapse of time and continuance of possession without pretence of title, or under pretence of a void title, cannot, it is true, be set up against the government; but long possession is, nevertheless, a strong weapon of defence in the hands of one who can show reasonable proof that the title of the government has been parted with, and has devolved to him.

As to the sufficiency of the evidence adduced in this case, it is not the part of this court, on a writ of error, to pronounce. That was the province of the court below sitting as a jury. That court determined it to be sufficient, and found the issue for the defendant. We think that the evidence was admissible, that it was pertinent to the issue, and tended to prove that issue on the part of the defendant, and that the law of the case, as declared by the court, was correct.

JUDGMENT AFFIRMED.

BOULDIN *v.* ALEXANDER.

1. When a person conveys in fee to persons whom he names a lot and church edifice upon it for the use of a Baptist church—an unincorporated religious body—specified, the trustees are not removable at the will of the *cestui que trusts* and without cause shown.
2. Although a withdrawal by one part of a church congregation from the original body of it and uniting with another church or denomination is a relinquishment of all rights in the church abandoned,—the mere assemblage in a church (as *ex. gr.*, the Baptist) where the congregational form of government prevails, of a majority of a congregation forcibly and illegally excluded by a minority from a church edifice in which as part of the congregation they had been rightfully worshipping, in an-

other place—the majority thus excluded maintaining still the old church organization, the same trustees, and the same deacons—is not such a relinquishment; and the majority thus excluded may assert, through the civil courts, their rights to the church property.

3. Although the civil courts will not in the case of persons excommunicated by competent church authority go behind that authority and inquire whether the persons have been regularly or irregularly excommunicated, the said courts may inquire whether the expulsion was the act of the church or of persons who were not the church, and who, consequently, had no right to excommunicate any one.
4. In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church.
5. Trustees of the church property are not necessarily, in the Baptist church, communing members; and accordingly excommunication from communing membership does not disqualify them, even if the excision be rightful; which in the present case, having been of a majority by a minority, it was held not to have been.

APPEAL from the Supreme Court of the District of Columbia, in a case arising out of a controversy in an unincorporated religious society of colored persons, in Washington, calling themselves the "Third Baptist Church." The case was thus:

From about the 1st of September, 1857, a small number of colored persons were in the habit of consociating in prayer-meetings and other religious conferences at the house of one Albert Bouldin, a colored man from Virginia, who had been licensed to preach, and was so styled the Reverend Albert Bouldin; he being always a chief actor in the assemblages. The persons were, at first, few in number, feeble in resources, and without any church edifice. But under Bouldin's leadership they increased in strength, and, after a certain time, went to work to raise money to build a meeting-house; Bouldin taking the lead in the whole matter, the temporal part as much as the spiritual, and being at once pastor, collector, treasurer, chief agent, and actor in the enterprise, and getting into his own hands most of the moneys collected. Having bought a lot on which to build a church, he took a deed for it in his own name, and proceeded to have the church built, which under his superintendence was done; a building now standing, on the corner of Fourth

and L Streets, northwest. Some of the chief persons in the work, however, were apparently dissatisfied with Bouldin's having the title to the property in his own name. Hereupon, April 1st, 1864, he and his wife conveyed a large part of the lot, including that on which the church was built, but apparently not the whole of the lot, to four persons, Joseph Alexander, Charles Alexander, John Middleton, and William Minor, as trustees, to be used, with the buildings on it, as "the Third Colored Baptist Church of the City of Washington;" these persons, in return, giving him their promissory notes and a deed of trust on the property to secure them; the notes being for a sum which Bouldin represented to them that he was in advance from his private funds beyond moneys received by him from collections.

A congregation had by this time been organized with sufficient regularity and in full conformity with the constitution of the general Baptist Church of the United States, in which, as is known, the congregational form of government prevails; and there was at this time no serious dissensions in the particular Third Church of which we are speaking. "The Rules of Church Order," making part of the Baptist Manual, an authoritative book in the Baptist church generally, required that "seven trustees" should be elected in January of each year, but provided that in case of any omission to hold an election then, the election should be held "at the next regular meeting for business." And the minutes of this church, which had been kept apparently with essential order, though not in a highly clerical style, by Bouldin, one Lee, or some other person elected as clerk, from the origin of the church till the time when some troubles, hereinafter mentioned, arose, showed that seven persons, Joseph Alexander, Henry Watson, Henry Scott, John Wiggins, John Middleton, William Laws, and W. J. Minor, were duly elected trustees, at a regular meeting of the church for business, on the 15th of February, 1867; the ordinary meeting, apparently, not having been held. These persons, the minute-book showed, had received about 200 votes of a not much larger number cast. After the troubles

above referred to arose, the minute-book passed from one hand to another, and Bouldin swore in the court below that this minute about the election was a forgery; and that no such election had ever taken place. The books were brought into this court, and showed some erasures and the cutting out apparently of some leaves, but little or nothing beyond Bouldin's statement to prove that this particular minute was not entitled to as much respect as others in the book. Minutes following it were made by Bouldin himself.

Very soon after the completion of the church edifice, already mentioned, dissensions arose in the congregation, and the church was divided into two parties, each asserting itself to be the true "Third Colored Baptist Church." On the 7th of June, 1867, one of these parties, being a very small minority of the church, and being probably about fifteen in number, including Bouldin, resolved to "turn out" four trustees, without naming them, and proceeded to elect four others in their stead. The persons thus elected were Manson Robinson, Julius Bouldin, William Pearson, and Charles Pearson. The attempted ejection of the old trustees was without citation, trial, or charges preferred. It was also, the reader will observe, at a time when, according to the rules of the church, an election of trustees was not in order; the rules that exist in Baptist churches generally, providing, as already mentioned, that trustees shall be elected in January of every year, or in case of failure to hold the election, at the next regular meeting for business. A few days afterwards, on the 10th or 17th of June, 1867, the same minority proceeded to "turn out" forty-one members of the church, also without citation or trial. Having thus got the control of the church property in their own hands, some of the persons elected to be trustees in place of former trustees caused the locks to be taken from the church doors, and new locks to be put on in their places, and they with Bouldin claimed and retained possession of the property from that time forth. Hereupon the four persons to whom Bouldin and wife had conveyed the property in trust and the seven that had been elected trustees in February,

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1867, worshipped in a school-house or in a place called Miller's Hall; retaining the old organization, with a new preacher named Jefferson, who had been licensed under Bouldin, and who (Bouldin having been dismissed by the party shut out from the church), was now acting temporarily as preacher, or by way of "supply." Such was the condition of things in the summer of 1867.

On the 28th of September of that year the four trustees named in the deed of the church lot, from Bouldin and wife, and also the seven persons who professed to have been elected trustees of the church, on the 15th of February, 1867, at the annual election provided for by the general rules of Baptist churches, filed a bill against Bouldin, who had received the money of the church, and who also professed to be a trustee, without, however, any election, and against three of the persons who professed to have been elected trustees at the meeting of the minority on the 7th of June, who took possession of the church, together with some other trustees in deeds of trust for Bouldin. The bill sought a discovery, and an account of the money received and expended by Bouldin, a release of deeds of trust of the church property given to secure notes held by Bouldin, a surrender and cancellation of the notes, alleging them to have been satisfied, and the restoration of possession of the church property to the complainants as the lawful trustees. It sought also an injunction against future interference by the defendants with the church property, against the sale of the notes, and against sale or foreclosure under the deed of trust. The bill charged that there was a plain mistake in the deed from Bouldin and wife, to the trustees of the church, which it prayed to have corrected. In the court below a decree was rendered in favor of the complainants, sustaining all their claims except that reference was made to a master to ascertain and report the state of accounts. From that decree this appeal came.

The appellants now contended:

1st. That the court erroneously decided that the com-

plainants were, at the time of the commencement of the suit, the legally constituted trustees of the church.

2d. That the complainants, and those who acted with them, withdrew from the church and formed a new congregation, and had so relinquished all their rights in the Third Colored Baptist Church.

It may be observed as part of the history of the case, that after this bill was filed, but before the evidence was taken, both of the organizations had applied for admission in 1867 to the Philadelphia Baptist Association, an ancient authoritative body of the Baptist Church, holding in that year its 160th anniversary. The body declared that the dispute was complicated, and that the applications required consideration and examination, and so declined to admit either party to its then session. At its session of 1868, however—Bouldin himself being heard, and the whole subject having been argued by Horatio Gates Jones, Esquire, of the bar of Philadelphia, and by other members of the Association—the body declared that Bouldin had been in fault, and that the Third Baptist Church should be represented in the body by the now complainants. The record of the Association read thus:

"Mr. Bouldin and party, being greatly in the minority, excluded all the trustees, and all the deacons, and about two hundred other members; the vote being cast by about fifteen members present, without the usual form of citation and opportunity of self-defence. Mr. Bouldin and his adherents now occupy for public worship the house on Fourth Street, of which the trustees above named* have not been legally dispossessed. When the controversy commenced, the aggrieved party† proposed to have the matter referred to arbitration; but Mr. Bouldin, though advised by President G. W. Samson and other white brethren to consent to this arrangement, refused. The aggrieved majority then submitted the case to an ecclesiastical council, which met May 4th, 1868, to which all contiguous Baptist churches were invited to send delegates, seventeen churches

* These were the four trustees mentioned in the deed of Bouldin and wife and the seven elected February 15th, 1867.—REP.

† These were the complainants and their friends.

in all. After deliberate investigation, this council unanimously designated the party represented by the trustees above named to be the Third Colored Baptist Church of Washington. We therefore recommend that the letter which these brethren bring be received as the letter of the Third Baptist Church of Washington to this Association."

Messrs. Moore and Riddle, for the appellants; Mr. Thomas Wilson, contra.

Mr. Justice STRONG delivered the opinion of the court.

It is contended that the court erroneously decided the complainants were, at the time of the commencement of the suit, the legally constituted trustees of the church. But it is very evident that Joseph Alexander, Charles Alexander, John Middleton, and William Minor were then trustees for the church of the church property, unless they had been removed by the action of the minority on the 7th of June, 1867. They were nominated as trustees in the deed from Bouldin and wife, and they had never surrendered or renounced their trust. And we think the evidence is satisfactory, that Joseph Alexander, Henry Watson, Henry Scott, John Wiggins, John Middleton, William Laws, and Willis J. Minor were then general trustees of the church, unless they, or some of them, had been removed by the action of the same minority, on the day last mentioned. It is not to be overlooked that we are not now called upon to decide who were church officers. The case involves no such question. What we have to decide is, where was the legal ownership of the property. The question respects temporalities, and temporalities alone. That the attempt made on the 7th of June, 1867, to remove the trustees then holding was inoperative, is not to be doubted in view of the facts of the case. Those who held under the deed were not removable at the will of the *cestui que use*, and without cause. And had there been cause, none was shown. No ecclesiastical authority has decided that the defendants, or any of them, were legitimate trustees of the church, or of its property. Even if it be assumed that it was in the power of the church

to substitute other trustees for those named in the deed, it may not be admitted that a small minority of the church, convened without notice of their intention, in the absence of the trustees, and without any complaint against them, or notice of complaint, could divest them of their legal interest and substitute other persons to the enjoyment of their rights.

It is equally true that the seven persons who sue as church trustees were not removed by the action of the minority meeting held on the 7th of June, 1867. Indeed that action does not seem to have been an attempt to remove them. It was voted to turn out four trustees, but who the trustees intended were nowhere appears. None were named. In view of the fact that the number was four, it is presumable the meeting had in view the four trustees of the church lot, named in Bouldin's deed, and not the ordinary trustees of the church, those contemplated by the Baptist Church Manual. That Manual provides, that in every church seven trustees shall be elected annually, in January, or at the next regular church meeting thereafter. And the church books, which appear to have been kept with considerable regularity from September 2d, 1857, until this controversy arose, show that on the 15th of February, 1867, at a regular church meeting, the seven persons who with the church-lot trustees are complainants in this bill, were elected trustees of the church for the ensuing year. This was before any division took place in the society. It is true, Mr. Bouldin testified that the minute of an election is a forgery, and that no such election ever took place. But we are satisfied that he is mistaken. An examination of the minute-book leaves no doubt in our minds that the election was made as claimed by the complainants, and that they were elected by a number of votes averaging more than two hundred. The entry in the minute-book is attested by the church clerk. It is in regular order, and there are subsequent minutes in the same book made by Bouldin himself. The court below was, therefore, as we think, not in error in holding that the complainants were the legally constituted trustees at the time when this suit was commenced. And if they were the right-

ful trustees, the decree for an account, for the surrender of the church property, and indeed the entire decree made by the court, was a matter of course upon the evidence.

But the appellants insist that the complainants and those who acted with them, withdrew from the church and formed a new congregation. This, they argue, was a relinquishment of all their rights in the Third Colored Baptist Church. It may be conceded, that withdrawal from a church and uniting with another church or denomination, is a relinquishment of all rights in the church abandoned. But there is no sufficient evidence in this case that any new congregation was formed, or that there was any withdrawal from the church, or union with any other. The complainants, and those who acted with them, after the church building had been wrested from the custody and control of the rightful trustees, and after very many of them had been excommunicated in mass by the small minority, held their religious services at another place. But they formed no new organization. They still had the same trustees, the same deacons, and they claimed to be the Third Colored Baptist Church, and as such they were recognized by councils of Baptist churches duly called, and by the Philadelphia Baptist Association, an ecclesiastical body with which the church was associated. That body, it is true, was not a judicatory. Its action was not conclusive of any rights. But the fact that the complainants and those acting with them applied for recognition as the Third Colored Baptist Church, and that the Association thus recognized them, is persuasive evidence that they were not seceders, and that their rights have not been forfeited.

This is not a question of membership of the church, nor of the rights of members as such. It may be conceded that we have no power to revise or question ordinary acts of church discipline, or of excision from membership. We have only to do with rights of property. As was said in *Shannon* v. *Frost*,* we cannot decide who ought to be mem-

* 3 B. Monroe, 253.

bers of the church, nor whether the excommunicated have been regularly or irregularly cut off. We must take the fact of excommunication as conclusive proof that the persons exscinded are not members. But we may inquire whether the resolution of expulsion was the act of the church, or of persons who were not the church and who consequently had no right to excommunicate others. And, thus inquiring, we hold that the action of the small minority, on the 7th and 10th of June, 1867, by which the old trustees were attempted to be removed, and by which a large number of the church members were attempted to be exscinded, was not the action of the church, and that it was wholly inoperative. In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. An expulsion of the majority by a minority is a void act. We need not, however, dwell upon this. Certain it is, that trustees are not necessarily communing members of the church. Excommunication from communing membership does not disqualify them, even if the excision be regular. Still more certain is it that they cannot be removed from their trusteeship by a minority of the church society or meeting, without warning, and acting without charges, without citation or trial, and in direct contravention of the church rules.

DECREE AFFIRMED.

PICKERSGILL *v.* LAHENS.

A general statute enacted that a party might stay by injunction proceedings in a suit at law on executing a bond, "with one or more sufficient sureties," conditioned, &c. A., a defendant in a case at law, being about to apply for an injunction to stay that suit, did accordingly execute a *joint* bond with B. as co-obligor; B. having no interest in the suit, nor deriving any benefit from the execution of the bond. *Held*, that there was nothing in the language of the statute which compelled the bond to be joint merely, instead of joint and several; and that being in

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terms joint merely, and B. being in fact but a surety, there was no right in the obligee (A. being insolvent) to pursue B.'s estate in equity; B. having died before A., and B.'s estate being so discharged at law.

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

A statute of the State of New York thus enacts:

"No injunction shall be issued to stay the trial of any personal action at issue in any court of law until the party applying therefor shall execute a bond, with one or more sufficient sureties, to the plaintiff in such action at law, in such sum as the chancellor or master allowing the injunction shall direct, conditioned for the payment to the said plaintiff, and his legal representatives, of all moneys which may be recovered by such plaintiff or his legal representatives, . . . in such action at law, for debt or damage, and for costs therein."

With this statute in force, Pickersgill sued Lahens at law in the Superior Court of New York, a common law court, on certain indorsements. Thereupon Lahens filed a bill in the Court of Chancery of the State, for relief against the indorsements; and having done so, applied, under the above-quoted act, for an injunction to stay the trial at law. The court upon the filing of a bond meant to be such as the above-quoted act required, granted a temporary injunction staying the suit at law till an answer to the bill in chancery should come in. The bond was the *joint* bond (not the joint and several bond) of Lahens and one Lafarge; this Lafarge not having been any party to the suits already mentioned, nor interested in them, and not deriving any benefit from his joining in the bond. The bond recited the action at law against Lahens, the bill and injunction in chancery, and the condition of the instrument was that the obligors should pay all moneys which should be recovered in the suit at law. Answers to the bill for relief having come in, the action at law proceeded, and a judgment was rendered against Lahens for $129,000. Before this time Lafarge had died; and at the time Lahens had become insolvent. Thereupon Pickersgill filed a bill in equity against the executors

of Lafarge, to have his estate pay the amount of the bond, with interest from the recovery of the judgment against Lahens. The executors demurred; assigning among other grounds of demurrer that it appeared by the bill that Lafarge was not *severally* bound by the bond, but *only jointly* bound with Lahens; that Lafarge received no consideration for becoming an obligor; that he was not interested in any of the matters in consequence whereof the bond was given, and was merely a surety therein, and that he departed this life before the filing of the present bill, leaving Lahens surviving him, who was still alive. The court below sustained the demurrer; acting doubtless on the ancient principle of equity, announced with a clear mention of its grounds by GRIER, J., for this court, in the *United States* v. *Price*,* that after the death of one joint obligor (the other surviving) the estate of the one deceased cannot be pursued in equity unless there was "some moral obligation antecedent to the bond;" the which obligation the court declared could not exist where the deceased obligor had been but a surety. To review the action of the court in sustaining the demurrer this appeal was taken.

Mr. W. W. McFarland, for the appellant:

If the fact that Lafarge is not shown to have had any direct pecuniary interest in the subject-matter of the action at law, or to have derived any personal benefit from the giving of the bond in question, is sufficient to bring the case within the decision made in the *United States* v. *Price*, the demurrer must be sustained. But we contend that in legal intendment both the obligors are to be regarded as principals, so far as the rights of the plaintiffs are concerned. In the case of statutory obligations of this character, it is the intention of the statute and not the intention of the party, that ought to control. The statute requires the bond to be given for the protection and indemnity of the parties, against whom

* 9 Howard, 90; S. C., on the circuit, under the name of United States v. Archer's Executors, 1 Wallace, Jr., 173.

the relief is sought, and whose rights are imperilled by its being granted, and it requires that sureties shall be given for the better security of the plaintiff. It is not a question of contract. The plaintiff has no election to accept or refuse to accept the bond. The only right he has in the premises, is to require that the sureties shall justify as required by the statute. The plaintiff had no right to say that the bond should be a joint and several obligation, nor had the court the right to say so. The language of the statute is, that "the party applying therefor shall execute a bond with one or more sufficient sureties." When the statute requires a bond to be given, and does not employ words of severalty, the fair if not the necessary intendment is that a joint obligation in form is intended; but it does not follow in such case that the statute intends or contemplates that the accident of the death of the sureties shall deprive the obligees of the security which the bond was intended to afford.

The intention of the statute doubtless here was, that the property of the principal and of the surety should stand charged with the liability assumed in favor of the plaintiffs, and we think that so the statute should be construed.

Mr. F. Kernan, contra, with whom were Mr. T. J. Glover, for the executors of Lafarge, and Mr. F. H. Dykers, for Lahens.

Mr. Justice DAVIS delivered the opinion of the court.

It is very clear that the estate of Lafarge is discharged at law from the payment of the obligation in controversy, on the familiar principle that if one of two joint obligors die the debt is extinguished against his representative, and the surviving obligor is alone chargeable. It is equally clear that in this class of cases, where the remedy at law is gone, as a general rule a court of equity will not afford relief, for it is not a principle of equity that every joint covenant shall be treated as if it were joint and several. The court will not vary the legal effect of the instrument by making it several as well as joint, unless it can see, either by independent testimony or from the nature of the transaction itself,

that the parties concerned intended to create a separate as well as joint, liability. If through fraud, ignorance, or mistake, the joint obligation does not express the meaning of the parties, it will be reformed so as to conform to it. This has been done where there is a previous equity which gives the obligee the right to a several indemnity from each of the obligors, as in the case of money lent to both of them. There a court of equity will enforce the obligation against the representatives of the deceased obligor, although the bond be joint and not several, on the ground that the lending to both creates a moral obligation in both to pay, and that the reasonable presumption is the parties intended their contract to be joint and several, but through fraud, ignorance, mistake, or want of skill, failed to accomplish their object. This presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery. If the surety should die before his principal, his representatives cannot be sued at law; nor will they be charged in equity. These general doctrines on this subject were presented at large in this court in the case of the *United States* v. *Price*, and they are sustained by the text writers and books of reports in this country and England.*

The authority of the decisions on this subject we do not

* Story's Equity Jurisprudence, §§ 162, 163, 164; Simpson *v.* Field, 2 Chancery Cases, 22; Sumner *v.* Powell, 2 Merivale, 30; S. C., on appeal, 1 Turner & Russell, 423; Weaver *v.* Shyrock, 6 Sergeant & Rawle, 262; Hunt *v.* Rousmanier, per Marshall, C.J., 8 Wheaton, 212, 213; S. C., 1 Peters, 16; Pecker *v.* Julius, 2 P. A. Brown, 33, 34; Harrison *v.* Minge, 2 Washington, 136; Kennedy *v.* Carpenter, 2 Wharton, 361; Other *v.* Iveson, 3 Drewry, 177; Jones *v.* Beach, 2 De Gex, McNaughton & Gordon, 886; Wilmer *v.* Currey, 2 De Gex & Smales, 347; Waters *v.* Riley, 2 Harris & Gill, 311; Dorsey *v.* Dorsey's Exrs., 2 Harris & Johnson, 480, note; Bradley *v.* Burwell, 3 Denio, 65; Mr. Cooper's Note to Justinian's Institutes, p. 462, and cases there cited; Richardson *v.* Horton, 6 Beavan, 185; Wilkinson *v.* Henderson, 1 Mylne & Keane, 582; Rawstone *v.* Parr, 3 Russell, 539.

understand the appellant as questioning in a proper case; but he insists they are not applicable here.

His position is, that a statutory obligation like the bond in question is different in principle, and should be interpreted differently from a contract made by private parties between themselves, as the obligees in such a bond cannot direct the form it shall take, nor elect whether to accept or refuse it. The bond, which is the foundation of this suit, was given in 1846, under the order of the Court of Chancery of New York, to stay the proceedings in an action at law then pending in the Superior Court of the city, and it is argued, as the statute does not require bonds of this character to be "joint and several," in legal intendment they must be joint in form, and all the obligors, therefore, should be regarded as principals. It is undoubtedly true, as words of severalty are not employed, that a joint bond is a compliance with the law, but it by no means follows that a joint and several obligation is not an equal compliance with its terms. It is certainly not forbidden, and as the statute is silent on the subject the fair intendment is that either was authorized, and that the court had the right to direct which should be given. If this be so, then it cannot properly be said that the party enjoined had no voice in the nature or sufficiency of the security to be taken, for the discretion of the chancellor was, necessarily, to be exercised in relation to both these matters, if his attention was directed to them, after both sides were heard. It is quite apparent, if this discretion had been invoked, that the instrument of security might have been different; and equally apparent that Lafarge, in case this had been done, might have been unwilling to assume the additional risks which a separate liability imposed on him. We must suppose, in the absence of any evidence on the subject, that he knew the legal differences between the different kinds of obligations, and became bound in the way he did because a joint liability was more advantageous to him. If this was his intention, it would be manifestly unjust for a court of equity, after the legal *status* was fixed by his death, to change the nature of the obligation which

he executed in order to charge his estate. In the cases in which equity has treated the obligation as joint and several, although in form joint, the surety participated in the consideration. In this case Lafarge had no pecuniary interest in the litigation which was enjoined, and derived no personal benefit from the instrument of writing which he signed, and, therefore, no good reason can be furnished why his standing in a court of equity is not as favorable as if he were surety, without advantage to himself, in the borrowing of money. In neither case is there any obligation to pay independent of the covenant. In the one there is a liability for a debt; in the other, for a result in an action at law. Both are cases of contract, for, indeed, suretyship can exist in no other way; and we know of no principle of equity by which a contract of indemnity is to be construed so as to charge an estate, and an engagement to pay money to receive a contrary construction. The equities in both are clearly equal, and as the estate of Lafarge is not liable at law, it will not be held liable in equity.

The demurrer to the bill was, therefore, properly sustained, and the decree is accordingly

AFFIRMED.

MARSHALL *v.* VICKSBURG.

1. A. filed a bill in equity to enforce a forfeiture, and obtain compensation for breach of agreement. The defendant demurred by a single demurrer. The court sustained the demurrer as respected the forfeiture, and overruled it as to the residue of the bill. The complainant amended his bill in conformity to the opinion of the court. The defendant answered. Testimony was taken, and the complainant got a decree for so much money; less, however, than he claimed. He thereupon appealed to this court. The defendant did not appeal. *Held*, that though the court below had erred in sustaining *in part*, and overruling *in part* a demurrer which was *single*, yet that the complainant by amending his bill, and the defendant by answering afterwards had both waived their right to object anywhere: as the defendant specially had in this court by not appealing; and that the question of forfeiture was withdrawn from this court.

2. A. leased a wharf from a city on the Mississippi before the rebellion for a certain term, the city binding itself for indemnity if his "right to collect wharfage was suspended for any period by the intervention of third parties." *Held*, that the diminution of trade on the river caused by the rebellion did not suspend his right to collect; and that he had no claim for indemnity under his contract on account of such diminution.
3. The same lease providing "that in case the right to collect wharfage or rents should be defeated permanently through the instrumentality or with the aid of the mayor and council of the city," the property should revert, *Held*, that the right was not defeated within the meaning of the clause by an ordinance which the complainant had himself caused to be passed; nor by a "tax" which the city had reserved a right to lay, as distinguished from a wharfage charge; nor by quarantine embargo laid with the complainant's consent.

APPEAL from the Circuit Court for the Southern District of Mississippi, on a decree given by that court on a bill filed by Charles Marshall against the city of Vicksburg. The facts of the case can be gathered from different parts of the opinion given below.

Messrs. P. Phillips and R. M. Corwine, for the appellant; Messrs. J. M. Carlisle and J. D. McPherson, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

On the 21st of November, 1851, the parties mutually executed an indenture, whereby Marshall conveyed to the city certain real estate therein described, and the city released to him certain other real estate also therein described. The premises conveyed to the city, embraced the city landing for steamers and other water-craft on the Mississippi River. It was stipulated that Marshall should receive all the wharfages and rents accruing from the premises conveyed by him from the date of the instrument, and for the term of ten years, to commence three months after the removal of a wharf-boat known as the "Governor Jones."

The wharfages collected from steamers were to be according to the rates specified in a lease from Marshall to Thomas Porterfield, and those from all other water-craft were to be such as should be fixed by the mayor and council of the city. The latter were not to be less than was then customary.

The city reserved the right to levy such tax on goods, wares, and merchandise coming to the landing as the mayor and council might deem proper. The indenture contained also the following clauses, which lie at the foundation of this litigation, and must control the rights of the parties:

"It is expressly agreed by the parties hereto, that if the *right to collect wharfage be suspended for any period* by the intervention of third parties, the time of such suspension shall be added to the said term of ten years, it being the intention of these parties that the said Marshall, his representatives, and assigns, shall actually receive the rents and wharfages accruing in ten years altogether, and no more.

"And in case the right to collect wharfage or rents shall be *interrupted or defeated permanently*, through the instrumentality or with the aid of the said mayor and council of the city of Vicksburg, all the property above conveyed by said Marshall and wife, shall immediately revert to him, his heirs, and assigns, and be as fully and absolutely his as if this deed had never been executed."

As filed, the bill asked for an enforcement of the forfeiture provided for. It alleges that the enjoyment of Marshall's wharf rights were interrupted by quarantines established by the city in the years 1853, 1854, 1855, and 1858, which subsisted for periods, amounting in the aggregate to about ten months, and claims that his term of ten years should be elongated to that extent. It claims also under these clauses compensation for the interruption of the navigation of the river to his injury by the civil war, and for several alleged breaches by the city of the agreement.

The city demurred. The court sustained the demurrer so far as it related to the forfeiture, and overruled it as to the residue of the bill. The complainant amended the bill in conformity to the opinion of the court. The defendant answered, and testimony was taken on both sides. The court decreed in favor of the complainant for the sum of $7600.67. The complainant thereupon appealed to this court. No appeal was taken by the city.

Opinion of the court.

The court was right in the view which it took of the prayer for a decree of forfeiture. Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either.* Nevertheless it was an error to sustain the demurrer in part. That cannot be done. Where there is a single demurrer, it must be wholly sustained or overruled.† But the defendant not having appealed, is foreclosed from making the objection, and indeed it was conclusively waived by both parties; by the complainant, by the amendment which he made to his bill; and by the defendant, by answering. The question of forfeiture is therefore withdrawn from the case.

The first of the clauses relates to the acts of third persons. Under this clause, the only claim asserted is one growing out of the diminution of wharf charges accruing to Marshall by reason of the war. The language of the clause is, "if the right to collect wharfage is suspended for any period," &c. He was allowed to collect the wharfages as long as he claimed the right to do so; and then voluntarily delivered up the possession of the landing according to an understanding between him and the city authorities. This is proved by the testimony of Lindsay and Auter.‡

Auter, who called upon him as chairman of the landing committee of the city council, says:

"He told me that his term had expired, and that he had no more to do with the landing." "He surrendered the landing to me as chairman of the landing committee." "Mr. Marshall told me the city had imposed a hospital tax from flat-boats, amounting to about $1800. This he claimed rightfully belonged to him, and this was all he did claim."

Lindsay was the mayor. He says:

"Marshall made the surrender in writing." "I took the floor at a meeting of the council, and stated to the board, that in all the controversies I had held with Mr. Marshall, he had said he

* Livingston *v.* Tompkins, 4 Johnson's Chancery, 415; 2 Story's Equity, § 1319.

† Daniels's Chancery Practice, 583, 584.

‡ Record, pp. 115, 125.

would, at the end of three months' extension (making the contract ten years and three months), make a peaceable and quiet surrender to the city, which he did do."

The breaking out of the war in 1861, necessarily interrupted the navigation of the Mississippi from the States not in rebellion. But the complainant's right to collect was in no wise suspended. He suffered from the war as others did, but his contract secured him no indemnity and a court of equity can give him none.

The second clause relates to the acts of the city. It declares that "in case the right to collect wharfage or rents be interrupted or defeated permanently," &c. Under this clause three claims have been pressed upon our attention.

It was insisted that the city, by her ordinance of February 7, 1852, reduced the wharfage for steamers from $5 per trip to $5 per week, in violation of the contract with the complainant, and largely to his injury. This is a grave imputation, and if established, would certainly entitle him to compensation. But the evidence shows that he drew up the ordinance himself, urged its adoption upon the council, that the city had no interest in the matter, and that the council passed it only by reason of his urgency, and because he thought the change would be beneficial to him.* *Volenti non fit injuria.*

It is alleged that under the ordinance of June 7, 1852, the city made a wharfage charge of $1 each upon all water-crafts other than steamers, touching at the landing. Upon looking into the ordinance we find it too clear to admit of doubt or require discussion that this charge was a tax, such as the city had reserved the right to impose, and not a wharfage charge falling within the category of those which belonged to the complainant. At the same time that this tax was exacted, Marshall was collecting an additional $2 from each of the vessels upon which it was imposed. With this the city in no wise interfered, and there is no complaint on that subject.

Lastly, it is claimed that the complainant is entitled to the

* See the testimony of Donovan, Record, p. 150; and of Arthur, p. 139.

income which he would have received during the extension of his term of ten years, if it had been extended at its close for the length of time the quarantines subsisted. The quarantines affected only boats coming up the river, and only such of those as had cases of fever on board. The quarantines were established with the consent of the complainant. He admits this, but says, that although he then made no such claim, he expected his term to be extended accordingly. He knew all about the quarantines when the extension which he asked for was conceded to him, and when he yielded up the possession, saying, he was done with the landing, and claimed only the proceeds of the tax of $1, which we have already considered. His right to collect wharfages was neither "interrupted or defeated permanently," nor indeed gainsaid or questioned by the city.

The claim is neither within the letter, meaning, nor equity of the contract and must be denied. It appears that Marshall made two loans from the city to remove incumbrances—one of $1000. The amount of the other is not shown. Neither of these loans has been repaid. There is no report of a master in the record. The decree is very brief. The record furnishes no means of ascertaining the ground upon which the court proceeded, in coming to the conclusion that the complainant was entitled to the sum decreed in his favor.

After a careful examination of the case we have found no error against the appellant.

DECREE AFFIRMED.

SHUTTE *v.* THOMPSON.

1. Although the formalities prescribed by the 30th section of the act of Congress of September 2d, 1789 (1 Stat. at Large, 88), authorizing the taking of depositions *de bene esse* in certain cases and stating the circumstances under which, and the mode in which they may be taken, must be strictly observed (the act itself being in derogation of the common law), yet a party may waive any provisions intended for his benefit. And in regard to this statute he will be held to have waived them if he

refrained, at a time when they might be removed and until after possibility of such removal had ceased, from making objections that provisions intended for his benefit were not complied with: and in fact consent that the deposition should be taken and returned to court as it was.

2. Hence if it appear that the witness examined was an aged man when his deposition was taken; that he had died before the trial; that one of the counsel of the opposite party had accepted notice of taking the deposition; that he had attended at the taking, and cross-examined the witness; that he made no objection either to the sufficiency of the oath, to the reasons for taking the deposition, or to the competency of the magistrate; and that, though the deposition had been filed in the record of the cause more than a year before the trial, no exception had been taken to it in all that time, consent to the manner of taking the deposition must be presumed: and the admission of the deposition in evidence will be held good even though it may not have been taken in all the modes prescribed by the act of Congress, to give security to the party against whom it is meant to be used.
3. In the case of a deed made by a grantor non-resident of Virginia, it is sufficient to allow a proper record of it under the Virginia statute of December 8th, 1792, that there be a certificate of the clerk of a District Court of the United States that the grantor personally appeared in court and acknowledged the instrument to be his free act and deed; this being accompanied by a certificate of even date, by the judge of the same court, that the clerk was then the officer that he professed to be.
4. In questions of boundary, reputation in the neighborhood at the present day is not admissible, unless it be traditionary, or derived from ancient sources, or from those who had peculiar means of knowing what the reputation of the boundary was in an ancient day.
5. A title to land in West Virginia assumed to have been made under the 37th chapter of the Virginia Code relating to sales of land for non-payment of taxes, which chapter, by the constitution of West Virginia and otherwise, was part of its laws, and was to remain in force after the creation of the latter State until repealed by it, was no title at all after the 27th of February, 1866; the entire said 37th chapter having on that day been repealed by the legislature of West Virginia.
6. Where no request is made for specific instructions and no error is perceived in the instructions actually given, the fact that the charge may not have covered the entire case is not ground for reversal.

ERROR to the District Court for the District of West Virginia:

Thompson brought ejectment, A.D. 1859, in the court below against Shutte for four conterminous tracts of land of 1000 acres each, situate in West Virginia. The plaintiff's

title originated in a grant made in the year 1787, by the State of Virginia, to one Jabez Bacon, who subsequently died leaving eight children, his heirs; among them one named Nathaniel. The grant to Jabez Bacon embraced twenty-one tracts of land, including the land now in controversy, and, as the tracts adjoined each other, it was, in substance, a grant of one body containing 20,000 acres, to the right of Bacon in which the plaintiff asserted that he had succeeded in virtue of sundry mesne conveyances. But it was admitted by the plaintiff in the outset of the case that all the deeds through which he claimed could not be produced; it being alleged that most of the originals were lost; several never having been even recorded. Among the instruments which were produced was a certified *copy* from the county records of a deed from Nathaniel Bacon (*one* of the eight sons of Jabez Bacon, the original grantee of the Commonwealth), to Philo Murray, of 1815; a like *copy* of a deed from Philo Murray to Peter Smith, of 1815; with original deeds from Gerrit Smith and other heirs of Peter Smith to the Oberlin College, of 1853; and from the Oberlin College to Uriah Thompson, of 1854. Assuming the copies to have been as good evidence as the originals (a matter denied by the defendant), the apparent defect in the plaintiff's title here, of course, was that but $\frac{1}{8}$ of Jabez Bacon's title had been vested in the plaintiff, and this was a matter which made a great question in the case. To get over this apparent defect, the plaintiff produced testimony of one Underwood and others to show that there had formerly existed in the possession of the treasurer of Oberlin College "twenty patents from the State of Virginia to Jabez Bacon for the 20,000 acres of land, and of *several* intermediate deeds by which said land was ultimately conveyed by Gerrit Smith to Oberlin College; deeds by *several men of the name of Bacon*, and Philo Murray, and Smith." These deeds, according to the testimony, had been sent by the treasurer of the college to an agent of it to effect a sale of part of the lands, which he did, and could not be found. This evidence was fortified by evidence that the heirs of

Jabez Bacon, in conversation about the land, never claimed any part of it; and that the Smiths from 1815 to 1823, and Oberlin College till its sale to the plaintiff in 1854, had paid the taxes; and that the parties paying taxes had unchallenged possession from 1823 till the date of this suit.

The defence was professedly a grant by the State of Virginia prior to that one to Jabez Bacon, and some other defences, arising under the tax laws of Virginia; but one great effort on the trial was to prevent the plaintiff from showing a title in himself; without which, of course, he could not recover in ejectment.

In the course of the trial, bills of exception were taken by the defendant to the admission of certain evidence offered by the plaintiff, and to the exclusion of certain other evidence offered by himself: and also to the charge of the court.

The first exception was to the admission by the court of the deposition of Underwood, already named; taken professedly under the 30th section of the act of Congress of September 2d, 1789.* This act authorizes the deposition of an ancient, or any infirm person (among others), to be taken *de bene esse*, when the testimony of such person is needed in any civil cause depending in any district in any court of the United States. The deposition may be taken before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause. The act further provides for notice to the adverse party, and enacts that every person deposing as aforesaid shall be carefully examined and cautioned and sworn or affirmed to testify the whole truth. It also further enacts that the depositions taken shall be retained by the magistrate until he deliver the same with his own hand into the court for which they

* 1 Stat. at Large, 88.

are taken, or shall, together with a certificate of the reasons of their being taken, and of the notice, if any, given to the adverse party, be by the magistrate sealed up and directed to the court, and remain under his seal until opened in court. In the present case the deposition had not been taken in conformity with these requirements; that is to say, it did not appear that the witness was sworn to testify the whole truth. Nor did it appear that there was any certificate of the reasons why the deposition was taken. In addition to this, it was taken before a township justice, and not by any magistrate described in the act of Congress. And on these accounts alone the defendant objected to its admission. The court, however, admitted it. In doing so it assigned as reasons "that it appeared that the deposition was filed in the papers of the cause more than one year before the trial thereof, and that no exceptions had been taken or indorsed thereon; that the witness was an aged man when his deposition was taken, and had died before the trial, and that no exceptions, verbal or otherwise, were taken until the deposition was offered in evidence by the plaintiffs; and because it further appeared that one of the counsel of the defendant had accepted notice for taking the deposition, and had appeared at the taking thereof, and cross-examined the witness, as was shown by the deposition;" and, as respected the character of the magistrate, "because the court, taking judicial cognizance of the acts of Assembly of West Virginia (from which it appears that a justice is required by law to keep a record of all his proceedings), and taking further notice of his power to impanel a jury to try causes before him, and that appeals will lie from his decisions, upon which transcripts of his record are evidence in the court, was, for these reasons, of opinion that he is 'a judge of a court within the meaning of this act of Congress relative to the taking of depositions *de bene esse*.'"

In the further progress of the trial, the plaintiff offered in evidence the *record* of two deeds; one from Nathaniel Bacon to Philo Murray, and the other from this Murray to Peter Smith, the grantors in both cases being residents of Connec-

ticut, and both deeds being acknowledged in the exact same way. The defendant objected to the admission of the records, because it appeared from them that the deeds had not been acknowledged as deeds made by persons resident out of the State of Virginia as required by its statutes to be, and because, therefore, the record of them was null.

To understand the force of the objection, it is necessary to state, that a statute of Virginia, passed December 8th, 1792, enacts that a deed acknowledged by persons residing in any of the United States, before any court of law, and certified by the court, shall be admitted to record, a copy of which shall be evidence.

The acknowledgment was thus in the first of these two deeds; *mutanda mutatis* in the second.

UNITED STATES OF AMERICA,
DISTRICT OF CONNECTICUT, *ss.:*

At a District Court of the United States, held at New Haven, within and for said district, on the 4th Tuesday of February, A. D. 1817—present, the Honorable Pierpont Edwards, Judge—personally appeared Nathaniel Bacon, signer and sealer of the within instrument, and acknowledged the same to be his free act and deed. In witness whereof I have hereunto set my hand and affixed the seal of said court, at New Haven, the 26th day of February, A. D. 1817.

[SEAL.] H. W. EDWARDS,
Clerk.

I, Pierpont Edwards, judge of said court, hereby certify that said H. W. Edwards is clerk of said court. In witness whereof I have hereunto set my hand the day above written.

PIERPONT EDWARDS,
District Judge.

In the further progress of the trial, the defendant gave in evidence plats and certificates of thirty-three surveys made in 1785, for one Thomas Laidley, one survey for William Barclay, one for John Lyne, one for Richard Mason, one for Joshua Jackson, and five patents to John Reed, the object being to show the location of the patents. Further, to identify them,

he offered to prove by a witness who had lived many years in the neighborhood of Thomas Laidley's survey No. 1, that a poplar corner represented on the plat was, and had been for many years, known and reported in the neighborhood as the poplar beginning corner of Laidley's survey. To this the plaintiffs objected, and the court refused to allow proof "of the reputation of the neighborhood as to the said poplar corner at the present day, unless such reputation was traditionary in its character, having passed down from those who were acquainted with the reputation of the tree from an early day to the present time," or unless "the information as to such reputation was derived from ancient sources, or from persons who had peculiar means of knowing what the reputation of the tree was at an early day." But the court permitted the defendant to prove that the occupants of the Laidley survey No. 1, and of the Mason tract adjoining thereto (the poplar being a corner of each), claimed the poplar as the true corner of their tracts. To this ruling of the court the defendant excepted; and this made the fourth bill of exceptions.

In the further progress of the case, the defendant offered in evidence a tax deed for the lands from the recorder of Doddridge County, one Taliaferro Knight, to John S. Hoffman, the purpose of the evidence being apparently to show title out of the plaintiff. The deed was dated on the 26th of March, 1866, and showed, by its recitals, that the land was returned delinquent for the non-payment of taxes for the year 1857, and was sold in 1860, to Hoffman, in virtue of the 37th chapter of the Code of Virginia of which West Virginia was then a part. That chapter allowed two years for redemption, and after their expiration the purchaser was obliged to have a survey made and reported to the court of the proper county, which, if approved, the court might order to be recorded. The clerk was required then to make a deed to the purchaser, in conformity with the survey. No sale could be consummated, and no deed could be made prior to the return, confirmation, and record of such survey. In 1863 West Virginia became a separate State, and by virtue of a

clause in its constitution, the laws of Virginia continued in force until changed by the West Virginia legislature. On the 27th of February, 1866, that legislature passed an act by which the entire 37th chapter of the Virginia Code was repealed so far as it applied to tax sales of lands in West Virginia.*

The court rejected the deed offered in evidence, and this made another of the exceptions.

The trial being closed, the court charged the jury; *the defendant asking no specific instructions on any point*, and no instructions being given as to the matter of how far the seven-eighths of the title of Jabez Bacon, for which no deeds, or copies of deeds, were produced, was to be presumed to be vested in the plaintiff. Verdict and judgment were given for the plaintiff, and the defendant brought the case here on error. The case being now in this court, the defendant in the case below, and now plaintiff in error here, contended that the instructions given were insufficient; his point as expressed in his brief being that they "did not clearly and correctly expound the law of the case."

Mr. C. Boggess (a brief of Mr. John S. Hoffman being filed) for the plaintiff in error; Mr. B. H. Smith, contra.

Mr. Justice STRONG delivered the opinion of the court.

The first error assigned is the decision of the court admitting the deposition of Underwood.

It must be admitted that the deposition was not taken in conformity with all the regulations of the act of Congress of September 24th, 1789. It does not appear that the witness was sworn to testify the whole truth. Nor does it appear that there was any certificate of the reasons why the deposition was taken. In addition to this it was taken before a township justice, and not by any magistrate described in the act of Congress, and for these reasons the

* Acts of Legislature, 1866, p. 85.

opposition to its reception in evidence was founded. No other reason was stated in the court below, and no others are urged in this court.

It is to be observed that the objections made are all formal rather than substantial. Still they are quite sufficient to require the rejection of the deposition, if there is nothing in the case to countervail their effect. But it is obvious that all the provisions made in the statute respecting notice to the adverse party, the oath of the witness, the reasons for taking the deposition, and the rank or character of the magistrate authorized to take it, were introduced for the protection of the party against whom the testimony of the witness is intended to be used. It is not to be doubted that he may waive them. A party may waive any provision, either of a contract or of a statute, intended for his benefit. If, therefore, it appears that the plaintiff in error did waive his rights under the act of Congress—if he did practically consent that the deposition should be taken and returned to the court as it was—and if by his waiver he has misled his antagonist—if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal had ceased, he ought not to be permitted to raise the objections at all. If he may, he is allowed to avail himself of what is substantially a fraud. Parties to suits at law may assert their rights to the fullest extent; but neither a plaintiff nor a defendant is at liberty to deceive, either actively or passively, his adversary, and a court whose province it is to administer justice, will take care that on the trial of every cause neither party shall reap any advantage from his own fraud.

In this case it appeared to the court below, as the record states, that Underwood was an aged man when his deposition was taken; that he had died before the trial; that one of the counsel for the defendant (now plaintiff in error) had accepted notice of taking the deposition; that he had attended at the taking, and cross-examined the witness; that he made no objection either to the sufficiency of the oath, to the reasons for taking the deposition, or to the com-

petency of the magistrate; and that, though the deposition had been filed in the record of the cause more than a year before the trial, no exception had been taken to it in all that time. Under these circumstances, the consent of the defendant to the manner of taking the deposition must be presumed, or a fraudulent attempt to mislead the plaintiff must be conceded. It has been decided that objections to the competency of a witness must be made at the time of taking his deposition, if the party objecting attended, and the objections were then known by him, in order that his opponent may remove them, and that if he does not then object he will be presumed to have waived objection.*

The reason is that unless such presumption is made, fraud and trickery must be imputed to the objecting party. There is at least equal reason for presuming the consent of the defendant, that the deposition of Underwood should be taken before the magistrate who took it, and in the manner in which it was taken. In *York Company* v. *Central Railroad Company*,† it was said that when a deposition has been taken under a commission the general rule is, that all objections of a formal character, and such as might have been urged on the examination of the witness, must be raised at such examination, or upon motion to suppress the deposition. In *Buddicum* v. *Kirk*,‡ it appeared that a deposition had been taken under a "*dedimus potestatem.*" Notice had been given to the plaintiff's attorney that it would be taken on the 8th of August, and, if not taken in one day, that the commissioners would adjourn from day to day until it should be finished. The attorney agreed that it might be taken on that day whether he attended or not. The commissioners met on the 8th of August, and adjourned from day to day until the 12th, when they adjourned until the 19th, and then took the deposition. There was no attendance of the plaintiff's attorney, and he had no notice of the several adjournments, yet this court held that the agreement of the attorney that the deposition might be taken whether he was present

* United States *v.* One Case of Hair Pencils, 1 Paine, 400.

† 3 Wallace, 113. ‡ 3 Cranch, 293.

or not, his subsequent examination of it without objecting to the want of notice, and the death of the witness, were sufficient grounds for the defendant to believe that the objection would be waived, and the deposition was ruled to be admissible. This, it is true, was not the case of a deposition taken "*de bene esse*," but it shows that formal errors and defects in taking depositions may be waived, and it shows that much less than appears in the present case will be held to be sufficient evidence of a waiver. See, also, *Rich* v. *Lambert*,* where it was ruled that the absence of an order for issuing a commission is waived by joining in executing the commission. In that case the thing waived was absence of authority to take the deposition.

It must be conceded that the authority to take depositions *de bene esse*, under the 30th section of the act of 1789, has always been construed strictly. Being in derogation of the rules of common law, the formalities prescribed by the act must be observed; and many cases may be found in which such depositions have been rejected, because it did not appear that the required conditions or formalities had been regarded. They are all, however, cases in which the party objecting did not attend the examination of the witness, or took no part in it. They are all consistent with the rule, that a party may waive any conditions that are intended for his sole benefit, and that he does waive every formal objection when he attends the examination of a witness, cross-examines without protest, and remains silent until the witness has died. Such was the case here. The deposition shows that the attorney of the objecting party attended before the magistrate, that he took part in examining the witness, and that he never made objection until more than a year afterwards, when the witness was dead, and when the case came to trial. All these facts appeared to the court below, and they were not controverted. Under the circumstances, therefore, we think the deposition was correctly received by the court, and that this assignment of error cannot be sustained.

* 12 Howard, 354.

The next error assigned is the admission by the court of the exemplifications of the record of a deed from Nathaniel Bacon, a son and heir of Jabez Bacon, to Philo Murray, and of the record of a deed from Philo Murray to Peter Smith. It is alleged that the deeds had not been recorded in compliance with the statutes authorizing deeds made out of the State to be recorded. The objection, we think, is founded upon a mistake of facts. The grantors were both residents in the State of Connecticut, and to each deed there was a certificate of the clerk of the District Court of the United States that the grantor therein named personally appeared in the court, and acknowledged the instrument to be his free act and deed. There is also a certificate of the judge, dated the day of the clerk's certificate, that the clerk was then clerk of the District Court. Probate was thus made strictly in accordance with the Virginia statute of December 8th, 1792. The deeds were therefore entitled to record, and they were duly recorded in pursuance of orders of the county court.* Hence there was no error in admitting the exemplifications in evidence.

We pass now to consider the fourth bill of exceptions. The court refused to allow proof of the reputation of the neighborhood as to a poplar corner at the present day, "unless such reputation was traditionary in its character, having passed down from those who were acquainted with the reputation of the tree from an early day to the present time," or unless "the information as to such reputation was derived from ancient sources, or from persons who had peculiar means of knowing what the reputation of the tree was at an early day." But the court permitted the defendant to prove that the occupants of the Laidley survey No. 1, and of the Mason tract adjoining thereto (the poplar being a corner of each), claimed the poplar as the true corner of their tracts. To this ruling of the court the defendant excepted.

We do not perceive that any injury could have been sustained by the defendant in consequence of this ruling, even

* Smith *v.* Chapman, 10 Grattan, 452; Hassler *v.* King, 9 Id. 115.

if it was incorrect; certainly none that would justify our sending the case to a new trial. But there was no error. Reputation as to the existence of particular facts not of a public nature, is not generally admissible, though where the existence of the facts have been proved *aliunde*, reputation is sometimes received to explain them.* Here, however, the evidence was offered not to explain a fact, but to establish it. We do not propose to discuss this subject at length. It is sufficient to say that the limitations imposed by the court upon the evidence of reputation offered, are fully sustained by authority.†

The next error of which complaint is made, is that the court refused to permit the defendant to give in evidence a tax deed for the lands from Taliaferro Knight, recorder of Doddridge County, to John S. Hoffman. It seems to have been offered to show title out of the plaintiff. The deed bears date on the 26th day of March, 1866. From the recitals contained in it, we are informed that the land was returned delinquent for the non-payment of taxes for the year 1857, and that it was sold in the year 1860, to John S. Hoffman. The sale was made in force of the laws of Virginia, of which West Virginia was then a part.‡ By that statute two years were allowed for redemption, and after they had expired, the purchaser was required to have a survey made and reported to the court of the proper county, which, if approved, the court might order to be recorded. After all this had been done, the clerk was required to make a deed to the purchaser, in conformity with the survey. No sale could be consummated, and no deed could be made, prior to the return, confirmation, and record of such survey. It is important to keep these provisions of the law in mind, for in 1863 West Virginia became a separate State. By virtue of a clause in its constitution, as well as without such ordinance, the laws of Virginia continued in force until changed by the West Vir-

* 1 Greenleaf on Evidence, § 138.

† 1 Starkie on Evidence, ch. 3d, passim.

‡ Chapter 37, Civil Code.

ginia legislature. But that legislature, on the 27th of February, 1866, passed an act by which the entire thirty-seventh chapter of the Virginia statutes was repealed so far as it applied to tax sales of lands in West Virginia.* At that time the deed to Hoffman had not been made, nor had the survey of the land been made and reported. This appears from the deed itself. It is plain, therefore, that there was no authority for the survey and report, or for the deed. Without the statute in existence when they were made, they could have no efficacy. As transmissions of title they were wholly void. The deed was therefore properly rejected.

There remains one more exception to be considered. It is to the charge of the court in answer to the request of the jury for instructions. It is, however, unnecessary to examine critically the charge. If we understand the complaint of the plaintiff in error, it is not so much that erroneous instructions were given, as that the court failed to give the directions which it is now contended should have been given. The point made in the brief of the plaintiff in error is, that "the instructions given to the jury by the court, did not clearly and correctly propound the law of the case." There were, however, no requests for specific instruction, and it is abundantly settled that error cannot be assigned for failure to give instructions that were not asked. The portion of the charge excepted to, may not have covered the whole case. It probably did not. But so far as given, we discover in it no erroneous directions. It is true that, under the statutes of the State, the claimant, in order to take the forfeited title, must have had an apparent title, or color of title, regularly derived from the Commonwealth, acquired legitimately, and must have discharged the State's lien for taxes. This does not seem to have been contested. It certainly was not denied by the court. The main controversy evidently was over the question whether the whole title of Jabez Bacon has become vested in the plaintiff. A deed from only one of his children appears to have been given in

* Acts of Legislature, 1866, p. 85.

Statement of the case.

evidence. But the loss of many title papers was proved. The heirs of Bacon made no claim, and disclaimed all intention of claiming. The plaintiff, and those under whom he claimed, had taken charge of the land, and kept it from 1815 till 1839, paying taxes. Then all the heirs of Smith quit-claimed to the Oberlin Collegiate Institute, whose title the plaintiff has. From 1826, possession has attended the claim, without challenge. Whether these facts, and others of which evidence was given, justified a presumption of a grant from the other heirs of Bacon was, of course, a question for the jury, in regard to which no instruction to the jury was asked. Nor are we informed what directions, if any, were given. In this part of the case there is, consequently nothing for us to review. And in the part of the charge to which exception was taken, we perceive no error.

JUDGMENT AFFIRMED.

DUNCAN *v.* JAUDON.

1. A person lending money to a trustee on a pledge of trust stocks, and selling the stocks for repayment of the loan, will be compelled to account for them, if he have either actual or constructive notice that the trustee was abusing his trust, and applying the money lent to his own purposes.
2. The lender will be held to have had this notice when the certificates of the stocks pledged show on their face that the stock is held in trust, and when, apparently, the loan was for a private purpose of the trustee, and this fact would have been revealed by an inquiry.
3. The duty of inquiry is imposed on a lender lending on stocks, where the certificate of them reveals a trust.
4. These principles are not affected by the fact that the stocks pledged may be such as the trustee under the instrument creating his trust had no right to invest in; as *ex. gr.*, stock of a canal company, when he was bound to invest in State or Federal loans.
5. Notice to the cashier of a bank, or of bankers, that the stock pledged is trust stock, is notice to them.

APPEAL from a decree of the Circuit Court for the Southern District of New York. The case was thus:

In 1833 Commodore William Bainbridge, a resident of

Philadelphia, died, leaving four daughters, one of whom was Mary T. B., subsequently the wife of Charles Jaudon. By his will he left to two trustees a considerable sum of money, directing them to invest the same in the stocks of the United States, or the stocks or funds of any individual State, and to hold the same in trust for his several daughters; one-fourth for his daughter Mary, the interest to be paid to her, "for her sole use and benefit during her natural life, and at the end of her natural life, the amount so invested to be equally divided between her children." The property left by the Commodore was invested by his trustees as the will directed, chiefly in five per cent. loans of Pennsylvania, and the interest was properly paid to the daughters. The interest received from the Pennsylvania loans, five per cent., was less than the *cestui que trusts* were content with; but the trustees appointed in the will would not depart from the directions imposed on them by it as to the class of investments in which they could invest; and becoming thus unacceptable to the *cestui que trusts*, they were discharged, in 1835, at their own request, from their trust, and surrendered the estate under their care to Samuel Jaudon, whom, on the consent of Mrs. Jaudon, the court appointed, *without security*, to be trustee, in the place of the trustees named in the will.*

The Pennsylvania five per cent. stock was now soon sold, and the proceeds invested by Samuel Jaudon in the stock of the Delaware and Raritan Canal Company, according to an arrangement previously made with the *cestui que trusts;* the new stock being one of a high character *in its class*, and which has paid for many years, with great regularity, ten per cent. a year dividend, with occasional large *extra* dividends. Mrs. M. T. B. Jaudon got thus finally 117 shares of this stock. The certificates, of which there were several, all ran thus:

"This is to certify that S. Jaudon, *trustee for Mrs. Mary T. B. Jaudon,* is entitled to seventy shares in the capital stock of the

* The new trustee was a brother of Charles Jaudon, the husband of Mrs. M. T. B. Jaudon.

Delaware and Raritan Canal Company. . . Transferable on the books of the Company, and on surrender of this certificate only by him or his legal representative."

This investment was made very soon after the new trustee was appointed. A similar one was made for all the sisters, and was perfectly agreeable to them all. Mrs. Jaudon considered that the trustee was "acting very judiciously, and was very glad of it."

In this state of things Samuel Jaudon, who had been dealing largely on his own account in a stock known as "Broad Top Coal and Iron Stock," a speculative stock of no established value, applied in 1865 to the National City Bank of New York to lend him money on 47 shares of this stock. They agreed to do so, and he delivered to the cashier of the bank the certificates standing in his name as trustee, executing also a power of attorney to sell in case of non-payment of the loan; the power describing him as "*S. Jaudon, trustee for Mrs. M. T. B. Jaudon*," and he signing himself in the same way. This dealing of Jaudon with the City Bank, based on the stock in question, and commencing in 1865, extended through a term of two years. During this time ten separate loans were made to him on the pledge of the 47 shares of the canal stock. The securities were returned to Jaudon whenever he paid up the amount of a loan, and redelivered to the bank each time a new loan was effected. In December, 1867, when the last loan matured, the bank, being unwilling to renew it, and Jaudon unable to pay it, sold the stock by the direction of Jaudon, and applied the proceeds of the sale to the payment of its debt.

A few months prior to this sale, that is to say, in July, 1867, Jaudon, wanting more money, applied to Duncan, Sherman & Co., bankers of New York, with one of which firm, William Butler Duncan, he had had ancient relations, and with whom alone he spoke in the matter, for a loan of $7000 at 90 days; telling him that he had securities to offer, and naming them,—the remaining 70 shares of the canal stock, like that pledged to the bank, declared on its face to be "in trust for Mrs. M. T. B. Jaudon." "*Upon the faith of*

the collaterals," and "to oblige" Jaudon, the proposition was accepted by Mr. Duncan, who told his cashier to attend to the matter. The cashier accordingly lent Jaudon the money, taking the certificates for the 70 shares, and a power to sell like those in the other case, in which he both described and signed himself as "*trustee of Mrs. M. T. B. Jaudon.*" Jaudon failing on the maturity of the loan to pay it, the stock was sold. There was no evidence that any of the principals of the house of Duncan, Sherman & Co. had seen the certificates or powers, or had any personal knowledge of the fact that Mrs. Jaudon claimed any interest in them. But their clerk did see the certificates; and it was testified by Mr. W. B. Duncan, that "without the collaterals he certainly would not have made the loan."

Mrs. Jaudon was absolutely ignorant of all that was done, until after the stock was sold, when Samuel Jaudon disclosed the history to her.

There was no doubt that every one of these loans, whether by the City Bank or by Duncan, Sherman & Co., were to Jaudon in his personal character and for his individual use, and that the money obtained was applied to discharge liabilities incurred in the purchase or carrying of the Broad Top coal stock, in which he was at the time dealing on his own account; taking in his own name, and without the exhibition of any trust whatever, certificates for what he bought.

Jaudon being insolvent, Mrs. Jaudon now filed a bill in the court below against him, Duncan, Sherman & Co., and the National City Bank, to reach the proceeds of the property which he had disposed of. Jaudon was himself examined as a witness, and narrated with apparent general candor the history of the transaction. He stated, however, in reply to questions inviting such answers, that from his conversations with his sister-in-law (the complainant), it was his general understanding that any changes in investment which he deemed advisable would be approved by her; and that if the investment in Broad Top stock had resulted as he had anticipated, her income would have been further increased; and that in making a purchase of the stock his intention was "to

surprise her by giving her something that was worth a great deal more than all the rest." With all this he stated, however, that he had never had any conversation whatever with his sister-in-law on the subject of changing the investment made in the canal stock.

The court below decreed that Duncan, Sherman & Co. should account for the value of the 70 shares pledged to them and sold, with the dividends and other proceeds that would have been received thereon, including interest on the dividends had they not been diverted from the trust. And that the bank should do the same by the 47 shares pledged to them and sold.

Both Duncan, Sherman & Co. and the City Bank appealed.

Mr. W. W. McFarland, for Duncan, Sherman & Co.; Mr. W. H. Arnoux, for the National City Bank, appellant:

Assuming that both of the defendants are to be charged with constructive notice that the stock in question was held subject to some trust, from the circumstance that the word trustee appeared upon the face of the certificates, a presumption impossible to make in regard to Duncan, Sherman & Co., no member of which firm ever saw the certificates—such notice cast upon the defendants no other duty than that of ascertaining whether the power to sell and buy securities, ordinarily attending the title to such securities, had been in this case lawfully withheld from the trustee by the terms of the trust.*

While in the case of executors the law implies the power to dispose of the personal assets, and a purchaser may, as a rule, assume its existence without inquiry, and while in the

* Ashton *v.* Atlantic Bank, 3 Allen, 217; Albert *v.* Savings Bank, 1 Maryland Chancery Decisions, 408; Atkinson *v.* Atkinson, 8 Allen, 15; Pennsylvania Life Insurance Co. *v.* Austin, 42 Pennsylvania State, 257; Garrard *v.* Pittsburg and Connellsville, &c., Co., 29 Id. 154; Dodson *v.* Simpson, 2 Randolph, 294; Tillinghast *v.* Champlin, 4 Rhode Island, 173, 213; Field *v.* Schieffelin, 7 Johnson's Chancery, 160; McLeod *v.* Drummond, 14 Vesey, 353.

case of strict trustees, where the purchaser has notice of the existence of the trust, it may be necessary for him to ascertain that the power of sale has not been withheld by the terms of the trust; nevertheless, unless it has been withheld, and the trustee is therefore unable to sell without committing a breach of trust, the principles of law, which govern both cases, are from that point forward the same, and are so treated in all the authorities.

In cases where it is the duty of the purchaser to inquire into the trustee's power to sell, and he finds that he possesses this power, and may sell, without by the act of sale committing a breach of trust, he has the right to presume, as the law presumes, in favor of honesty and against fraud.*

There are a few cases in which the purchaser is bound to see to the application of the purchase-money. To this class the foregoing observations are of course inapplicable, but to this class the case at bar does not belong.

2. A pledge or mortgage stands upon the same footing, and is governed by the same principles as a sale, it being but a part execution of the larger power, and the exercise of which may be just as beneficial to the beneficiaries.†

3. There was no violation of the trust in question by the trustee in disposing of the canal stock. It did not even belong to any of the classes of securities in which the testator expressed a desire to have his estate invested. For aught that the defendants knew, it might have been the intention, as perhaps it was the duty of the trustee, by raising the money in question, to *reinvest* the trust funds in the class of securities contemplated by the testator. The testator's express desire in regard to the character of the investment of the trust funds, was disregarded with the consent and at the solicitation of the beneficiaries, in hopes of thus securing a larger income.

4. The evidence of Mr. Jaudon shows that it was left largely to him by this *cestui que trust*, his sister-in-law, in

* Broom's Legal Maxims, 911?

† Petrie *v.* Clark, 11 Sergeant & Rawle, 388; Miles *v.* Durnford, 2 Simons (New Series), 234; Russell *v.* Plaice, 18 Bevan, 21.

what security to invest. There had been a complete departure from the terms of the will by the investment in canal shares. The change to Broad Top stock was no greater than that was. Mr. Jaudon considered the Broad Top a promising investment, and hoped to surprise his sister-in-law by a most agreeable accession to her income. He meant to *re*invest the trust moneys produced by the sale of canal shares in this new stock. This, no doubt, it was wrong in him to do; but not more wrong than what he had already done; and in one case, as in the other, he meant all for the best. But the canal stock having been sold really to make a trust reinvestment, neither Duncan, Sherman & Co., nor the bank can be made liable for the failure of the new fund; though, of course, Mr. Jaudon can be for violating the directions of his testator.

Mr. T. R. Strong, contra.

Mr. Justice DAVIS delivered the opinion of the court.

It is too plain for controversy that Samuel Jaudon committed a gross breach of trust in allowing the shares of stock in the Delaware and Raritan Canal Company to be disposed of and applied in the manner they were; but as he is insolvent, and the specific property cannot be reclaimed, the inquiry arises whether the appellants, with whom the shares were pledged and for whose benefit they were sold, or the *cestui que trust*, shall bear the loss occasioned by his misconduct.

It is argued that the appellants bear a different relation to this stock from what would be the case if the investment in it had been authorized by the terms of the will. It is true the will directed investments to be made in government or State stocks, and on this account the conversion by Jaudon of the State stocks on hand into canal stock, was a wrongful act and a breach of trust. But the *cestui que trust* was at liberty to approve or reject this unauthorized proceeding, and her decision on the subject concerned no one not interested in the trust estate. She elected to approve it after she

learned of the occurrence, and by doing this adopted the new investment and waived the breach of trust. But her waiver on that occasion did not bind her to observe the same line of conduct in case of further violation of duty. It would be absurd to suppose because she ratified this transaction she intended to assent to future breaches of trust. Indeed, it is quite clear from the evidence that she acquiesced in the arrangement because her relatives who had charge of the estate advised it. In the nature of the case, she could not have had that sort of information on such a subject on which to base a correct judgment, and, therefore, necessarily relied for the security of her rights on the counsel of older and more experienced persons in whom she placed confidence. It is due to the trustee to say that the change of investment was a family arrangement, in order to obtain a greater income, and that the stock selected for this purpose was one of the best of its kind that the market afforded.

Although it is wrong in any case for trustees under a will, in making investments, to depart from the rule prescribed by the testator, yet if it is done, and acquiesced in by the party in interest, and there is no interference by the court having charge of the trust, the right of action to the *cestui que trust* for an illegal disposition of the property thus substituted is not affected by reason of this departure. It is still an estate held in trust for the beneficiary under the will, and to be protected equally with an investment made strictly in accordance with the terms of the will. It follows, then, that the relation of those having dealings with the trustee, based on shares of stock held in this way, is not changed by reason that the original purchase was not in accordance with the directions of the testator.

This brings us to a consideration of the particular transactions on which the claim for relief in these cases is founded. The dealings of Jaudon with the City Bank, based on the stock in question, commenced in 1865 and extended through a period of two years.

The dealing with Duncan, Sherman & Co. was confined to a single transaction.

The evidence leaves no room for doubt that each and all of the loans were to Jaudon in his personal character and for his individual use, and that the money obtained was applied to discharge liabilities incurred in the purchase, or carrying, of Broad Top coal stock, a speculative stock of no established reputation, in which he was at the time dealing on his own account.

It is true, when he borrowed the money he had no expectation of resorting to the trust funds to repay it, but his good intention in this respect furnishes no excuse for his conduct. It was wrong for him, under any state of circumstance, to pledge the stock in order to obtain money for his personal wants. He held a fiduciary relation to it, and yet used it as if it were his own, and bargained for the consequences which followed, although the necessity for the ultimate sale of it was not anticipated by him at the time he pledged it. If the law allowed the property of the *cestui que trust* to be treated in this manner there would be little encouragement to vest an estate in trustees for the benefit of others.

It is argued that the several transactions of Jaudon with the bank and Duncan, Sherman & Co. were really, on his part, for the purpose of reinvesting the trust funds. How can this be, when he had not a thought at the time he got the money of failure to pay it? His speculations, then, were on his own account, and, like all sanguine men who deal in stocks, he had full faith that the venture in which he was engaged would prove remunerative. The idea of reinvestment was an afterthought, occurring at the time he found himself unable to pay, and obliged, as he supposed, to part with the property of his *cestui que trust.* And even then it did not assume the shape of a settled purpose, but only an intention to offer the injured party Broad Top security, in which he was operating, for the canal stock, which he was about to appropriate to his own necessities. It is natural that a trustee who makes use of trust property to pay his own debts, without a deliberate design to defraud, should intend, at some future time, to put the party wronged by

him in as good a position as before; but can such an intention be treated as a purpose to reinvest the trust funds in the securities in which the trustee is privately speculating? If it can, personal property in the hands of trustees, be the declaration of trust ever so specific, is in a very unsafe condition. The stock was not sold because it was desirable to change the investment, but for the simple reason that it had been pledged, and it was pledged for the sole object of enabling Jaudon to obtain money to advance his personal ends. If, therefore, there had been occasion for making a reinvestment, and authority to do it, the transactions in question had no reference to any such object.

But why change the investment, when the canal stock, one of the most stable of its kind in the country, was paying on the average a semi-annual dividend of 5 per cent. If it were allowable under the will to invest in the stock of private corporations at all, few more desirable than this were accessible. Experience had shown that it was safe and yielded a large income, and no prudent trustee having once invested in it, and had his conduct approved, looking alone to the interest of his *cestui que trust*, would take the hazard of selling it and purchasing another. But there was no authority to sell it, even were it desirable to do so, or to deal with it so that a sale might become necessary. If Jaudon thought so there was no foundation for his belief, and he is compelled to admit, although his whole testimony is an effort to justify his conduct, that he never had any conversation with his *cestui que trust* on the subject of changing this stock.

It was treated by all concerned, during the long course of years in which it was held in trust, as a most desirable investment, and no thought of substituting other securities for it was ever entertained by any one, until the idea occurred to Jaudon as a means of escape from the embarrassment in which he was placed by the unlawful use he made of it. The *cestui que trust* not only never gave consent to pledge or sell it, but had no reason to suppose that the trustee would attempt anything of the kind; nor has she said or done anything, fairly interpreted, which tends even to relieve

the trustee from the legal responsibility which pertains to the administration of the trust estate.

It follows, then, that the use of the stocks by Jaudon in his transactions with the bank and Duncan, Sherman & Co. was, on his part, a flagrant breach of trust, without either justification or excuse. If so, are they blameless? They cannot be, if they had actual or constructive notice that the trustee was abusing his trust and applying the proceeds of the loans to his own use. As we have seen, the loans were for no purpose connected with the trust, but for Jaudon's own benefit, and the face of the papers given as collateral security for the debts thus incurred informed the parties dealing with him that he held the stock as trustee for Mrs. Mary T. B. Jaudon, and inquiry would have revealed the fact that the use to which the stock was put was unauthorized.

The duty of making such inquiry was imposed on these parties, for it is out of the common course of business to take corporate stock held in trust, as security for the trustee's own debt. The party taking such stock on pledge deals with it at his peril, for there is no presumption of a right to sell it, as there is in the case of an executor. In the former case the property is held for custody, in the latter for administration.

It matters not whether the stock is pledged for an antecedent debt of the trustee or for money lent him at the time. It is unlawful to use it for either purpose.

In *Lowry* v. *Commercial and Farmers' Bank of Maryland*,* which was a case of misappropriation of corporate stock by an executor, Chief Justice Taney held "that if a party dealing with an executor has, at the time, reasonable ground for believing that he intends to misapply the money, or is, in the very transaction, applying it to his own private use, the party so dealing is responsible to the persons injured." And the Supreme Court of Massachusetts, in a recent case,†

* Taney's Circuit Court Decisions, 310.

† Shaw *v.* Spencer and others, 100 Massachusetts, 389.

in its essential features like the case at bar, decides that if a certificate of stock, expressed in the name of "A. B. Trustee," is by him pledged to secure his own debt, the pledgee is, by the terms of the certificate, put on inquiry as to the character and limitations of the trust, and, if he accepts the pledge without inquiry, does so at his peril. In that case the *cestui que trust* was not named in the certificate, and the court remarked that, if it were so, the duty of inquiry would hardly be controverted.

If these propositions are sound, and we entertain no doubt on the point, the liability of the appellants for the conversion of the stock belonging to Mrs. Jaudon cannot be an open question. They either knew, or ought to have known, that Jaudon was operating on his own account, and are chargeable with constructive notice of everything which, upon inquiry, they could have ascertained from the *cestui que trust.*

If this inquiry had been pursued they could not have failed to discover the nature and foundation of the trust, and that the trustee had no right to pledge the stock for any purpose. The bank, in its dealings with Jaudon, was guilty of gross negligence, and, in consequence of this, inflicted serious injury upon an innocent person. It may be that the cashier never inquired of Jaudon what he wanted with the money, but nine successive loans to him in one year, each time on the pledge of the same trust security, was evidence enough to satisfy any reasonable man that the money was wanted for private uses, and not for any honest purpose connected with the administration of the trust.

Duncan, Sherman & Co., although intending no wrong, cannot escape their share of responsibility. Duncan lent the money to Jaudon to oblige him, and, in the very nature of the transaction, he did it for Jaudon's private accommodation. On making the application Jaudon told him he had securities to offer, naming them, and naturally he supposed they were Jaudon's own property. It is his misfortune that he turned them over to his cashier, with directions to accommodate Jaudon, without having personally examined them. If he had made this examination, we are persuaded

the *cestui que trust* would have had no occasion to be dissatisfied with his conduct.

It is needless to argue that Duncan is bound by the notice communicated to the cashier when he received the certificate and concluded the business with Jaudon.

Without pursuing the subject further, we are satisfied that the decrees below should be

AFFIRMED.

BROWN *v.* HIATTS.

1. Statutes of limitation of the several States did not run during the late civil war against the right of action of parties upon contracts made previous to, and maturing after, the commencement of the war.
2. Interest on loans made previous to, and maturing after, the commencement of the war ceased to run during the subsequent continuance of the war, although interest was stipulated in the contract.
3. These doctrines held in a case where a mortgagee, who was a citizen and resident of Virginia, one of the Confederate States, brought a suit, after the close of the war, upon a bond and mortgage executed by citizens of Kansas, one of the loyal States, previous to the war, but which matured a month after the commencement of the war.
4. It having been held that the civil war commenced in Virginia at the date of the proclamation of the President of intended blockade of her ports, April 27th, 1861, and to have ended, so far as the statutes of limitation are concerned, on his proclamation of its close, April 2d, 1866, the period between those dates must be deducted in the computation of the time during which the statute of Kansas had run against the right of action of the mortgagee on the said bond and mortgage.

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

Brown filed a bill against Hiatt and wife to foreclose a mortgage, executed by the latter persons upon certain real property in Kansas, to secure their joint and several bond for $2400, with interest, and to obtain a sale of the mortgaged premises for its payment. The case was thus:

On the 29th of May, 1860, Brown, who was then and still is a citizen and resident of Virginia, being at the time in

Kansas, lent to the defendants, citizens of that State, the sum of $2000, at interest, at the rate of 20 per cent. a year, and took the bond in suit, payable in twelve months, for the amount, with the interest for the period included, making the sum of $2400, the whole drawing the stipulated interest after maturity.* As security for the payment of this bond with interest, and simultaneously with its execution, Hiatt and wife made and delivered to Brown the mortgage in suit, which covers three hundred and twenty acres, in the county of Leavenworth, in that State.

With the execution of the bond, and as further or collateral security for its payment, the defendant, Hiatt, assigned to the complainant a mortgage held by him upon certain real property in Kansas, executed by one Kenyon and his wife, to secure their joint note for $800, made in December, 1858, and payable in December, 1860, with interest at 6 per cent. a year. Upon this note there was then a credit of $75.

At the same time the defendant, Hiatt, also assigned to the complainant for the like further or collateral security a judgment rendered in his favor upon the foreclosure of a mortgage against one Perkins, in the District Court of the United States for the District of Kansas, on the 6th of June, 1859, for $763, and costs. This judgment drew 7 per cent. a year. The assignment was absolute in its terms, but it is admitted to have been executed as further or collateral security for the payment of the bond in suit.

The complainant, as stated, was at the time a citizen and resident of Virginia, and soon after the completion of the transaction in question he returned to that State, carrying with him the bond and mortgage, and retained them there in his possession until September, 1865. His residence was all this time in that portion of the State which was declared by the proclamation of the President to be in insurrection against the government of the United States, and was during the entire period of the war, until the surrender of the

* The law of Kansas, then in force, allowed parties to agree for the payment of any rate of interest on money due or to become due upon any contract.

Confederate forces by General Lee, under the domination of the Confederate government.

At the time the collaterals mentioned were assigned it was agreed, in consequence of the residence of the complainant in Virginia, that the defendant, Hiatt, should exercise such oversight over them as would be necessary to preserve them for the purposes for which they were appropriated, so that resort might be had to them if the mortgage to the complainant should prove to be insufficient security.

In April, 1861, some correspondence was had between the complainant and Hiatt respecting these collaterals, in which the complainant expressed a desire that the conveyance of any property struck off to him on a sale under the Perkins judgment, should show on its face that the property was only held as collateral security, and in which Hiatt stated that he had a prospect of paying off the mortgage to the complainant by the proceeds of work on a contract in Pennsylvania during the coming summer. No intimation was made on either side of any agreement, by which the collaterals were, under any circumstances, to be taken in satisfaction of the bond and mortgage in suit.

On the 17th of April, of that year, the Convention of Virginia passed the ordinance of secession, purporting to take the State from the Union. The proclamation of President Lincoln declaring a blockade of her ports followed on the 27th of the same month, and the war commenced. From the time of its recognition until its termination, or at least until the cessation of active hostilities, all commercial intercourse between the parties, except by special license of the government, was illegal, and by the act of Congress of July 13th, of that year, and the subsequent proclamation of the President, was expressly interdicted.

During this period of non-intercourse and early in 1863, Hiatt went to the office of the district attorney of the United States in Kansas, and stated to that officer that the complainant had large claims against persons living in the State, secured by mortgages on real property, which were subject

to confiscation; and in enumerating the debtors of the complainant, stated that he himself owed that person a considerable sum of money secured by mortgage on his farm, the amount of which he could not state, but it was the amount for which the mortgage was given, and that he would much prefer paying it to the government rather than to the complainant. This was the first intimation that the district attorney had that the complainant held any claims in Kansas subject to confiscation. Upon the suggestion thus made, that officer proceeded to examine the records of the county, and found among them the record of the bond and mortgage to the complainant. He thereupon instituted proceedings for their confiscation in the District Court of the United States for the District of Kansas, under the act of Congress of March 17th, 1862. To the information the defendants appeared and filed an answer, verified by the oath of Hiatt, in which they alleged that they were not indebted and had not been indebted to the complainant since May, 1861, upon the bond and mortgage executed by them. And they set up in substance that the bond and mortgage had been paid and satisfied by the Perkins judgment, or the property purchased under it, and the Kenyon note and mortgage, pursuant to a verbal agreement made at the time the bond and mortgage were executed.

Upon the trial of this question of payment and satisfaction, Hiatt produced what purported to be a letter from the complainant which supported the averment as to the agreement mentioned. The district attorney, believing the letter to be genuine and the testimony of Hiatt in support of it trustworthy, dismissed the proceedings, and instituted other proceedings for the confiscation of the Kenyon note and mortgage. These resulted in a sale of a part of the premises covered by that mortgage, and the proceeds of the sale were paid into court. In the meantime the Perkins judgment, owing to a defective acknowledgment of the mortgage on which it was given, proved to be entirely valueless, and the property upon which it was a lien, was sold to satisfy a prior incumbrance.

Statement of the case.

The present suit was commenced in February, 1867, and the defences made to it were substantially these:

1st. That a verbal agreement was entered into between the parties at the time the bond and mortgage were executed, by which the complainant was to take in their satisfaction, at the election of the defendants, the Perkins judgment and the Kenyon note and mortgage, and that the defendants, in 1862, made such election, which was acceded to and accepted by the complainant. The election thus made was alleged by the defendants to have been communicated to the complainant by letter, sent by mail, and his acceptance of the collaterals was alleged to have been contained in a letter received by mail, from him, in which he stated that he should henceforth hold the collaterals as his own property in satisfaction of the bond in suit. These letters were not produced by the defendants in this case, but were alleged to have been lost. And it appeared that communication by mail between that portion of Virginia in which Brown, the complainant, resided, and Kansas, ceased in 1861, and was not re-established until after the cessation of hostilities in 1865.

2d. That the right of the complainant to maintain the suit was barred by the statute of limitations of the State of Kansas, which requires a suit of this character to be brought within three years after the cause of action has accrued; and—

3d. That the Perkins judgment and Kenyon note and mortgage had become valueless, and were lost through the neglect of the complainant, and that he should, therefore, be charged with their full amount. The defendants also alleged that the debt against Kenyon was confiscated by judgment of the District Court as the property of the complainant.

The Circuit Court held that the alleged verbal agreement was not proved, and that the statute of limitations of Kansas did not run against the right of action of the complainant during the continuance of the civil war, but allowed the amount of the Kenyon note, alleged to have been confis-

cated by the proceedings taken for that purpose, on the demand of the complainant, and gave judgment for the balance and a decree for the foreclosure of the mortgage and sale of the premises, if the amount found due was not paid within a designated period. From this decree both parties have appealed to this court.

Messrs. Conway Robinson and E. S. Brown, for Brown; Mr. A. G. Riddle, for the Hiatts.

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

We fully concur in the conclusion of the Circuit Court that the alleged verbal agreement between the parties that the complainant should take the Perkins judgment and Kenyon note, at the election of the defendants, in satisfaction of the bond and mortgage in suit, is not proved. The existence of any agreement of the kind is positively denied by the complainant, and all the circumstances of the case show conclusively to our minds that no such agreement was ever made. In the first place the amount of both collaterals, assuming them to have been perfectly good, was, at the time the loan was made, less by several hundred dollars than the amount lent. Then the loan drew twenty per cent. interest a year while one of the collaterals bore interest only at six per cent., and the other at seven per cent. a year, so that the excess of the amount due on the loan over the amount due on the collaterals was constantly increasing. In the second place the letter which Hiatt pretends to have received from the complainant recognizing the alleged verbal agreement and accepting the election of the defendants, was not produced, and the complainant denies under oath that he ever wrote such a letter. The latter's testimony is corroborated by the fact that communication by mail, by which means Hiatt pretends to have received the letter, had long before ceased between that portion of Virginia in which the complainant resided and the loyal portion of the United States. In the third place the statements of Hiatt made to

several parties at different times were inconsistent with the existence of any agreement of the kind mentioned. In 1863 he stated to the district attorney that he owed the complainant the entire amount secured by his mortgage, and this was more than a year after the pretended satisfaction of the bond and mortgage in suit. The story put forth by the defendants is contradicted by the testimony of the complainant, is intrinsically improbable, and is irreconcilable with their repeated statements to others, and with their answer to the information in the confiscation proceedings. The case well illustrates the wisdom of the rule of law and the importance of its enforcement, that parol testimony of a verbal agreement shall not be permitted to vary or contradict the terms of a written contract made at the same time. The contract here in writing shows that the Kenyon note and mortgage were assigned as collateral security. The object of the testimony was to prove that a different agreement was really made, namely, that the note should be held as such security only at the option of the defendants, and at their election could be turned over with the Perkins judgment in full payment and satisfaction of the bond and mortgage. Had an objection been taken to the admissibility of this evidence it would undoubtedly have been excluded.

We concur also with the Circuit Court in its ruling, that the statute of limitations of Kansas did not run against the right of action of the complainant during the continuance of the civil war. That statute required the action to be brought within three years after the cause of action accrued, and it constituted a rule of decision in the National courts equally as in the courts of that State. The cause of action in this case accrued on the 29th of May, 1861. At that time the civil war embraced Virginia, or at least that portion of the State in which the complainant resided.

It was held in the case of *The Protector*,* that the war began in that State at the date of the proclamation of intended blockade of her ports by the President. That was the first public act of the executive in which the existence of war in

* 12 Wallace, 700.

that State was officially recognized, and to its date the courts therefore look as the commencement of the war. And so far as the operation of the statute of limitations is concerned, it was held in the same case that the war continued until proclamation was in like manner officially made of its close. That occurred on the 2d of April, 1866. The period, therefore, between the 27th of April, 1861, and the 2d of April, 1866, must be excluded in the computation of the time during which the statute has run against the right of action of the complainant on the bond and mortgage in suit, and being excluded the present suit is not barred.

It is unnecessary to go at length over the grounds upon which the court has repeatedly held that the statutes of limitation of the several States did not run against the right of action of parties during the continuance of the civil war. It is sufficient to state that the war was accompanied by the general incidents of a war between independent nations; that the inhabitants of the Confederate States on the one hand, and of the loyal States on the other, became thereby reciprocally enemies to each other, and were liable to be so treated without reference to their individual dispositions or opinions; that during its continuance all commercial intercourse and correspondence between them were interdicted by principles of public law as well as by express enactments of Congress; that all contracts previously made between them were suspended; and that the courts of each belligerent were closed to the citizens of the other.

Statutes of limitation, in fixing a period within which rights of action must be asserted, proceed upon the principle that the courts of the country where the person to be prosecuted resides, or the property to be reached is situated, are open during the prescribed period to the suitor. The principle of public law which closes the courts of a country to a public enemy during war, renders compliance by him with such a statute impossible. As is well said in the recent case of *Semmes* v. *Hartford Insurance Company*,* "The law im-

* 13 Wallace, 160.

poses the limitation and the law imposes the disability. It is nothing, therefore, but a necessary legal logic that the one period should be taken from the other."

As the enforcement of contracts between enemies made before the war is suspended during the war, the running of interest thereon during such suspension ceases. Interest is the compensation allowed by law, or fixed by the parties, for the use or forbearance of money, or as damages for its detention, and it would be manifestly unjust to exact such compensation, or damages, when the payment of the principal debt was interdicted. The question whether interest should be allowed on such contracts during the period of war was much considered soon after the Revolution. In the case of *Hoare* v. *Allen*,* decided in 1789 by the Supreme Court of Pennsylvania, it was held that interest did not run during the war on a debt owing to an enemy, contracted previously. "Where a person," said the court, "is prevented by law from paying the principal, he shall not be compelled to pay interest during the prohibition." The legislation of Congress after the commencement of the War of the Revolution, like the legislation of 1861, prohibited commercial intercourse with the inhabitants of the enemies' country, and the court observed that the defendant could not have paid the debt to the plaintiff, who was an alien enemy, without a violation of the positive law of the country and of the law of nations, and that parties ought not to suffer for their moral conduct and their submission to the laws. The decision was followed by the same court in *Foxcraft* v. *Nagle*, in 1791. Similar decisions were rendered by the Court of Appeals of Virginia and the Court of Appeals of Maryland.

The counsel for the complainant attempts to draw a distinction between those contracts in which interest is stipulated and those to which the law allows interest, and contends that the revival of the debt in the first case, after the termination of the war, carries the interest as part of the

* 2 Dallas, 102.

debt; while in the latter case interest is allowed only as damages for the detention of the money. We are, however, of opinion that the stipulation for interest does not change the principle, which suspends its running during war. In the first case cited, from Pennsylvania, interest was stipulated in the contract. "A prohibition," says Mr. Justice Washington, in *Conn* v. *Penn*,* "of all intercourse with an enemy during the war, and the legal consequence resulting therefrom, as it respects debtors on either side, furnish a sound, if not in all respects a just reason, for the abatement of interest until the return of peace. As a general rule it may be safely laid down that wherever the law prohibits the payment of the principal, interest during the existence of the prohibition is not demandable."

Upon the third ground of defence we are unable to agree with the Circuit Court. We concur in its ruling that the complainant is not justly chargeable with any neglect in the collection of the collaterals. His residence within the Confederate States rendered it impossible for him to superintend proceedings for their enforcement. The Perkins judgment proved to be worthless in consequence of the defective acknowledgment of the mortgage, for the enforcement of which the judgment was rendered, which defect gave precedence to another mortgage, under which the property was sold and by which the proceeds were absorbed. The Kenyon note and mortgage were confiscated, and the premises, or a part of them, covered by that mortgage, were sold by the marshal, and the proceeds paid into court. That note and mortgage the complainant did not own; he held them only as collateral security for the payment of the bond of the defendants. They were owned by the defendant, Hiatt. He concocted a scheme to defraud the complainant, and invented the shallow story of an agreement with him to take the collaterals in satisfaction of the loan, although they were less than the loan in amount by several hundred dollars. By barefaced and impudent falsehood, and the production

* Peters's Circuit Court, 524.

of a fabricated letter purporting to be from the complainant, he induced the district attorney to believe that the bond and mortgage of the defendants had been paid and satisfied, and that the collaterals belonged to the complainant, and as his property their confiscation was decreed. Having thus led the public prosecutor to treat his own property as belonging to another, and to be confiscated as such, he must suffer the consequences of his own folly and crime. He cannot charge the loss of the collaterals thus caused to the complainant.

It follows from the views we have expressed that the judgment and decree of the Circuit Court must be reversed, and that court be directed to enter a judgment in favor of the complainant for the amount due on the bond in suit; such amount to be made up by adding to the principal the interest due to the date of the judgment, at the rate stipulated, deducting the period intervening between the 27th of April, 1861, and the 2d of April, 1866; and also a decree directing a sale of the mortgaged premises and the application of the proceeds to the payment of the amount found due, if such amount be not paid within such reasonable period as may be prescribed by the court. And it is

SO ORDERED.

GOULD *v.* REES.

1. Where three elements are claimed in a patent, in combination, the use of two of the elements only does not infringe the patent.
2. The introduction of a newly-discovered element or ingredient, or one not theretofore known to be an equivalent, would not constitute an infringement.

ERROR to the Circuit Court for the Western District of Pennsylvania.

Rees sued Gould in an action at law for an alleged infringement of a patent for improvement in steam engines, dated January 24th, 1860.

The claims of the patent were as follows:

"Having thus described the nature, construction, and opera-

tion of my improvement, what I claim as my invention and desire to secure by letters-patent of the United States is:

"*First.* The flanges *i* on the reversing crank or arm *b*, and the projection *t* on the cam-rod *e*, when used for the purpose of guiding the hooks 1 and 2 into their proper position on the wrists 3 and 4 of the reversing crank or arm *b*, as herein described and set forth.

"*Second.* The use of the link *m*, or its equivalent, when used in connection with the cam-rods *f* and *g*, reversing crank or arm *b*, and the crank or arm *l*, as herein described and for the purpose set forth.

"*Third.* The use of the connecting rods *o* and *g*, or their equivalents, when used in combination with the link *m*, cam-rod *e*, and levers *p* and *r*, as herein described and for the purpose set forth."

Numerous exceptions were taken by the defendant to certain rulings of the court, and also to certain instructions to the jury, but *this* court passed mainly upon the principle involved in the second and third specifications of error, which were in these words:

"2d. The court below erred in instructing the jury in reply to the fourth point of law presented by the counsel of the defendants below, which point was in the following words:

"'That when a combination of mechanical devices is claimed, it is not infringed by the use of a combination differing substantially in any of its parts, and that the omission of one essential feature or element of the combination as claimed avoids the patent.'

"The charge of the court below to said fourth point being as follows:

"'If the jury believe that the mechanical devices used by Rees, although differing in mechanical form or construction, are equivalent to those patented and used in the combination patented to produce the same result, it is an infringement of the patent. *And this, although there is an omission of one of the features of the combination.* It is the ordinary device resorted to by those who design to infringe, and who have been unsuccessful in their experiments to produce a desired result. The law secures to the patentee the right to the use of his machine, provided it consists of a new combination, although composed of parts well known and in common use.'"

"3d. The court erred in instructing the jury in reply to the

sixth point of law presented to him by the defendants' counsel, which point was in the following words:

"'That the first claim of the plaintiff's patent, in the following words, to wit: "I claim the flanges *i*, on *the reversing crank or arm* b, *and the projection* t, *on the cam-rod* e, *when used for the purpose of guiding the hooks* 1 *and* 2 *into their proper position on the wrists* 3 *and* 4 *of the reversing crank or arm* b, *as described and set forth*," is for a combination of the arm *b*, having flanges *i*, with the cam-rod *e* having a projection *t*, and is not infringed by the use of either of the elements of the combination without the other, nor by the use of the arm *b* if without the flanges *i*; or of the cam-rod *e* without the projection *t*.'

"The charge of the court to said sixth point being as follows:

"'The use of the combination is an infringement, and *the omission of one of the elements* and the substitution of another mechanical device to perform the same function will not avoid the infringement. All the elements of the machine may be old, and the invention consists in a new combination of those elements whereby a new and useful result is obtained. Most of the modern inventions are of this latter kind, and many of them are of great utility and value.'"

Verdict having gone under these rulings for the plaintiff, the defendant brought the case here.

Mr. G. H. Christy, for the plaintiff in error. No counsel appeared on the other side.

Mr. Justice CLIFFORD delivered the opinion of the court.

Patentable inventions may consist entirely in a new combination of old ingredients whereby a new and useful result is obtained, and in such cases the description of the invention is sufficient if the ingredients are named, the mode of operation given, and the new and useful result is pointed out, so that those skilled in the art, and the public may know the nature and extent of the claim and what the parts are which co-operate to produce the described new and useful result.

Damages are claimed by the plaintiff for the alleged infringement of certain letters-patent, and he instituted for that purpose an action of trespass on the case against the defendant to recover compensation for the alleged injury.

Letters-patent were granted to the plaintiff on the twenty-fourth of January, 1860, for a new and useful improvement in steam engines, described in the specification as "a new and useful mode of operating and handling" such machines, which consists, as the patent states, in so arranging and constructing the cranks or arms of the lifters and cam-rods of puppet-valve engines that they may be operated and handled with ease and speed, by means of levers and connecting rods, the whole being arranged and constructed in the manner described in the specification.

Very minute description of the various parts of the mechanism of the invention is given in the specification, and in order to enable others skilled in the art to make and use the invention, the patentee proceeds, with much detail, to describe its construction and operation, but in the view taken of the case by the court it will not be necessary to enter into those details in the present investigation of the controversy between these parties.

Process was issued, and being served, the defendant appeared and pleaded as follows: (1.) That he was not guilty. (2.) That the plaintiff was not the original and first inventor of the improvement described in the letters-patent, and tendered an issue to the country, which was joined by the plaintiff.

Besides the two pleas pleaded, he also gave notice in writing that he would give evidence under the general issue to prove that the alleged invention was well known and generally used in steamboats navigating the Western waters long anterior to the alleged date of the plaintiff's invention. Subsequently the parties went to trial, and the jury, under the instructions given by the court, returned their verdict for the plaintiff, and the defendant excepted to certain rulings and to the instructions of the court, and sued out a writ of error and removed the cause into this court.

Enough has already been remarked to show what the general nature, construction, and operation of the improvement is without entering more into the details of the description, as given in the specification, except to reproduce

the claims of the patent as made by the patentee. They are as follows: First. The flanges on the reversing crank or arm, and the projection on the cam-rod, when used for the purpose of guiding the hooks into their proper position on the wrists of the reversing crank or arm, as described and set forth in the descriptive portion of the specification. Second. The use of the link, or its equivalent, when used in connection with the cam-rods, reversing crank or arm, and the other crank or arm, as therein described and for the purpose therein set forth. Third. The use of the connecting rods, or their equivalents, when used in combination with the described link, cam-rod, and levers, as therein described and set forth.

Argument to show that each of the claims is for a combination of ingredients is unnecessary, as the statement of the respective claims is sufficient to establish the affirmative of the proposition; nor is it necessary to add anything to show that all of the ingredients of the respective claims are old, as the specification does not contain a word to justify the theory that the patentee ever pretended that he had invented anything except the several combinations described in the three claims of his letters-patent.

Exceptions were taken by the defendant to certain rulings of the court, as well as to several of the instructions given by the court to the jury, and all or nearly all of those rulings and instructions are assigned for error in this court, but in the view of the case taken by this court, it will not be necessary to examine more than one of the exceptions, which is the one calling in question the instruction defining the rights of a patentee where the invention consists solely in a combination of old ingredients, as the proposition of law given to the jury in that instruction is clearly erroneous, and of a character which entitles the defendant to a reversal of the judgment and to a new trial.

Evidence was introduced on both sides, and the defendant requested the presiding justice to instruct the jury that when a combination of mechanical devices is claimed, the patent is not infringed by the use of a combination differing sub-

stantially in any of its parts, and that the omission of one essential feature or element of the combination as claimed avoids the infringement, repeating that request in respect to each of the three claims of the patent, and the bill of exceptions shows that the presiding justice refused to give the instruction as to any one of the three claims, and that he instructed the jury in respect to the second* claim that the use of the combination is an infringement, and that the omission of one of the elements and the substitution of another mechanical device to perform the same function will not avoid the infringement, adding what undoubtedly is correct, that the elements of the machine may be old and the invention consist in a new combination of old elements whereby a new and useful result is obtained.

Just exception cannot be taken to the last paragraph of the instruction, but the preceding clause, which asserts that the omission of one of the elements and the substitution of another mechanical device to perform the same function will not avoid the infringement, cannot be sustained, as the principle as there stated, without any qualification, is not correct, and when given, as the instruction was, without any explanation, it was well calculated to mislead the jury.

Mere formal alterations of a combination in letters-patent do not constitute any defence to the charge of infringement, as the inventor of a combination is as much entitled to suppress every other combination of the same ingredients to produce the same result, not substantially different from what he has invented and caused to be patented, as the inventor of any other patented improvement. Such inventors may claim equivalents as well as any other class of inventors, and they have the same right to suppress every other subsequent improvement, not substantially different from what they have invented and secured by letters-patent, but they cannot suppress subsequent improvements which are substantially different from their inventions, whether the new improvement consists in a new combination of the same

* Qu. *First* claim.—REP.

ingredients or of some newly-discovered ingredient, or even of some old ingredient performing some new function, not known at the date of the letters-patent, as a proper substitute for the ingredient withdrawn.*

Unquestionably the withdrawal of one ingredient in a patented combination and the substitution of another which was well known at the date of the patent as a proper substitute for the one withdrawn, is a mere formal alteration of the combination; and if the ingredient substituted performs substantially the same function as the one withdrawn, it would be correct to instruct the jury that such a substitution of one ingredient for another would not avoid the charge of infringement.

Grant all that, and still it is clear that the concession will not support the charge of the court, as it is equally clear that if the combination constituting the invention claimed in the subsequent patent was new, or if the ingredient substituted for the one withdrawn was a newly discovered one, or even an old one performing some new function, and was not known at the date of the plaintiff's patent, as a proper substitute for the ingredient withdrawn, it would avoid the infringement, as a new combination or a newly-discovered ingredient substituted for the one omitted, or even an old one performing a new function not known at the date of the plaintiff's patent as a proper substitute for the one withdrawn, would not be an equivalent for the ingredient omitted within the meaning of the patent law; nor could it be successfully claimed as such by the plaintiff in order to support the charge of infringement. Such an alteration is not a mere formal alteration, as the difference between the two improvements is such that the new combination would be the proper subject of a patent and consequently would avoid the charge of infringement in a case like the one supposed by the court.

Unexplained, the theory assumed by the court warranted the jury in finding for the plaintiff, though the defendant in

* Seymour *v.* Osborne, 11 Wallace, 555.

constructing his machine omitted one of the ingredients of the plaintiff's combination and substituted another in its place to perform the same function, whether the ingredient substituted for the one omitted was or was not newly discovered, or was or was not well known at the date of the plaintiff's patent as a proper substitute for the one omitted from the combination constituting the plaintiff's invention.

Bonâ fide inventors of a combination are as much entitled to equivalents as the inventors of other patentable improvements; by which is meant that a patentee in such a case may substitute another ingredient for any one of the ingredients of his invention if the ingredient substituted performs the same function as the one omitted and was well known at the date of his patent as a proper substitute for the one omitted in the patented combination. Apply that rule, and it is clear that an alteration in a patented combination which merely substitutes another old ingredient for one of the ingredients in the patented combination is an infringement of the patent, if the substitute performs the same function and was well known at the date of the patent as a proper substitute for the omitted ingredient, but the rule is otherwise if the ingredient substituted was a new one, or performs a substantially different function, or was not known at the date of the plaintiff's patent as a proper substitute for the one omitted from his patented combination.

Where the defendant in constructing his machine omits entirely one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe, and if he substitutes another in the place of the one omitted, which is new or which performs a substantially different function, or if it is old, but was not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe.*

Tested by these principles, as the instruction in question

* Carver *v.* Hyde, 16 Peters, 514; Vance *v.* Campbell, 1 Black, 427; Roberts *v.* Harnden, 2 Clifford, 504; Mabie *v.* Haskell, Ib. 511; Brooks *v.* Fiske, 15 Howard, 219; Stimpson *v.* Railroad, 10 Id. 329; Prouty *v.* Ruggles, 16 Peters, 341; Barrett *v.* Hall, 1 Mason, 477; Howe *v.* Abbott, 2 Story, 194.

must be, it is plainly erroneous, as it warranted the jury in finding for the plaintiff, whether the ingredient substituted for the one omitted was new or old, or whether the one substituted was or was not well known at the date of the plaintiff's patent as a proper substitute for the omitted ingredient.

JUDGMENT REVERSED AND A NEW VENIRE ORDERED.

RAILROAD COMPANY *v.* JOHNSON.

The constitutionality of the acts of Congress of February 25th, 1862, and of subsequent acts in addition thereto, making certain notes of the United States a legal tender in payment of debts, reaffirmed.

IN error to the Supreme Court of Errors of Connecticut.

Johnson sued the Norwich and Worcester Railroad Company on certain coupons for interest attached to bonds, made by the said company A. D. 1860. When the coupons fell due, the amount was tendered in the legal-tender notes of the United States, issued under the act of Congress of February 25th, 1862, and the several acts in addition thereto, and they were refused. The State court rendered judgment that this tender was not good, and that the plaintiff should receive the amount with interest in the gold and silver coin of the United States. This writ of error was brought to reverse that judgment.

Mr. J. Halsey, for the plaintiff in error. No opposing counsel.

Mr. Justice MILLER delivered the opinion of the court.

In accordance with the principles settled by this court in the cases of *Knox* v. *Lee*, and *Parker* v. *Davis*,* which were affirmed in *Dooley* v. *Smith*,† the tender was a good and valid one, and the judgment for coin is erroneous, and must be reversed.

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* 12 Wallace, 457. † 13 Id. 604.

It is, therefore, ordered that the judgment of the Supreme Court of Errors of Connecticut be, and the same is hereby, REVERSED, and the cause remanded to that court for further proceedings

IN CONFORMITY WITH THIS OPINION.

The CHIEF JUSTICE dissenting: I think it my duty to express my dissent from the judgment just announced, for the reasons stated in the opinion of the court in *Hepburn* v. *Griswold*,* and in the dissenting opinions in *Knox* v. *Lee*, and *Parker* v. *Davis*.

My brothers CLIFFORD and FIELD concur in this dissent.

PELHAM *v.* WAY.

When, under the act of July 17th, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," the libel and monition have been framed in such a way, and the marshal has served his process in such a way, that notwithstanding the completion of the proceeding and a sale in form, *intended* to divest the rebel of his property, the property has not, after all, been divested in law, and the rebel's rights remain uninjured, he cannot in an action against the marshal for a false return recover more than nominal damages.

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

An act of Congress, approved July 17th, 1862, and entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," among other things, provided, "that if any person within any State or Territory of the United States other than those named as aforesaid after the passage of this act, being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within sixty days after public warn-

* 8 Wallace, 603.

ing and proclamation duly given and made by the President of the United States, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, all the *estate*, *property*, money, stocks, and *credits* of such person, shall be liable to seizure as aforesaid, and it shall be the duty of the President to seize and use them as aforesaid, or the proceeds thereof;" and further, "that to secure the condemnation and sale of any such property, proceedings *in rem* shall be instituted in the name of the United States," in the District Court; and that the proceeding shall conform as nearly as may be to proceedings in admiralty and revenue cases; "and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property."

The President of the United States, by proclamation duly made on the 25th day of July, A.D. 1862, issued public warning to all persons contemplated by the said provision, and the sixty days therein specified expired on the 23d day of September, A.D. 1862.

This act had twice at least been the subject of construction in this court. It came up once in *Pelham* v. *Rose*,* where this court took a distinction between the evidence of a credit and the credit itself; and held that when the debtor had given to his creditor a promissory note, and that note was in existence, *and the thing proceeded against*, it was necessary to the legal service of any monition that the marshal should seize and take it into his possession and control. The corollary was, that when the note, at the commencement of and during the pendence of proceedings to confiscate was beyond the jurisdiction of the marshal, there was no due service and no confiscation.

The same statute came up for consideration at a later date in *Miller* v. *United States*.†

In that case a libel had been filed under the act to confiscate railroad stocks belonging to a rebel, and the notice, in-

* 9 Wallace, 103.

† 11 Id. 296.

stead of being served on the owner, was served on the officers of the railroad company.

The court held that the service was good. It said:

"The act of Congress made it the duty of the President to cause the seizure of all the estate, property, money, *stocks*, *credits*, and effects of the persons described, and in order to secure the condemnation and sale of such property after its seizure, directed judicial proceedings *in rem* to be instituted. It contemplated that every kind of property mentioned could be seized effectually in some mode. It had in view not only tangible property, but that which is in action. It named stocks and credits; but it gave no directions respecting the mode of seizure. It is, therefore, a fair conclusion that the mode was intended to be such as is adapted to the nature of the property directed to be seized, and in use in courts of revenue and admiralty. The modes of seizure must vary. Lands cannot be seized as movable chattels may. Actual manucaption cannot be taken of stocks and credits. But it does not follow from this that they are incapable of being seized, within the meaning of the act of Congress. Seizure may be either actual or constructive. . . . Garnishment almost everywhere exists. What is that but substantial attachment. It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. In all cases where the garnishee is a debtor, or where the garnishment is of stocks, it is effected by serving notice upon the debtor or corporation. A corporation holds its stock as a *quasi* trustee for its stockholders. The service of an attachment, though it is but a notice, binds the debt or the stock in the hands of the garnishee from the time of the service, and thenceforward it is potentially in '*gremio legis.*' The statute declares that proceedings to confiscate shall conform, as nearly as may be, to proceedings in admiralty or revenue cases. Now, it is legitimate in certain proceedings in courts of admiralty, to attach credits and effects of such an intangible nature that they cannot be taken into actual possession by the marshal, and the mode of attachment is by notice, dependent upon statutory enactment."

The court accordingly held that the confiscation and sale had made a valid transfer of the stock.

Statement of the case.

Under this already mentioned act of Congress, of July 17th, 1862, the United States, in 1863, filed a libel of information in the District Court for the District of Indiana, "against *the following described credits and effects* of Henry Pelham, . . . *that is to say, one promissory note dated March 1st*, 1862, *for the sum of* $7000, *and due four years after date*, executed by Lewis Pelham to Henry Pelham." Lewis Pelham was still in Indiana, and within the jurisdiction of the marshal; but Henry Pelham was in Kentucky, outside of the marshal's jurisdiction, *and had the note with him there.* The libel, after reciting the act of July 17th, 1862, and making other proper recitals, alleged that "by force of the said statute, and the public warning of the President of the United States, the *said estate, credits, and effects* of him, the said Henry Pelham, so described as aforesaid, became and were forfeited to the United States, and that the same were liable to be condemned as enemies' property."

The writ of monition stated that a libel had been filed by the district attorney against "one promissory note," and commanded the marshal "to attach the note, and to detain the same in your custody until the further order of the court concerning the same," and "to give due notice to all persons claiming the same," &c.

The marshal made return, on the back of the writ, as follows:

"May 2, 1863.

"In obedience to the within warrant, I have arrested *the property within-mentioned*, and have cited all persons having or pretending to have any right, title, or interest therein, as by the said warrant I am commanded to do.

"D. G. ROSE,
"Marshal."

A summons was at the same time issued against Lewis Pelham, the maker of the note, which was served on him by the marshal, and he appeared and answered, admitting the facts alleged in the libel.

The fact of a publication of notice to all other parties in interest was proven, and a decree of condemnation was

made, and a writ of *venditioni exponas* issued to the marshal, who returned that he had offered for sale the promissory note, and sold it to Lewis Pelham for $3000.

Hereupon, the rebellion being suppressed, Henry Pelham sued the sureties of the marshal (he being dead), in the District Court for the District of Kentucky, for damages alleged to have accrued by the marshal's false return in the case. The declaration alleged a false return "to a writ of monition in a libel by the United States against the following described *credits and effects* of Henry Pelham, . . . that is to say, one promissory note for $7000, executed by Lewis Pelham to the said Henry." It was an admitted fact in the case that the note was, from the issuing of the monition in the proceedings for confiscation, till, and at the time of the return to the monition by the marshal that he had arrested the same, outside of the jurisdiction of the said District Court, and not within the territorial limits of the State of Indiana; but, on the contrary, was, during all that time in the possession of the said plaintiff in the State of Kentucky, where he resided.

The plaintiff requested the court to instruct the jury as follows:

"If the jury find, from the evidence, that the allegations of the declaration are true, they will find for the plaintiff, and assess his damages in the amount of the note, with interest thereon from maturity."

The court refused to give this instruction, and, on the contrary, charged that under the conceded facts in the case, the plaintiff was entitled to no more than nominal damages.

A verdict was rendered accordingly, and the refusal to charge as requested, and the charge as given, were now assigned for error.

Messrs. Coburn, Dye, and Harris, for the appellants; Mr. I. B. Niles, contra.

Mr. Justice STRONG delivered the opinion of the court.

That the errors assigned are unfounded is very plain, if

the record of confiscation in the District Court is not a bar to the recovery by the plaintiff of the debt formerly due to him from Lewis Pelham, and which was evidenced by the note dated March 1, 1862. The decree in that case is doubtless conclusive of all matters then adjudicated upon, and, as it was a proceeding *in rem*, the subject is to be ascertained from the record, from the information, the monition, and from the marshal's return. If they show that the "credit," or the debt due from Lewis Pelham to the plaintiff, was attached, and if the decree was upon the title to that credit, the plaintiff has been divested of his interest therein, and divested in consequence of the marshal's false return. On the other hand, if the information, the monition to the marshal, his return, the decree of the court, and the marshal's sale, all relate to another subject, not to the "debt" or "credit," then the plaintiff has not been divested of the credit, and he has sustained no appreciable injury in consequence of the falsity of the marshal's return. Undoubtedly a debt or a credit was capable of seizure under the confiscation acts, and of subsequent condemnation and sale. This we ruled in *Miller* v. *The United States*,* and we then showed how property in action could be seized and brought within the jurisdiction of the court. But the question here is whether the debt was seized, or whether the subject of the seizure, and the consequent libel, was only an evidence of the debt, a thing capable of actual manipulation and delivery. That it was the latter an inspection of the record, and the decision of this court in *Pelham* v. *Rose*,† sufficiently establish. The libel was against a promissory note, particularly describing it, and it was that, not the debt of which it was evidence, that was claimed to have been forfeited. The monition was against the promissory note, and nothing else. The marshal was commanded to attach the note and detain the same in his custody. It made no allusion to any right in action. The marshal's return was that he had arrested the property (described in the monition). The decree of

* 11 Wallace, 268.

† 9 Id. 103.

the court was that the note should be exposed to sale, and the sale was of the property mentioned in the libel and in the decree. Plainly, a debt is distinguishable from any instrument of evidence of the debt. This was the view taken of the case in *Pelham* v. *Rose*. The language of this court then was as follows: "In the case at bar a visible thing, capable of physical possession, is the subject of the libel. It is the promissory note of Pelham which constitutes the *res* against which the proceeding is instituted, and not a 'credit,' or debt, which the note is supposed by the defendant's counsel to represent." For this reason it was held that to effect its seizure it was necessary for the marshal to take the note into his actual custody and control. That case determined that the arrest returned by the marshal was not a seizure of the debt, and consequently the debt was not confiscated. It follows that the plaintiff has shown no injury sustained by him which entitles him to more than nominal damages.

JUDGMENT AFFIRMED.

REYBOLD *v.* UNITED STATES.

The government chartered a vessel during the war of the rebellion; the owners agreeing to keep her "tight, stanch, strong, well-manned," &c., and to bear the marine risks; the war risks to be borne by the government. The vessel was to proceed, "with the *first good opportunity*, to such ports and places as ordered and directed by the quartermaster of the government." On the 20th January, 1865, the vessel being then in the Potomac at Washington, and the navigation considerably obstructed by ice, the quartermaster consulted her captain about her condition and capacity, and was informed that she was sheathed with iron, and was of capacity to take a certain number of men and horses, which the government wanted to transport. The quartermaster then ordered the captain to receive the men and horses, and to proceed on the next morning down the river to City Point. The captain made no objection to the order, because, as he testified, "he considered it imperative as a military order, and as such obeyed it; though if he had considered that he could have used his judgment he would not have left the wharf, as he did not con-

Statement of the case.

sider it safe." Having accordingly received the men and horses he set off. In going down the river the vessel, though "tight, stanch, strong, well-manned, &c.," was wrecked by the ice. *Held*, that the risk was a marine risk—not one of war; and that though the acquiescence of the master deprived the act of the quartermaster of being a tortious act, no recovery could be had in the Court of Claims.

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

Reybold, owner of the steamer Express, chartered her to the government under a charter-party, whereby it was agreed

"That the vessel now is and shall be kept and maintained tight, stanch, strong, and well and sufficiently manned, victualled, tackled, apparelled, and ballasted, and furnished in every respect fit for merchant service at the cost and charge of her owner. And when laden shall proceed, *with the first good opportunity*, to such ports and places as ordered and directed by the quartermaster of the United States.

"The war risks to be borne by the United States; the marine risks to be borne by the owner."

On the 20th and 21st of January, 1865, the vessel was at Washington; the Potomac River being then frozen over from bank to bank; the ice eight inches thick; and the channel alone, in which, nevertheless, masses of ice were floating, kept open by the current and by the passage of vessels. In consequence of this condition of the river, the navigation was suspended except by government steamers and the ferry-boats. On the 20th of January, the master received an order from the quartermaster to take certain men and horses on board and proceed "to-morrow morning" to a place called City Point.

Previous to giving this order, the quartermaster, in answer to his inquiries, was informed that the vessel was sheathed with iron, and was of *capacity* to take the men, horses, &c., by the captain, who made no objection to the order, because, as he testified, "he considered it imperative as a military order, and as such obeyed it; though if he had considered he could have used his judgment, he would not have left the wharf, as he did not consider it safe."

Having taken the men and horses on board on the 20th, he set off on the following morning for City Point.

While the vessel was crossing the river, her hull was crushed by heavy cakes of ice, and she filled and sank. The injury in sinking did not arise from any defect in the vessel or any fault on the part of her officers or crew. The Court of Claims found as conclusions of law:

1. That the peril was within the term "marine risks," and therefore to be borne by the owner.

2. That the charter-party placed the steamer in the military service of the United States in a time of war, and that the term was to be construed in reference to that service, and included risks from perils of the sea and seasons incident to that service, and its exigencies.

3. That the steamer, being in the military service, was subject to military orders necessary for the proper performance of the service.

It accordingly gave its decree for the United States. And from that decree the owner of the vessel appealed.

Mr. E. Fitch, for the appellant:

The master and crew were the servants of the owners, who appointed, paid, and subsisted them; and under a right interpretation of the charter-party, the master was to see to and control the navigation of the vessel and direct her motions. The quartermaster could indeed order and direct the freight to be carried and the ports and places at which it should be delivered; in other words, control the destination and employment of the vessel. But the owners maintained the right to say what was the right mode of her navigation.

Now, whether the state of the weather and the condition of the water are suitable for the commencement of the voyage, it appertains to the office of master of the vessel to determine. "The master must commence his voyage without delay as soon as the weather is favorable. . . . *But he must on no account sail out during tempestuous weather.*" So say all the codes. Indeed, by most of the ancient marine ordinances the master is required before he hoists sail to consult his

mate, pilot, and others of the crew, as to the wind and weather. But by the law of England, or by our law, the entire management of the ship is intrusted to the master.*

In the present case the order of the quartermaster deprived the master of the steamer of the right to judge whether the "good opportunity" mentioned in the charter-party existed. It defined and specified the time for the commencement of the voyage. "*To-morrow morning*" was the point of time named for the departure of the vessel, without regard to the state of the weather or the condition of the river. The departure of the vessel at that time, in face of apparent danger, was an unskilful and negligent act of navigation, for which the United States and not the owners are responsible.

The order of the quartermaster was a military order, issued by a military officer of the United States "acting in discharge of his official duty" in time of war. Obedience to it could not be refused.†

But the United States are estopped from alleging that the master should not have obeyed it. They cannot be permitted to complain because the master did what they, by their duly authorized agent, commanded him to do. His act was their act, for he was acting within the scope of his authority. Nor can the fact, that the master obeyed without objection, relieve them from the responsibility of the order and its consequence. To object was no part of his duty.

It cannot be said that the master acquiesced, in the proper sense of the word, in the order given. His opinion was not asked, nor was he consulted in regard to the dangers to be encountered in making the voyage. He was asked in regard to the *condition* and *capacity* of his vessel, and to these inquiries he made true answers. But the voyage was not made the subject of negotiation or consultation between him and the quartermaster. The order was given, and received and

* Abbott on Shipping, Part 4, chapter 5, page 351 (original), and cases and ordinances cited in note thereto.

† The Venice, 2 Wallace, 276.

obeyed, as a military order simply, imperative in its terms and admitting no question.

By the term "marine risk," as used in the charter-party, was evidently intended such risk from marine dangers and perils as the vessel would be subjected to while making her voyages under and in pursuance of the contract; that is, while controlled and navigated by the master and crew chosen by the owners. It was not intended that the United States could substitute some other person, by them chosen, in place of the master, and still continue the responsibility for the marine risk upon the owners. Nor was it intended that they could override the judgment of the master by military command, and cast upon the owners the risk from marine perils thereby incurred.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

This case is in only one particular different from that of *Morgan* v. *United States*, decided at the last term.* Both were contracts of affreightment, with stipulations that the United States should bear the war risk and the owners the marine risk. The hiring in each case was for a particular purpose, the transportation of troops and munitions of war from place to place, as the necessities of the service might require; and although the United States were empowered to direct the manner of loading the vessels and their points of destination, yet the owners retained the control and management of them, and agreed to keep them in good repair and fit for the service in which they were engaged. In each case the loss sued for was occasioned by the perils of the sea, and in both the effort has been, notwithstanding the express terms of the contract that the owners were their own insurers against such risks, to shift the responsibility upon the United States.

* 14 Wallace, 531.

It was insisted in Morgan's case that the owners were relieved and the government chargeable, because the master was compelled to proceed to sea by the peremptory order of the quartermaster, when, in his judgment, expressed to that officer, the state of the wind and tide rendered it hazardous to do so, but we held, as in several previous cases,* that if this were so, it was outside of the contract—a tortious act of the officer—and, therefore, not within the jurisdiction of the Court of Claims.

In the present case the master made no objection to the order requiring him to proceed on his voyage, and this constitutes the only difference between the two cases. This difference, however, instead of helping the cause of the claimant, makes the justice of the defence still clearer. It was the business of the master to know whether the navigation of the river was dangerous or not, and naturally, he would be better informed on such a subject than a quartermaster of the United States. How are we to know, in the absence of proof, that the order would have been given, or, if given, not withdrawn, had the master stated that in his opinion, in the state of the river, it was unsafe to attempt to make the voyage? Why not speak of the danger when he told the quartermaster, in reply to an inquiry on the subject, prior to the order being given, that his vessel was sheathed with iron and had capacity to take the men and horses to City Point? This was the time to have spoken, as the object of the inquiry was plainly to ascertain whether or not the boat, if she had the requisite capacity, was in a condition to withstand the masses of ice which were floating in the channel of the river. It is very clear that, upon the information which was given, in the absence of any objection to the proposed voyage, the officer of the government had the right to suppose, in the judgment of the master, it could be safely undertaken. It is no excuse to say that the master at the time knew it was unsafe to leave the wharf, but said nothing,

* Reed *v.* United States, 11 Wallace, 591; United States *v.* Kimbal, 13 Id. 636.

because he considered the order a military one, and as such to be obeyed. It is true, by the terms of the contract of affreightment, he was subject to the orders of the quartermaster, but this contract did not require him to sail out of port during such tempestuous weather as would necessarily jeopardize the safety of his boat.

If obedience to an order given under such circumstances had been demanded, after proper objection, it would have been a tortious act on the part of an officer of the government.

In such a case, if relief is to be afforded, it must come from Congress, for the Court of Claims has no power to entertain a suit based on a consideration of this character.

If, however, the master chose to obey the order without objection, and in the course of the voyage the steamer commanded by him is lost or injured by a peril of the sea, her owners can have no just cause of complaint against the government, and must abide the consequences of their stipulation.

In every aspect of the case the judgment of the Court of Claims should be

AFFIRMED.

SALOMONS *v.* GRAHAM.

A State made a contract with a person whom it employed to work for it, to pay him so much money for his work; the money to be paid from time to time as the work went on. The work was done. Payment was made part in money, and part in State warrants much depreciated when paid out, and which the contractor was obliged, in order to keep his engagement to the State, to sell at a heavy loss; though in the hands of the purchasers they were ultimately redeemed. The people of the State subsequently ordained by its constitution that the debt of the State should not be increased so as to exceed $25,000,000. And after this, there being no money unappropriated in the treasury, and the debt of the State then being $25,000,000, the legislature passed an act to pay the contractor $50,331 to reimburse him the losses which he had sustained by the State's want of good faith in paying him in money all that it owed him under its contract. On an application for a mandamus, the

Supreme Court of the State adjudged that this act created a new debt, and so increased the debt of the State above $25,000,000, and was void. *Held* in this court, that no writ of error lay under the 25th section of the Judiciary Act.

MOTION by *Mr. T. J. Durant* to dismiss a writ of error to the Supreme Court of Louisiana, taken on assumption that the case fell within the 25th section of the Judiciary Act, quoted *supra*, p. 3. The case, as it appeared from some recitals and other evidences in the record, was thus:

The State of Louisiana, on the 22d March, 1866, made a contract with one Nixon, public printer, to pay him in cash, monthly, certain prices for printing to be done by him. He did the work. The State, however, paid him in cash but part of what it owed him. The balance was paid in State warrants, then much depreciated, though finally redeemed by the State. These warrants Nixon had to sell at large discounts, in order to comply with his contract to the State.

In December, 1870, the people of Louisiana ordained by their constitution that the debt of the State should not be increased so as to exceed $25,000,000.

This constitution being in force, the legislature, in March, 1871—reciting the contract with Nixon above mentioned, the kind of payments made—a part State warrants, "which he was compelled to receive, or get nothing at all"—his sale of them, and his losses: and reciting that "the good faith of the State required that it should make good the losses by him thus incurred"—passed an act, there being no moneys at the time in the treasury unappropriated, appropriating to him $50,331, "to reimburse him for the loss and discount suffered by him by reason of the premises stated, and of the failure of the State to pay him in cash, as *required by its contract with him.*" And the auditor of public accounts, one Graham, was required to issue his warrant for the amount. This the auditor refused to do; and Nixon, having sold his claim to one Salomons, Salomons applied to one of the State courts of Louisiana for a mandamus. The auditor and the attorney-general of Louisiana appeared, and showed for cause that the constitution of Louisiana forbade the act required, for

that the said constitution prohibited the increase of the debt of the State beyond $25,000,000; and that the debt already exceeded that amount before the passage of the act in favor of Nixon. The Supreme Court of the State where the case finally came, gave judgment, refusing the mandamus. The ground was that the State had settled with Nixon; that the appropriation made by the act of March, 1871, was the creation of a debt, and not the mere recognition of one existing at the time of the constitutional amendment, and unaffected by it, and that there having been no moneys in the treasury when the appropriation was made to answer it, the act increased the debt of the State above $25,000,000, and was unconstitutional and void. From this judgment of the Supreme Court of Louisiana the relators took this writ of error.

Mr. J. J. Key, against the motion to dismiss, argued that the contract of the State of March 22d, 1866, with Nixon, having been in force prior to the declaration of the constitution of Louisiana, made in December, 1870, and that contract not having been rightly performed—being in fact a still existing contract, as the act of March, 1871, showed—the constitution of Louisiana violated the 10th section of the 1st article of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts. The new constitution of Louisiana was such a law. The case, he argued, thus came within the 2d clause of the 25th section.

The CHIEF JUSTICE:

No question as to the repugnance of the constitution of Louisiana to the Constitution of the United States was made in the Supreme Court of the State, or decided by that court; nor is it easy to see how such a question could be made. The main question argued and decided was whether an act of the legislature increasing the debt of the State when it already exceeded $25,000,000, was repugnant to the constitution of the State. The court held that it was. This decision involved no Federal question.

WRIT DISMISSED.

Statement of the case.

OELRICHS *v.* SPAIN.

1. In the jurisprudence of the United States, the objection that there is an adequate remedy at law raises a jurisdictional question, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel.
2. The equity jurisdiction will be sustained when time, expense, and multiplicity of suits will be saved, as also when the case contains an element of trust.
3. Securities to an injunction bond cannot go behind the decree to raise a question of illegality as to an agreement on which it is founded.
4. A release not under seal is not a technical bar, even in a suit at law. But even when sealed it cannot be set up in equity to defeat those who were not parties to it, and who had separate interests.
5. An injunction bond, given to one who held the legal title to a fund, will enable him at law to recover to the full extent damages touching the entire fund; and a court of equity will follow the law in its proper distribution.
6. Counsel fees are not recoverable on such bonds.

APPEAL from the Supreme Court for the District of Columbia, a court (as is said, *infra*, p. 219) of general jurisdiction, the case being thus:

On the 9th of November, 1842, the Bank of the United States was the owner of $500,000 of the bonds of the then independent Republic of Texas, a government, at that time, of bad pecuniary credit. Owing W. S. Wetmore $50,000, the bank assigned these bonds, with arrears of interest on them, to him as a *security* for the debt. In July, 1845, the Republic became one of the United States, under the name of the State of Texas, and immediately certain holders of its bonds became urgent that Congress should assume the payment of them, principal and interest. Among these holders was General James Hamilton, a person of some political influence in his day, and who had been instrumental in procuring the admission of Texas into the Union. As the Bank of the United States would gain largely if the United States did so assume the debt, Hamilton applied to its trustees—the bank having itself failed, and assigned its effects—urging them to employ him to have it done; and the trustees, in October, 1845, agreed with him that if he would devote his

"best efforts, time, and means to the great object of securing the recognition and payment of these claims," and if his efforts should be successful, they would allow him a commission of ten per cent. for the service so rendered. This agreement was limited, by its terms, to two years. However, Hamilton having labored successfully, this provision as to time was not insisted on. The trustees communicated the agreement fully to Wetmore, September 16th, 1850, without mentioning the original limitation, and directing him to "hold subject to the order of Hamilton, one-tenth of any sum over and above his claim against the said bonds." Wetmore acknowledged the receipt of this order, and promised to hold the bonds accordingly.

Through his, Hamilton's, efforts, largely, Congress, by an act of 9th September, 1850, did assume the payment of this debt, and authorized a five per cent. stock of the United States to be issued in lieu of the bonds of Texas; the act requiring, however, that before the stock of the United States should be issued, the holders of the Texas bonds should "first file at the Treasury of the United States, releases of all claims against the United States for said bonds."

The amount finally paid, June 3d, 1856, in behalf of the claim held by Wetmore, was	$817,720 88
Wetmore having paid himself his own debt, paid the residue of the nine-tenths to the trustees of the bank. This left in his hands, as trustee for Hamilton, the remaining one-tenth, or	81,772 08
A considerable time before this money was payable by the United States, Hamilton, who had long been pecuniarily embarrassed, directed Wetmore, by written orders, which Wetmore accepted, to pay out of it, when received,	
To Wetmore, himself, ... $2,500	
To Corcoran & Riggs, ... 25,000	
To one Hill, ... 33,500	
with interest from certain dates; so much being due by him, Hamilton, for money borrowed of these persons respectively.	
It seemed to be admitted by all, as unquestionable, that the trustees of the Bank of the United States were, in virtue of some agreement of an admitted priority, entitled to receive of this	81,772 08
The sum of	12,051 50
Leaving as Hamilton's true one-tenth, ...	$69,720 58

Statement of the case.

In this state of things—and when if Wetmore had been allowed to distribute the one-tenth of Hamilton, or his one-tenth less the bank's last-named deduction, it would have paid Hill, as well as Wetmore and Corcoran & Riggs, all in full—one Spain filed a bill against Wetmore, Corcoran, & Riggs, and the trustees of the bank, *Hill not being by name made a defendant*, charging that Wetmore had the $81,772.08 as the property of Hamilton, and that he, Spain, had an assignment of the whole fund made by Hamilton at an early date. The bill then alleged that Wetmore, disregarding this earlier assignment, pretended to hold the fund, subject to certain other alleged assignments of later date; the bill specifying that to Wetmore himself, and those to Corcoran & Riggs, *Hill*, and the trustees of the bank—and alleging that Wetmore meant to apply the fund to the payment of these last "*said recited claims*," and that the secretary was about to pay to Wetmore the said sum of $81,772.08. Asserting thus a superior equity, the bill then prayed: "*That the said Wetmore, his assignees, aiders, and abettors, may be enjoined and restrained from receiving the sum of* $81,772, *being the one-tenth of the three certificates*," &c. Subpœnas were prayed against all these parties, and that the representative of *Hill* (Hill himself being now dead), should *be made defendant when discovered.* An injunction was granted "*as prayed for.*" A bond, in the penalty of $15,000, signed by a certain *J. F. May* and *Henry May*, in favor of Wetmore, Corcoran & Riggs, and the trustees of the bank, but not by name in favor of *Hill*, was filed. The writ of injunction was issued on the 31*st of May*, 1856, directed to Wetmore, Hamilton, Corcoran & Riggs, and the trustees of the bank. It recited the filing of the bill and its object. The restraining clause was in these words:

"You, the said W. S. Wetmore, *your assignees, aiders, and abettors*, are hereby restrained and enjoined from asking for or receiving the sum of $81,772.08, being the one-tenth part of the bonds or certificates," &c.

This writ was served on Wetmore, and Corcoran & Riggs. From that time, until the dissolution of the injunction, here-

inafter mentioned, the money laid idle in the Treasury of the United States. Answers were filed by Wetmore, Corcoran & Riggs, the trustees of the bank, and by the representative of Hill.

On motion of the defendants, it was subsequently thus ordered:

"It appearing to the satisfaction of the court that there is *not sufficient security to indemnify the defendants for their costs and damages*, &c.; it is ordered that the complainant file a bond in the penalty of $20,000, conditioned to pay the *defendants* such costs and damages as they may *respectively sustain*."

Prior to this the complainant had released his injunction as to the sum of $12,051, improperly enjoined, and this had been paid by Wetmore to the bank, and *a release of the injunction bond executed by the trustees of the bank. The form of that release did not appear in the record.*

The second bond, ordered as above-mentioned to be filed, was filed, executed by *Spain* and *Oelrichs*. This, by *consent of the parties*, was ordered to stand in lieu of the bond previously filed, reserving the right of the obligees to have recourse to the original bond for interest theretofore accrued. The obligees named in this bond were Wetmore, and Corcoran & Riggs, but not Hill by name. The bond recited the injunction issued by the court to restrain the collection of the money mentioned in the writ; it recited also that certain portions of the money so enjoined had been released and paid over. The condition was:

"That if the said Spain, &c., shall prosecute the writ of injunction to effect, and pay *as well the costs, damages, and charges that shall occur in said Circuit Court in Washington County, as all costs, damages, and charges that shall be occasioned by said writ of injunction*, and shall in all things obey such order and decree as the said court shall make in the premises, then the obligation to be void and of no effect, otherwise to remain in full force and effect."

The cause being heard it was decreed, on the 19th February, 1861, 4 years 8 months and 16 days after the injunction had issued—

Statement of the case.

1. That the legal title to the fund was from the 9th November, 1849, and still is in Wetmore.

2. That from the 16th September, 1850, when the trustees of the bank notified to him their arrangement with Hamilton, and he accepted it, Wetmore held the *legal title of the one-tenth as trustee of the fund.*

First, to pay himself, with interest, the loan of . . .	$2,500
Second, to pay Corcoran & Riggs, ...	30,000
Third, to pay Hill, with interest from 9th March, 1852, .	33,500

From this decree Spain alone appealed. At the December Term, 1863, this court affirmed the decree with costs.*

Pending the appeal, there being no supersedeas and the decree having dissolved the injunction, the treasury paid to Wetmore, on 20th March, 1861, the sum remaining due on the one-tenth, $69,720.60.

There had been previously paid to the bank, the sum improperly enjoined, to wit: 30th March, 1859, the pro rata on $12,051.48.

The sum they paid to Wetmore was in three drafts, intended to represent the interests of the parties as settled by the decree, to wit:

For Wetmore, ...	$4,333 89
" Corcoran, ...	30,000 69
" Hill, ...	35,386 00
	$69,720 58

Wetmore and Corcoran & Riggs were paid in full; but on Hill's debt, as found by the decree, $52,457, there still remained unpaid $17,071.

Soon after the injunction was issued in this case, two others were issued on bills filed in the same court: one by the James River and Kanawha Company, and one by Pierce Butler. In the former an injunction bond was executed in the penalty of $5000, signed by Caperton and others; in the latter, one signed by Butler and others in the penalty of $2500.

* Spain *v.* Hamilton's Administrator, 1 Wallace, 604.

Statement of the case.

Butler's bill was heard with that of Spain, and subsequent to the decree in that case the James River and Kanawha Company dismissed their bill.

In both of *these* cases, the bonds expressly included among the obligees Hill's executor, as well as Wetmore and Corcoran & Riggs; while in the two bonds filed in Spain's case, as already said, neither Hill nor his executor was expressly named as obligee.

In this state of things the only child, heir, and legatee of Hill filed a bill to assert his father's claim for damages occasioned by these several injunction bonds. To aid in this, the representatives of Wetmore, as also the executor of Hill, were joined as complainants. The securities in the two bonds in the Spain case, May and Oelrichs, and the security in the bond in the James River Company's case, Caperton, were made defendants.

The bill was also filed against Corcoran & Riggs to seek a discovery from them as to whether any settlement had been made with them of the bond in the James River case.

It was also filed to marshal assets, and to assert the right of Hill to the whole of this latter bond, and compel Corcoran & Riggs to resort for payment to the *other* bonds, they being named as obligees in all, while Hill was named only in one—provided it should be decreed that the omission to name Hill specifically as obligee in the Spain bonds, prevented his looking to them for redress; a matter which was not conceded.

The bill also stated that Corcoran & Riggs has made some settlement of the $5000 bond, and prayed a discovery.

As to the bond for $2500 given by Butler, the complainant stated its payment by his representatives; and as to these representatives, the representatives of Henry May, one of Spain's securities, Spain himself, Ellis and Ould, parties to the James River bond, all non-residents and beyond the jurisdiction—the bill prayed that process might issue against them if they should come within the jurisdiction.

On this bill, answers, and proofs, the cause was tried and

decrees rendered asserting Hill's right to resort to the Spain bonds for redress of damages, and referring Corcoran & Riggs to the bonds on which they were named and Hill was not; and also allowing both Hill and them to recover counsel fees paid in attending to the injunction. The items thus appeared:

Corcoran & Riggs for damages, interest on the amount of their lien during the term payment was delayed by the injunction, a term of 4 years, 8 months, and 16 days, ...	$8,475 00
Their counsel fees in the adverse litigation, ...	1,000 00
	$9,475 00
Deduct the amount they received upon the bond given in behalf of the James River and Kanawha Company, . . .	5,000 00
Balance, ...	$4,475 00

Of this sum, $2455.94 was charged on May's bond, and $2019.06 on Oelrichs's.

To Hill's estate for loss of principal by reason of the fact that part of the fund which would otherwise have been applied to it in part payment was absorbed for the interest due the prior claims, ...	$827 41
Interest on $36,214.35 for 4 years, 8 months, and 16 days, .	10,230 55
Counsel fees in the adverse litigation, ...	1,500 00
	$12,557 96
Deduct the amount received on the Butler bond, . . .	2,500 00
Balance, ...	$10,057 96

Of this sum there was charged to May's bond $5027.15, and to Oelrichs's, $5030.81.

May and Oelrichs now appealed, and the case was before this court for final adjudication.

Messrs. T. T. Crittenden and T. J. Durant, for the appellants:

1. The court is without jurisdiction of the action, since "a plain, adequate, and complete remedy could have been had at law," as well under the well-known 16th section of the Judiciary Act, as on settled rule independent of it. And the reason is plain. A suit on a bond against principals and sureties is, in its nature, a suit at the common law.

2. But if the court below had jurisdiction, the decree

rendered is erroneous. The decree is, in part, in favor of Hill's estate, but his administrator is not named in the bill as a defendant, nor in the order of injunction, nor in the writ of injunction, nor in the injunction bonds, and no injunction was asked against Hill's estate. In no way, under these facts, can the sureties on the injunction bonds be made liable to Hill's estate.

3. By the non-performance of his undertaking within the two years Hamilton was not entitled to receive or claim one-tenth part, or any portion of the fund; nor were Wetmore, or Corcoran & Riggs, or the representatives of Hill.

Further, the employment of Hamilton by the trustees of the bank, for a contingent compensation, was for the purpose of obtaining legislation to procure the payment of the claim of the trustees, and in doing so, to use personal and secret influence on legislators. For this reason, as well as by reason of champerty appearing on the face of the agreement, neither Hamilton nor his assignees could have maintained any action or title, or acquired any interest under or by virtue of the agreement.* The injunction bond, therefore, did not injure them.

4. The trustees of the Bank of the United States were joint obligees with Wetmore, Corcoran & Riggs. They released these injunction bonds, with consent of all parties. This, in law, releases the bond *in toto*, as the action, if maintained at all, must be in names of all the obligees in bond.

5. The act of Congress shows that Hill's administrator having omitted to file his release as required by law, neither he nor Wetmore could legally claim his share of the money during the pendency of Spain's bill, and in fact he obtained his money in 1861 by a blunder of the accounting officers, and wrongfully. There was nothing in the injunction, even if it had named him, to prevent his filing his release so as to be qualified to claim the money when the injunction was dissolved. His not filing it even then shows he was not prevented by the injunction.

* Tool Company *v.* Norris, 3 Wallace, 45.

6. The counsel fees were wrongly allowed. Such an allowance tends to lower the standard of professional honor, and has by the best courts been discouraged.*

Messrs. P. Phillips, J. M. Carlisle, and J. D. McPherson, contra:

I. As to jurisdiction. To oust the jurisdiction of equity, the remedy at law must be as "practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."† Now, here, it was surely the interest of the parties to the several bonds, to be brought together in one suit, where their relative rights could be determined, and thus save the necessity of another suit for contribution and apportionment.

On a promise under seal, a suit at law must be in the name of the party to the instrument. A third party, for whose benefit it was made, cannot maintain the action. It was, therefore, the undoubted right of Hill, as *cestui que trust*, to assert in a court of equity his equitable title in the bonds filed in Spain's case, without reference to the legal title in the trustee which might be enforced at law.

The Court of Chancery in the District of Columbia, where the bill below was filed, is a court of general jurisdiction,‡ and as to such a court nothing is intended to be out of its jurisdiction which is not shown to be so. It is requisite that the plea must not only show that equity has no jurisdiction, but what court has, and whether it is able to afford a complete remedy.

If Hill cannot recover on Spain's bonds, because not expressly named, then, as Corcoran & Riggs are named in all the bonds, and Hill only in one, equity will compel the former persons to indemnify themselves out of the bonds in which Hill is not named; and if they have already collected

* Day *v.* Woodworth, 13 Howard, 370; The Baltimore, 8 Wallace, 378; Stimpson *v.* The Railroads, 1 Wallace, Jr., 164; Gadsden *v.* Bank of Georgetown, 5 Richardson, 342.

† Boyce *v.* Grundy, 3 Peters, 215; Wylie *v.* Coxe, 15 Howard, 420.

‡ See Phillips's Practice, 283.

the amount of the James River bond in which Hill is named, equity will place him to this extent in their situation in reference to Spain's bonds.*

If neither Corcoran & Riggs nor Hill are entitled to recover on Spain's bonds, then, as against the same defendants, equity will prefer Hill's right to indemnity out of the James River bond, as they had received the full amount for which the court had decreed their lien, while a large amount decreed to Hill remained unpaid. Further, under any circumstances, Hill was entitled to an account against Corcoran & Riggs, and to a decree against them for such portion of the sum received by them from the James River bond as his claim bore to theirs.

Now, looking to the fact that each of the defendants in Spain's suit was entitled to make his election as to whether he would resort to the first bond, looking also to the several bonds and the various defendants, and to the character of the questions which they gave rise to, and which will be obvious to any intelligent lawyer on reading the case, it cannot be maintained that, if there was a remedy at law, it was as "practical and as efficient to the ends of justice and its prompt administration, as the remedy in equity."

Our position also is, that the bonds executed in favor of *Wetmore*, cover not only that portion of the fund in which he had a personal interest, but also the other portion which he held *in trust* for Corcoran & Riggs and Hill, that the bond was in fact a security attached *to the fund enjoined, and was made to him as trustee for these parties.* It is true that no *subpœna* was served on Hill, but the bill prayed that his representative, when discovered, should be made a party. On the face of the bill, Hill's interest is specifically stated. He was a necessary party to the suit. Before, as well as after filing his answer, he was bound to obey the injunction, though not served with process; and if he disobeyed, was liable to attachment. The bond, when filed, was for the

* Alston *v.* Munford, 1 Brockenbrough, 279; Cornish *v.* Willson, 6 Gill, 299; Cheesebrough *v.* Millard, 1 Johnson's Chancery, 412.

benefit of all the defendants enjoined, whether served or not.*

That these bonds were not intended as indemnity, merely for the personal claim of $2500, which Wetmore held, is manifest, because

1st. Spain describes the fund he wishes to enjoin, as amounting to the large sum of $81,000. At the same time he sets forth particularly the fact that Wetmore only claimed for himself the sum of $2500, and that the large remainder Wetmore professed to hold for Corcoran & Riggs and Hill. But he enjoins the whole sum.

2d. Having thus stated that much the larger portion of the fund belonged to other parties than Wetmore, the court could never have consented to enjoin the whole fund on a bond securing only the party who had the smallest interest therein.

3d. The order for the bond requires the bond to be "conditioned to pay the *defendants* such costs and damages as *they* may *respectively* sustain by reason of the injunction."

4th. When, therefore, the court approved the bond, and by *consent of the defendants* substituted it for the first, the court, as well as the defendants, must have understood it to be such a bond as the order directed to be given.

The prayer is for an injunction against Wetmore, "*his assignees, aiders, and abettors,*" restraining *them* from asking for or receiving the sum of $81,000, and the writ which was issued on this prayer is to the same effect.

In another portion of the bill, the prayer is, "that the said Wetmore, and *all and each of the said named defendants, their assignees, aiders, and abettors, may be enjoined,*" &c.

Now, construing the bonds in reference to this prayer, Hill is directly included; for Hamilton is one of the "said named defendants," and Hill is his "assignee."

This is certain, that Corcoran & Riggs and Hill were deprived of the use of $69,720, less the small amount due to Wetmore, for five years, by reason of Spain's injunction

* Cumberland Co. *v.* Hoffman Co., 39 Barbour, 19.

operating on the whole fund. Practically, the injunction operated as directly on them as if they had been specifically named in the writ of injunction. The decree establishes that these parties were the owners of the fund when the injunction was issued. That in point of fact they have been greatly damnified, is not, and cannot be denied. The sole question is, have they in law any redress on these bonds for the wrongs thus inflicted? If they have not, it is not because they were not entitled to an indemnity, but because by accident, omission, or fraud, they have been deprived of it.

II. Then it is asserted that Hamilton had no interest in the fund, because his agreement with the bank was void as against the policy of the law, and it is thence inferred that no damage has accrued to any one by the injunction bonds. But it is not against this policy that one may agree to address the legislature by argument in favor of a certain measure. We need not, however, enter into this subject, for the objection is wholly misapplied. This is not an action to enforce the agreement, but one which relates solely to the disposition of money paid on such agreement.* Besides, if the question could have ever been made, it cannot be now, after the decree in the former case, where the bank and Spain were parties, and where the decree was based on the fact that Hamilton *did* own the fund. Oelrichs and May identified themselves with that litigation, and though not technically parties, are bound by the decree in it as much as if they had been named on the record.

III. It is next maintained that the release by the trustees of the bank discharged the bond as to those obligees who did not release. But this rule cannot apply to a case where the interest of the obligees is separate and distinct. No act of one under such circumstances could qualify, much less destroy, the rights of another. Even if the release had been by the present complainants, *equity* would not give it effect beyond the intention of the parties and the justice of the case.†

* Brooks *v.* Martin, 2 Wallace, 78.

† Clagett *v.* Salmon, 5 Gill & Johnson, 315.

IV. Again, it is urged that no loss of interest has accrued, because the claim was never presented in such a form as to authorize its payment by the treasury if no injunction had been granted. The bill of Spain prayed the injunction, on the averment "that the Secretary of the Treasury *is about to pay to said Wetmore the sum of* $81,772.08." The attempt is now made to controvert this sworn statement, and to prove that no payment could have been made, because neither Hamilton nor Hill had filed releases, as were required by the Secretary of the Treasury. If the law required this, the presumption is that the releases *have been filed;* the money has been paid. This presumption is not rebutted by the admission that these releases are not found in a certain file of papers in the department. The act requires releases from the "*holders of* the securities." Neither Hamilton nor Hill, his assignee, had any interest in the certificates. Hamilton had only a personal demand upon the bank for his commissions, when the sum of money was collected and paid over.

But, again: What necessity was there to file these releases after the injunction lodged in the department which forbade all parties from receiving the fund enjoined? This payment could not take place until the injunction was dissolved and the interest of the several parties ascertained. When the decree was presented showing that neither Hamilton nor Hill had any interest in the certificates, and decreeing that *Wetmore was alone entitled to receive the whole sum* (if, in fact, no releases were filed), we can do no otherwise than conclude that the secretary considered such releases unnecessary, and therefore waived them.

V. As to counsel fees. Hill is entitled to include the counsel fees paid *in consequence of the injunction.* Whether counsel fees are recoverable in actions *ex contractu* is not the question. On this point the decisions are not harmonious. The claim here is founded on the *express terms of the obligation*, which is to pay "as well the costs, damages, and charges as shall occur in said Circuit Court, *as all costs, damages, and charges as shall be occasioned by said writ of injunction.*" These "costs, damages, and charges," superadded, are not

referable to the Circuit Court, for *they* are specifically provided for, and if they do not cover counsel fees they are meaningless. In *Edwards* v. *Bodine*,* the condition of the injunction bond was "to pay such *damages* as the parties may sustain by reason of the injunction." The court allowed the fees, saying:

"Here it is not matter of discretion—the condition is *imperative*."

The same rule is applied to attachment bonds.†

Mr. Justice SWAYNE delivered the opinion of the court.

This litigation grows out of a prior suit, to which it is necessary briefly to advert in order to render intelligible the issues to be decided in the case before us.

The Bank of the United States assigned to William S. Wetmore certain bonds of the State of Texas as security for a debt which the bank owed him. He surrendered the bonds to the State and received in their stead certificates of indebtedness which he deposited in the Treasury of the United States for payment, under the act of Congress of the 9th of September, 1850, and the explanatory act of February 28th, 1855. The bank thereafter transferred one-tenth of the certificates, less the amount due to Wetmore, to General James Hamilton. Hamilton subsequently became indebted to Wetmore and gave Wetmore a lien upon his share of the fund to secure the payment of the debt and interest. He gave like liens to Corcoran & Riggs, to James Robb & Co., and to H. R. W. Hill. Robb & Co. transferred their claim to Hill. The trustees of the bank also claimed a part of the one-tenth as not embraced in the transfer to Hamilton. Before the fund was paid over by the Treasury Department, Albert C. Spain, as guardian of Mary McCrae, a lunatic, filed a bill in

* 11 Paige, 226; and see Aldrich *v.* Reynolds, 1 Barbour's Chancery, 616; Corcoran *v.* Judson, 24 New York, 107; Prader *v.* Grimm, 28 California, 12; Bronson *v.* Railroad, 2 Wallace, 283.

† Seay *v.* Greenwood, 21 Alabama, 496; Trapnall *v.* McAfee, 3 Metcalfe, 34.

equity, wherein he asserted a prior and paramount lien upon the fund in behalf of his ward, and prayed an injunction to prevent the defendants from receiving any part of the amount in question until the claim set up in the bill should have been passed upon by the court. To this bill Wetmore and the other claimants, except Hill, were made parties defendant. An injunction was granted as prayed for, and on the 31st of May, 1856, an injunction bond was executed. The penalty was $15,000. The obligees were Wetmore and the other defendants. The obligors were John F. and Henry May. The condition was that Spain "should prosecute the writ of injunction with effect and pay all damages and costs" which the obligees, "or any of them, shall sustain by the granting of this injunction." On the 23d of April, 1856, a further bond was given, pursuant to the order of the court, in the penal sum of twenty thousand dollars. The obligees were Wetmore and others. Hill was not one of them. The obligors were Spain and Oelrichs. The condition was that Spain should prosecute the writ of injunction "with effect and satisfy and pay as well the costs, damages, and charges which shall accrue in said Circuit Court of Washington County, as all costs, damages, and charges which shall be occasioned by said writ of injunction, unless the said court shall decree to the contrary."

By consent of parties it was thereupon ordered by the court that this bond should be filed in lieu of the prior bond, "reserving the right to the obligees to have recourse to the original bond for interest theretofore accrued, at the election of the obligees, and not otherwise."

On the 31st of May, 1856, the James River and Kanawha Company having filed a bill and procured a like injunction, gave bond in the sum of $5000. The obligees were Wetmore and all the other adverse claimants of the fund, including Spain and the executor of Hill. The obligors were Thomas H. Ellis, Hugh Caperton, and Robert Ould. The condition of the bond was that the company "shall well and truly prosecute the said suit with effect and shall answer all damages and costs which the defendants, or either of them,

may sustain by the granting of this injunction, in case it shall be dissolved." On the 20th of June, 1856, Pierce Butler procured a like injunction and gave bond in the sum of $2500. The obligees were Wetmore and the other claimants of the fund, including Hill's executor. The condition was that Butler should "pay and satisfy all costs and damages that may accrue to the obligees, or either of them, by reason of said injunction, in case the same shall be dissolved." In the progress of the cause, Spain dismissed his injunction as to the claim of the trustees of the bank for the sum of $12,051.50. That amount was paid to them, and they thereupon released their claim under the injunction bonds. By agreement of counsel the cases of Spain and Butler were heard together. The court decreed that there should be first paid to Wetmore the principal and interest of his debt, amounting together, including the cost of audit, to $4333.66. That there should be next paid to Corcoran & Riggs the amount of their lien, $30,000. And, thirdly, to the representatives of Hill the debt due to his estate, found to be then, with interest, $52,457.

The amount applicable to this demand, after satisfying the demands of Wetmore and Corcoran & Riggs, was $38,171. This left a balance due Hill's estate of $14,285.54 unsatisfied and unprovided for. The case was removed to this court by appeal, and the decree of the court below was here affirmed.* The James River and Kanawha Company dismissed their bill. Corcoran & Riggs subsequently collected upon the bond executed by Ellis, Caperton & Ould the sum of $5000. The penalty of the bond of Butler, $2500, was paid to the complainant, J. Dick Hill.

This bill is brought by the executors of Wetmore, the executor of H. R. W. Hill, and J. Dick Hill, his devisee and only heir-at-law, against John F. May, William W. Corcoran, George W. Riggs, Hugh Caperton, and Henry Oelrichs. It gives sufficient reasons for not making additional parties whose presence would otherwise be necessary, though not

* Spain v. Hamilton's Adm., 1 Wallace, 604.

indispensable, in this litigation. The object of the bill is to enforce in favor of Hill's estate the liability for damages arising under the injunction bonds, and if need be to marshal the assets. The executors of Wetmore claim nothing except in trust for the benefit of Hill's estate.

The court below allowed Corcoran & Riggs for damages, interest on the amount of their lien during the time payment was delayed by the injunction, being a period of four years eight months and sixteen days.

The interest, thus computed, makes the sum of . .	$8,475 00
The court also allowed them for counsel fees in the adverse litigation, ...	1,000 00
	$9,475 00
From this was deducted the amount they received upon bond given in behalf of the James River and Kanawha Co., ...	5,000 00
Balance, ...	$4,475 00

Of this sum, $2455.94 was apportioned to May's bond, and $2019.06 to Oelrichs's.

The damages awarded to Hill's estate were as follows:

Loss of principal by reason of the fact that part of the fund which would otherwise have been applied to it in part payment was absorbed for the interest upon the prior claims, ...	$827 41
Interest on $36,214.35 for 4 yrs. 8 mos. 16 days, . .	10,230 55
Counsel fees in the adverse litigation, ...	1,500 00
	$12,557 96
Deduct the amount received on the Butler bond, . .	2,500 00
Balance, ...	$10,057 96

Of this sum there was appropriated to May's bond $5027.15, and to Oelrichs's, $5030.81.

May and Oelrichs appealed, and the case is now before this court for final adjudication.

It has been insisted by the counsel for the appellants that there is a complete remedy at law, and that the bill must, therefore, be dismissed. Such must be the consequence if the objection is well taken. In the jurisprudence of the

United States this objection is regarded as jurisdictional, and may be enforced by the court *sua sponte*, though not raised by the pleadings nor suggested by counsel.*

The 16th section of the Judiciary Act of 1789 provides, "that suits in equity shall not be sustained in any case where plain, adequate, and complete remedy can be had at law;" but this is merely declaratory of the pre-existing rule, and does not apply where the remedy is not "plain, adequate, and complete;" or, in other words, "where it is not as practical and efficient to the ends of justice and to its prompt administration, as the remedy in equity."†

Where the remedy at law is of this character, the party seeking redress must pursue it. In such cases the adverse party has a constitutional right to a trial of the issues of fact by a jury.‡

But this principle has no application to the case before us. Upon looking into the record it is clear to our minds, not only that the remedy at law would not be as effectual as the remedy in equity, but we do not see that there is any effectual remedy at all at law. If the injunction bonds were sued upon at law, and judgments recovered, a proceeding in equity would still be necessary to settle the respective rights of the several obligees to the proceeds. The direct proceeding in equity will save time, expense, and a multiplicity of suits, and settle finally the rights of all concerned in one litigation. Besides, there is an element of trust in the case, which, wherever it exists, always confers jurisdiction in equity.

It has been urged that Hamilton's arrangement with the bank was illegal and void, and never fulfilled on his part, and that he had no title to the residuum of one-tenth of the certificates to which his assignment related. It is a sufficient answer to say that the trustees of the bank were parties to the former suit, and that the court recognized and affirmed

* Parker *v.* Winnipissiogee Company, 2 Black, 551; Graves *v.* Boston Company, 2 Cranch, 419; Fowle *v.* Laurdson, 5 Peters, 495; Dade *v.* Irwine, 2 Howard, 383.

† Boyce *v.* Grundy, 3 Peters, 215. ‡ Hipp *v.* Baben, 19 Howard, 278.

the validity of the claim by administering the fund arising from it. The appellants cannot go behind the decree in the case in which their bonds were given. The law and the facts of that case, as settled by the court, are conclusive of their rights in this proceeding. They cannot be permitted to raise any question as to either.

The release given by the trustees of the bank cannot avail the defendants. If it were not by a sealed instrument, it would not be a technical bar even in a suit at law. In what form it was given is not disclosed in the record. But if it were properly executed under seal, it cannot in equity affect the severable and separate rights of parties to the bonds other than those by whom it was executed.

It is true that neither Hill nor his representatives were parties to either the bond of May or the bond of Oelrichs, and that they were not named in the writ of injunction issued upon the filing of the first bond. But Spain's bill averred that Wetmore held the fund in trust for Hill. Wetmore was an obligee in both bonds. The legal title to the entire fund was in him, and was never divested. It was extinguished by the payment of the money by the Treasury Department, and its distribution pursuant to the decree of the court. Wetmore during his lifetime, and after his death, his legal representatives, might have recovered upon the bonds at law to the full extent of the damages touching the entire fund. Such was his and their legal right. Equity would have distributed the proceeds, if need be, according to his rights and the equities of the other parties in interest. In this case equity follows the law as regards the liability of the appellants, and, having the proceeds in hand, will distribute them in this proceeding.*

The objection that proper releases were not filed in the Treasury Department is untenable. The proofs establish three facts:

The fund would have been paid over earlier but for the injunction.

* Livingston *v.* Moore, 7 Peters, 547; Riddle *v.* Mandeville, 5 Cranch, 322.

It was paid after the injunction was dissolved.

The delay caused by the injunction was the period for which interest was allowed by the court below.

Whether the payment was, or would have been, improperly made, is an inquiry which does not arise in this case, and with which the appellants have nothing to do.

It is sufficient for the purpose of this case that there was, in fact, such delay, and that it proceeded from the cause alleged in the bill.

The decree of the court below was preceded by the report of a master, which the decree affirmed and followed. Upon looking into the report we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as a part of the damages covered by the bonds.

In *Arcambel* v. *Wiseman*,* decided by this court in 1796, it appeared "by an estimate of the damages upon which the decree was founded, and which was annexed to the record, that a charge of $1600 for counsel fees in the courts below had been allowed." This court held that it "ought not to have been allowed." The report is very brief. The nature of the case does not appear. It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent.† They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute.‡

In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto* vindictive damages may be given by the jury. In regard to that class of cases this court has said: "It is true that

* 3 Dallas, 306.

† Tesse et al. *v.* Huntingdon et al., 23 Howard, 2; Whittemore *v.* Cutter, 1 Gallison, 429; Stimpson *v.* The Railroads, 1 Wallace, Jr., 164.

‡ The Baltimore, 8 Wallace, 378.

damages assessed by way of example may indirectly compensate the plaintiff for money expended in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction."*

The point here in question has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant and assumpsit damages are recovered, but counsel fees are never included. So in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the *honorarium* can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary.

We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy.

The amount of the allowance in this case may be remitted here, as was done in the case in 3d Dallas, and the decree of the Circuit Court will thereupon be AFFIRMED. Otherwise the decree will be REVERSED, and the cause remanded for the reformation of the decree,

IN CONFORMITY TO THIS OPINION.

* Day *v.* Woodworth et al., 13 Howard, 370, 371.

CASE OF THE STATE FREIGHT TAX.

[READING RAILROAD COMPANY *v.* PENNSYLVANIA.]

1. The transportation of freight, or of the subjects of commerce, is a constituent part of commerce itself.
2. A tax upon freight, transported from State to State, is a regulation of commerce among the States.
3. Whenever the subjects in regard to which a power to regulate commerce is asserted are in their nature National, or admit of one uniform system or plan of regulation, they are exclusively within the regulating control of Congress.
4. Transportation of passengers or merchandise through a State, or from one State to another, is of this nature.
5. Hence a statute of a State imposing a tax upon freight, taken up within the State and carried out of it, or taken up without the State and brought within it, is repugnant to that provision of the Constitution of the United States, which ordains that "Congress shall have power to regulate commerce with foreign nations and among the several States, and with the Indian tribes."

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

On the 25th of August, 1864, the Legislature of Pennsylvania passed an act entitled "An act to provide additional revenue for the use of the Commonwealth." It enacted—

"SECTION 1. That the president, treasurer, cashier, or other financial officer, of every railroad company, *steamboat* company, canal company, and slackwater navigation company, and *all other* companies now or hereafter doing business *within this State*, and *upon whose works* freight may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive tolls only, except turnpike companies, plank-road companies, and bridge companies, shall, within thirty days after the first days of January, April, July, and October of every year, make return in writing to the auditor-general, under oath or affirmation, stating fully and particularly the number of tons of freight carried over, through, or upon the works of said company, for the three months immediately preceding each of

the above-mentioned days; and each of the companies, except as aforesaid, shall, at the time of making such return, pay to the State treasurer, for the use of the Commonwealth, on each two thousand pounds of freight so carried, tax at the following rates, viz.:

"First, on the product of mines, quarries, and clay-beds, in the condition in which said products may be taken therefrom, 2 cents.

"Second, on hewn timber, animal food, including live stock; also, on the products of the forest, vegetable, and other agricultural products, the value of which has not been increased by labor, 3 cents.

"Third, on all other articles, 5 cents.

"Where the same freight shall be carried over and upon *different but continuous lines, said freight shall be chargeable with tax as if it had been carried but upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof.* Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, *are authorized to add the tax hereby imposed to said tolls and collect the same therewith,* but in no case shall tax be twice charged on the same freight carried on or over the same line of improvements: *Provided,* That every company now or hereafter incorporated by this Commonwealth, whose line extends into any other State, and every corporation, company, or individual of any other State, holding and enjoying any franchises, property, or privileges whatever in this State, by virtue of the laws thereof, shall make returns of freight and pay for the freight carried over, through, and upon that portion of their lines within this State, as if the whole of their respective lines were in this State."

[It is a fact that is referred to in the argument, and which may, therefore, well enough be here noted, that the roads of some railroad companies in Pennsylvania traverse the whole of that great State. That is the case with the railroad of the Pennsylvania Railroad Company (the great "Pennsylvania Central"); also of the Philadelphia and Erie. Other roads are very short; hardly Pennsylvania roads at all. This is the case with the Lake Shore Road in what is known in Pennsylvania as "the Triangle;" the small part of the State which borders on Lake Erie. The east terminus of the road

receives converging roads from the whole State of New York, from New Jersey, and from all New England, and from its western end roads diverge again over the whole West. So the New York and Erie Railroad, whose line for its main great extent runs along the south line of New York, but which, from a necessity of the soil in New York, had to make a small curvature which brings it for a few miles into Pennsylvania. So the Philadelphia, Wilmington and Baltimore, in its chief length in Maryland and Delaware, its northern terminus only in Pennsylvania. So other roads.]

On the 25th of October, 1866, the accounting officers of Pennsylvania stated an account under the statute already quoted between the Commonwealth and the Reading Railroad Company, "for tax on tonnage for the quarters ending December 31st, 1865, and March 31st, and June 30th, 1866." The company named is a corporation created under the laws of Pennsylvania, and is engaged in the sole business of transporting freights for hire, and carrying no commodities of its own. An important part of its business is carrying coal from the mountains of Pennsylvania to a place called Port Richmond, near Philadelphia, a distance of about one hundred miles; the whole road being in Pennsylvania. A portion of the coal transported to Port Richmond is sold there to consumers, but by far the larger portion is intended for exportation to points beyond the limits of Pennsylvania, and is transferred at Port Richmond into vessels destined for such points. A considerable quantity of coal is also transported by the railroad company to a point on the Schuylkill Canal, where it is loaded in barges and exported beyond the State. The company was charged by the State:

For freight transported to points within the State of Pennsylvania, ...	$38,361
For that exported to points without the State, . . .	46,520
	$84,881

The latter sum the railroad company refused to pay. It set up that the statute of 1864, to the extent that it imposed a tax on freight other than that both received and delivered

within the State of Pennsylvania, was unconstitutional and void, because, among other reasons, it was in conflict with the Constitution of the United States, which ordains that "Congress shall have power to regulate commerce with foreign nations, and among the several States."

Suit being brought in the Common Pleas of Dauphin County, the jury found that the freight in question was originally destined for exportation beyond the boundaries of Pennsylvania, and that it was actually exported, in a continuous course of transportation, in the cars of the defendants, to points on the river Delaware, or the Schuylkill Canal, and thence in vessels. Being instructed by the court (PEARSON, J.) that such a finding should be followed by a verdict for the defendants, verdict and judgment so went.

The charge of the judge was but a reiteration of the opinion which he had previously expressed in other cases on the constitutional point in question, and which appeared to have been acquiesced in by the Commonwealth of Pennsylvania, since, although writs of error were taken to the judgments in those cases, he observed that they were never argued, "as they were considered correctly decided by the then Attorney-General of Pennsylvania, the Honorable W. M. Meredith." However, a writ of error was taken from the Supreme Court of Pennsylvania to the judgment entered on the verdict in the present cause, and it resulted in the judgment of the Court of Common Pleas being reversed by the higher tribunal;* that court admitting the force of the argument that could be made against their view, but conceiving that "a case of simple doubt should be resolved favorably to the State act, leaving the correction of the error, if there was any, to the Federal judiciary."

To understand the full force of the argument in the opinion of that court, the reader must refer to the opinion itself. Among other grounds on which it rested the reversal, were these:

That the products carried from points within the State to

* See 62 Pennsylvania State, 286.

points without, or from points without to points within, were not discriminated against and required to pay more than other products carried wholly within the State, all paid the same exact freight; a charge for transportation simply.

That this tax was not imposed as, or intended to be, a regulation of commerce, in other words a rule by which commerce was to be governed; but was a tax to raise money for the support of government, and made, therefore, in the exercise of an authority which flowed from the power to tax for revenue. Adverting to the case of *Brown* v. *Maryland*,* and to the question put there by Chief Justice Marshall, as about a thing plainly unconstitutional,—

"What restrains a State from taxing any article passing through it from one State to another, for the purpose of traffic? Or from taxing the transportation of articles passing from the State itself to another State, for commercial purposes?"—

the Supreme Court of Pennsylvania said:

"The Chief Justice had reference to *specific burdens*. These subjects must not be singled out and taxed, for this would be discrimination affecting intercourse, invidious and inviting retaliation from other States or foreign powers. But he did not mean by these illustrations, that those who use the artificial works, constructed by the State, or under their franchise, might so do without compensation, because they transported their goods on them for such purposes, or that they are not bound to share with our citizens the equal burdens, which is the price they must pay for availing themselves of these facilities."

That in virtue of her unquestioned power to improve her own resources and to regulate her internal affairs, the State had built up a network of railways and canals, and had improved natural channels, and that in virtue of her right of eminent domain and her power to legislate on her internal affairs and the creations of her own sovereignty, she had a right to exact tolls, charges, and fares for their use, and that whether this was done by a direct charge on the tonnage or

* 12 Wheaton, 419.

by a tax on the corporations who used the franchise was unimportant.

The court stated that it would not rest the case on the debatable ground of State power to regulate interstate commerce in the absence of Congressional legislation on the same subject. The case, having been brought here, was twice argued.

Messrs. James E. Gowen and Robert E. Lamberton, for the plaintiff in error; a brief of Mr. J. W. Simonton, for other railroad companies interested with the plaintiff in error in the question involved, being filed by leave of the court.

I. Assuming that the act in question is a regulation of interstate commerce, and therefore interferes with the constitutional authority of Congress, the first point to be considered is, whether its applicability to the domestic, as well as to the extra-territorial, commerce of the State excludes it from the operation of the constitutional provision. In other words, *is a regulation of commerce, which would be unconstitutional if confined to foreign commerce, rendered constitutional by being extended to domestic commerce also?*

If this question must be answered affirmatively, the attempt of the framers of the Constitution to secure commerce between the States from State regulation has been unsuccessful. The simple expedient of including its own domestic commerce within its commercial regulations will enable any State to regulate, to any extent, the commerce between the States which happens to be carried on within its territorial limits. The price to be paid for such a prerogative, would, in most cases, be trifling. The citizens of Pennsylvania can well afford to submit to a commercial regulation which taxes, for their benefit, the millions of tons of freight which are transported through or from their State. A regulation of commerce which taxes the vast tonnage of the great thoroughfares which traverse the State from east to west and from north to south; which taxes the tonnage of the Pennsylvania, of the Erie, of the Lake Shore, of the

Philadelphia, Wilmington, and Baltimore, and other railroads over which freight is transported, through or from the State; which compels foreign consumers of coal, and the other mineral products of Pennsylvania, to pay tribute for the privilege of having them transported, either by natural or artificial channels, by rivers or by railroads, is not likely to be considered oppressive by the people of Pennsylvania. A State through whose territory a single line of railroad passes would not hesitate to regulate railroad commerce without discriminating in favor of its own domestic commerce, if the regulations proposed would render the commerce of a continent tributary to its treasury. The steamboat traffic of the Mississippi would be a tempting subject for the commercial regulations of the several States within whose boundaries it is carried on. None of the evils which induced the framers of the Constitution to invest Congress with the power of regulating commerce between the States would be avoided under such an interpretation of the Constitution.* The increase of the States and the vast increase of commerce between them would render the burdens of State regulations a hundredfold more onerous than they were before the Constitution was adopted. Can it be supposed that, at the present time, a citizen of California would not object to paying transit duties in every State through which his merchandise may happen to be transported, on its passage from the Atlantic to the Pacific, merely because the same duties were imposed upon domestic transportation within those States. He would justly argue that the duties collected inured to the benefit of the citizens of the States which imposed them, and not to *his* benefit.

Practically, therefore, the prohibition against State regulations of interstate commerce would be nugatory, if it could be evaded by extending such regulations to domestic as well as to extra-territorial commerce; and no interpretation of the Constitution which permits such an evasion can

* See The Federalist, No. 7, by Mr. Hamilton, depicting the injurious consequences of permitting the several States to regulate commerce.

be legitimate. Indeed, unless it can be shown that a statute which regulates commerce between the States as well as commerce in the State, is not a regulation of commerce between the States, the argument is at an end.

In *Crandall* v. *The State of Nevada*,* a statute enacted that there should "be levied and collected a capitation tax of $1, upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged and employed in the business of transporting passengers for hire." But the unanimous judgment of this court condemned the statute as unconstitutional. A majority of the court did not think the statute a regulation of commerce, though a part did. But all held the statute unconstitutional and void. The right of citizens of the United States to pass from point to point of the National territory, unrestricted by State regulations, was emphatically asserted. Would the statute have been constitutional if it had also taxed the right of passage within the State of Nevada? Can any State tax, and, by taxing, prohibit the passage of citizens of the United States, from, into, and through her territory, because she imposes a similar tax and a similar prohibition upon the right of passage within her territory? Can a State tax imported wines in the hands of the importers by a statute which taxes all wines, domestic as well as foreign?†

II. Considering the case, then, as if the tax imposed by the act in question had been expressly confined to the transportation of the freight through, into, or from Pennsylvania, *is the imposition of such a tax a regulation of commerce between the States?*

If taxing interstate commerce is not regulating it, it is not easy to imagine what would be. In *Brown* v. *Maryland*,

* 6 Wallace, 35; and see Clarke, Treasurer of the State of Delaware, *v.* The Philadelphia, Wilmington, and Baltimore Railroad Company, in the Court of Errors and Appeals of Delaware, A.D. 1871, and the opinion of Bates, C.; also The Erie Railway Company *v.* The State of New Jersey (2 Vroom, 531), which, in all material respects, is identical with that now before the court.

† Low *v.* Austin, 13 Wallace, 29.

Marshall, C. J., when speaking of the power of a State to tax its own citizens or their property, within its territory, refers to the imposition of a State tax upon goods passing through or from the State, as an extreme illustration, apparently, of an encroachment upon the reserved power of Congress to regulate commerce. He says:

"If the States may tax all persons and property found in their territory, what shall restrain them from taxing goods in their transit through the State, from one part to another, for the purpose of re-exportation? The laws of trade authorize this operation, and general commerce requires it. *Or what restrains a State from taxing any article passing through it, from one State to another, for the purposes of traffic? Or from taxing the transportation of articles passing from the State itself, to another State, for commercial purposes?* These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect, materially, the purposes for which the power was given."

There is nothing (as there was assumed by the court below to be) in the language quoted, which warrants the inference that "specific burdens" on the subjects mentioned were referred to. The Chief Justice was speaking of the power claimed for the States, to tax *all persons and property found on their territory;* and he meant to assert that a State tax *on all property* within its limits could not be levied on goods in transit through or from the State.

The main object of conferring upon Congress the power to regulate commerce among the several States, was to put an end to the onerous and vexatious taxes and duties with which it had been burdened by State legislation. It does not seem to have occurred to the framers of the Constitution, that the States might still continue to tax interstate commerce, notwithstanding the grant of this power to Congress; but perhaps there never has been a case yet where the validity of a State tax law has been questioned on the ground of its being a regulation of interstate commerce, in which an attempt has not been made to show that the law was not a regulation of commerce, but merely an exercise of the

State power of taxation. The present case is no exception, but no advantage can be derived from repeating the reasons which have in former cases led this court to reject such reasoning.

Will it be said that the statute in question only incidentally and indirectly affects interstate commerce, inasmuch as the tax complained of is levied, not on the goods transported, but on the business of the transporting companies?

This distinction, even if it were substantial—which is not admitted—does not tend to show that the tax is not a regulation of commerce. On the contrary, the fact that the *transportation* itself, and not the *goods* transported, is taxed, renders the tax the more plainly a tax upon commerce. It is the very *commerce* itself that is taxed, and not the *subjects* with which it deals. The imposition of a tax on every ton of coal mined in Pennsylvania would not be a tax on commerce; but a tax on the transportation of the coal from the mines to the consumer, is as clearly a tax on the commerce in coal as any that can be imagined.*

What is "commerce?" Washington, J., in *Corfield* v. *Coryell*,† tells us:

"Commerce with foreign nations, and among the several States, can mean nothing more than intercourse with those nations and among those States, for the purposes of trade, be the object of the trade what it may, and thus intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several States, or by a passage overland through the States, where such passage becomes necessary to the commercial intercourse between the States."

Beasley, C. J., in *The Erie Railway Company* v. *The State of New Jersey*,‡ speaks to the same effect. He says:

"If there can be no commerce between the States without goods, so there can be none without the transportation of goods. The two must be united to constitute interstate commerce. So

* Gibbons *v.* Ogden, 9 Wheaton, 189.

† 4 Washington's Circuit Court, 379.

‡ 2 Vroom, 531.

it is not certain, then, that a duty on one of these two elements in commerce must, in the nature of things, operate as a tax upon the other. As commerce, the two things are indissoluble; are they divisible for the purpose of taxation? I think it may be laid down as a general rule, universally applicable to all cases arising under the clause of the Constitution now considered, that whenever the taxation of a commodity would amount to a regulation of commerce, so will the taxation of an inseparable incident, or a necessary concomitant of such commodity. The object being to protect the merchandise from all exactions in its transit over a State, by a rule of construction, as necessary as it is elementary, we must imply a protection to the means required to effect such a passage, because, without such implication, the privilege intended to be secured is defeated."

That the *transportation* of freight was intended by the legislature, in the act of 1864, to be the subject of the tax, is as clear as words can make it. A tax upon goods is not *per se* a tax upon commerce, much less upon interstate commerce in the goods, for they may never become subjects of commerce; but how the transportation of goods from a consignor in the State to a consignee out of the State can be taxed without taxing, and therefore without regulating interstate commerce, it is not easy to see.

In *Brown* v. *Maryland*, it was argued at the bar, that the tax was not upon the article imported, but upon the occupation of the importer. But says Marshall, C. J.:

"It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that the tax on the sale of an article imported only for sale, is a tax on the article itself. It is true that the State may tax occupations generally; but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So a tax on the occupation of an importer is in like manner a tax on importation. It must add to the price

of the article, and be paid by the consumer or by the importer himself in like manner as a direct duty on the article itself would be made (paid?). This the State has no right to do, because it is prohibited by the Constitution."

In *Almy* v. *California*,* a tax upon a bill of lading was held to be substantially and really a tax upon the exports for which the bill of lading was to be used.

In both these cases cited, this court acted on what GRIER, J., with his ponderous sense, says in the *Passenger Cases*:†

"We have to deal with things, and we cannot change them by changing their names. Can a State levy a duty on vessels engaged in commerce and not owned by her own citizens, by changing its name from a 'duty on tonnage' to 'a tax on the master?' or an impost on imports, by calling it a charge on the owner or supercargo, and justify the evasion of a great principle by producing a dictionary or a *dictum* to prove that a ship captain is not a vessel, nor a supercargo an impost?"

That a tax either on the transportation of goods or on goods themselves while being transported must ultimately be paid by the consumer is too clear for argument. "When this tax is laid on the transportation of the merchandise, there is no room for doubt that, by the operation of well-known laws, it must pass from the carrier to the thing carried, and, in the precise ratio of the statutory burden, enhance their price in the market. The consumer must pay the custom, whether it be placed on the goods or upon their transportation. The result then is, that this imposition on the business of transportation, which, it is argued, is constitutional, produces the same effect—neither more nor less—upon the private business of the owner of the goods, as would be produced by a direct tax on the goods themselves, which latter form of taxation would be undeniably unconstitutional. This substantial identity in the results would seem to favor strongly an inference of the substantial identity in the causes producing them. The conclusion, from this course of reasoning, therefore is, that if the trans-

* 24 Howard, 169.

† 7 Id. 458.

portation of merchandise *in transitu* from State to State can be taxed by a State in the form of law now before this court, the constitutional provision under consideration affords no protection whatever to the owner of goods which are the subjects of such transportation."*

The Supreme Court of Pennsylvania considers, however, that the tax may lawfully be exacted as compensation for the use of works constructed under the eminent domain of the State. But,

1. The rivers of Pennsylvania were not constructed under the State power of eminent domain, and the tax imposed by the statute on every ton of freight transported within the territorial limits of Pennsylvania, by a steamboat company, cannot be considered as a compensation for privilege of using the public works of the State. The law applies alike to all means of transportation, whether on the navigable rivers passing through the State, the great lakes of the West, or any line of canal or railroad. If goods are laden at Olean, in the State of New York, to be carried on the steamboats, or any other boats of a transportation company, to New Orleans, they may be taxed by the ton, so soon as the boat with its freight crosses the line of Pennsylvania; and thus our great rivers be no longer free to the commerce of all the citizens of every State through which it passes.

2. The State has parted with the right to exact tolls for the use of the railroads and canals owned by the canal and railroad companies of Pennsylvania. The Philadelphia and Reading Railroad Company, and not the State of Pennsylvania, has the right to charge toll for the use of its railroads.

The absence of an intention to exact a toll for the use of artificial roads or water-courses when they imposed the tax in controversy, is also made manifest by the fact that the tax is not graduated by the length of transportation. A ton of freight which passes but a few miles through the territory of Pennsylvania is taxed as much as a ton which has been transported three hundred miles. The through freight

* Per Beasley, C. J., in Erie Railway Company *v.* New Jersey, *ut supra.*

of the Philadelphia, Wilmington and Baltimore, or of the Lake Shore, or of the New York and Erie lines, all of them very short roads, is taxed as heavily as that of the Pennsylvania Railroad, which traverses the whole length of Pennsylvania.

How then can the tax on transportation, levied by the act in question, be treated as compensation for the use of artificial highways, and what advance towards a proper determination of this case is made by discussing the question of the right of a State to demand toll for the use of the railroads and canals which she owns? Once admit that a tax on transportation within or through the territory of a State may be sustained by treating it as a toll for the use of highways, and there is no limit to the burdens which may be imposed on interstate commerce. What proportion of the commerce by land between the States of this Union is not carried on by means of artificial roads? and where ordinary county or State roads, the control of which has been retained by the Commonwealth, are used, the theory would be much more plausible than in the case of railroads and canals constructed by companies.

Would the decision of this court in *Crandall* v. *Nevada* have been in favor of the right of a State to tax passengers in transit from her territory if it had been argued that the tax was a compensation for the use of the road on which they were travelling?

III. *The statute in question interferes with that freedom of transit of goods and persons between one State and another which must necessarily exist under a political organization like ours.*

The case of *Crandall* v. *Nevada* seems to settle this. It is true that the tax there declared unconstitutional was a tax on the passage of persons and not of property; but the reasoning of the court is as applicable to the one case as to the other; and in *Woodruff* v. *Parham*,* the rule laid down in *Crandall* v. *Nevada* is spoken of as securing "freedom of transit of *goods* and persons between one State and another."

* 8 Wallace, 138.

Argument in favor of the tax.

Mr. F. Carroll Brewster, Attorney-General of Pennsylvania, and Mr. Lewis Waln Smith, contra:

Before considering the points of law raised by the plaintiffs in error, it is of importance to discern from the words of the act the exact practical working of the tax in its execution.

First. It is an act to raise additional revenue, and the mode of the collection of the tax is identical with the collection of the other taxes to which the Commonwealth looks for nearly all her revenue.

Second. The tax is imposed on all the corporations in the State, and is charged against each of them in proportion to all the tons carried, without any discrimination between those carried exclusively within the State, or those intended for transportation abroad.

Third. The company is allowed thirty days after the end of each quarter in which to report the number of tons carried, and sixty days more in which to pay the tax settled, so that the goods carried have all of them, before this tax becomes due or payable, passed beyond the jurisdiction of the State, if they were intended for shipment abroad, and no claim or lien whatever has attached to them. It is the franchise of the corporation which is liable for the non-payment of the tax.

Fourth. The tax, although familiarly called a "tonnage tax," is, in actual results, a tax on the corporation, graded by the amount of business it transacts in its province of transporter; and if the term "tonnage tax" implies it is a tax on a ton, it is erroneous, the 2000 pounds which go to make up a Pennsylvania ton being merely a convenient standard whereby to measure the business done by the corporation.

If such a tax be unconstitutional, it must be because it is the exercise of a power expressly and directly prohibited to the State by the Constitution of the United States. Every presumption is in favor of its legality. It is a means, and one of great importance, through which the State of Penn-

sylvania seeks to raise the funds necessary to the maintenance of the administration of the government of the State. Taxation for such a purpose is the exercise of a high and unquestioned privilege of a sovereign, and no far-drawn analogy or dubious passage can be allowed to rob her of the right which is absolutely necessary to her existence as a State—the right to raise revenue by taxation. It must ever be remembered, in considering questions arising under our complex system of government, that within its own sphere, each government, that of the United States, and that of the States, is sovereign. In exercising its power within that sphere, its acts are governed only by its own pleasure. And this view of the relation of the States to the National government is stated with great preciseness and force by this court in the recent case of *The Collector* v. *Day*,* where the Federal government sought to tax under its law, levying a general income tax, the salary of a judge of a State. Speaking of "the separate and independent condition of the States in our complex system, as recognized by the Constitution, and the existence of which," say the court, "is so indispensable, that without them the general government itself would disappear from the family of nations," this court in the case cited say:

"It would seem to follow as a reasonable, if not a necessary consequence, that the means and instrumentalities employed for carrying on the operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired; should not be liable to be crippled, much less defeated, by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax, and more especially those means and instrumentalities which are the creation of their sovereign and reserved rights. Without this power and the exercise of it, we risk nothing in saying that no one of the States under the form of government guaranteed by the Constitution could long preserve its existence."

* 11 Wallace, 113.

IS THEN THE STATUTE IN QUESTION SUCH A REGULATION OF COMMERCE AS IS IN VIOLATION OF THE CONSTITUTION OF THE UNITED STATES?

1. *If it is a "regulation of commerce," the State of Pennsylvania has a right, under the clause referred to, to make such regulation, Congress not having forbidden the same by legislation.*

The clause which vests in Congress the power to regulate commerce does not, *ipso facto*, take from the States the right to also regulate commerce, provided that the regulations of the latter do not come in conflict with those of the former. If there be any conflict, it is conceded that the State law at once falls. But in the present case no such question arises. Congress has not passed any law regulating commerce between the States. There can, therefore, be no conflict with a superior enactment, and the only question remaining is, whether the power regulating commerce vested in Congress is exclusive. It is submitted that there is no decision of this court which can be said to so decide. Analogies may be drawn, or the individual *dicta* of judges cited, but there is no judicial decision which settles the question. On the other hand, wherever the issue has been presented it has been avoided, and declarations from the bench abound in all the reports, disclaiming any intention of so deciding. On the other hand, the opinions of a majority of the judges, taken from their decision, bear towards the doctrine, that until Congress sees fit to exercise the power vested in it, the States have a right to regulate commerce, so far as the same are local in their nature, and do not arrive to a National rule.*

It is true that the view of the question favorable to the exclusiveness of Congressional power is sustained by the decision of this court in the cases of *Brown* v. *Maryland*, *Gibbons* v. *Ogden*,† and by the decision of a divided court in the *Passenger Cases*.‡ But the case of *Gibbons* v. *Ogden* was

* Sturges *v.* Crowninshield, 4 Wheaton, 122, 192; Houston *v.* Moore, 5 Id. 1; License Cases, 5 Howard, 578; Cooley *v.* Port Wardens, 12 Id. 299; Crandall *v.* Nevada, 6 Wallace, 35, and other cases.

† 9 Wheaton, 226.

‡ 7 Howard, 416.

decided on the ground that the State grant of an exclusive right to the waters of a navigable river was in conflict with that branch of commerce as to which Congress has made direct legislation, and being repugnant to it must give way. Had the court been of the opinion that the grant was unconstitutional, merely because it was an attempt of a State to regulate commerce, the decision would have been based on that ground; but the court expressly avoided giving any such an opinion. So far as the *Passenger Cases* are concerned, the decision of the court was such as to greatly weaken the opinion, even had it been based exclusively on the ground of the exclusiveness of the power of Congress. However all this may be, the later cases of *Gilman* v. *Philadelphia*,* of *Hinson* v. *Lott*,† and of *Crandall* v. *Nevada*, more than balance whatever inclination the previous decisions might have had.

Indeed, *Gilman* v. *The City of Philadelphia* is emphatic in its recognition of the principle we contend for, if the meaning of the decision is rightly stated by Clifford, J., in a dissent which he made from it. He says:

"The precise doctrine advanced, as I understand the opinion, is that Congress has not passed any act regulating the navigation of the river, and that inasmuch as there is no Federal regulation upon the subject, the law of the State legislature authorizing the erection of the bridge is a valid law, even if the bridge be an obstruction to navigation, because the State law is not in conflict with any act of Congress giving protection to the otherwise paramount right of navigation."

Is there anything in the idea that a State can regulate interstate commerce, if Congress omits to do so, which is inconsistent with the intent of the clause inserted in the Constitution giving Congress the power to regulate commerce? We fail to see any such thing. At the time of the adoption of the Constitution the commerce of the country was burdened by the imposition of imposts and exposts by the several States, and by the regulations of commerce im-

* 3 Wallace, 713.

† 8 Id. 150.

posed by them. The power to regulate commerce was vested in Congress, so that at any time it could pass a law regulating commerce, so as to relieve it from all the burdens so vexatious under the Confederation. That power was given to Congress to exercise, should it see fit, and should the exigencies of the occasion require. If, as Johnson, J., says, in his opinion in *Gibbons* v. *Ogden*, which will doubtless be relied on in reply, "all the laws bearing on commerce dropped lifeless from the statute-book," it was not necessarily because the power of regulating commerce had ceased to be in the States, but because each State knew that if it persisted in its impositions Congress would exercise the power, and thus cancel its laws by the passage of one paramount. The moment that the direful picture, drawn by the plaintiffs in error, should be painted in experience, Congress could exercise its power and sweep all such State laws into utter nullity.

2. *The tax is not such a regulation of commerce as to be included in the power given to Congress, supposing that power to be exclusive.*

In order that we may discover whether the act now alleged to be unconstitutional is a "regulation of commerce," it is necessary to see what is "commerce," and what amounts to a "regulation." "Commerce," says Marshall, C. J., in *Gibbons* v. *Ogden*, "is undoubtedly traffic; but it is something more. It is intercourse. It describes the commercial intercourse between nations and parts of nations in all its branches, *and is regulated by prescribed rules for carrying on that intercourse.*" And again he says: "It is the power to regulate, that is, to prescribe the rules by which commerce is to be governed." This corresponds with the derivation of the word "regulate," and furnishes us with the key to what is meant by a regulation of commerce. "*Regula*, a rule—Regulate, to adjust by rule: as, to regulate weights and measures; to regulate the assize of bread; to regulate trade."* We can, therefore, paraphrase the term "power

* Webster.

to regulate commerce" by the words, "power to prescribe rules which govern the intercourse of one nation with another." Can the tax in question be considered in any way a rule to govern the intercourse of the people of Pennsylvania with those of other States? Does it make a rule to govern the shipment of a ton of coal passing out of the State? It clearly does not, for a ton of coal is shipped just as freely, without either the knowledge or interference of the State, as though there was no such law in force. It is not until months after the ton has been shipped that the State knows the fact: it is not until months later that the tax is payable by the company. How then can this be a rule to govern the intercourse? And the same reasoning applies to goods brought into the State from abroad. They are delivered to the consignees, and the packages broken and the goods sold before the railroad company is asked to pay the tax in question. There is nothing, then, which connects the tax with the goods or the intercourse. There can be no such thing as a rule where there is nothing which it affects. It is essential to a regulation that it have something to regulate. But here it neither regulates the carrier, nor the shipper, nor the purchaser, nor the goods transported. How then is it a regulation of commerce, when it does not affect any of the things that go to make up commerce? It is only by sublimating the meaning of commerce into the naked word "intercourse," and then maintaining that this tax *interferes* with "intercourse" by making the profits of the transporter less, and consequently removing from him a portion of the incentive to business, that this tax can be construed to mean a regulation of commerce. But if the rule of interpretation taken by this court is such, that anything is a regulation of commerce which tends to diminish the profits of transportation, then there is no tax levied by a State which is not within such a construction, and therefore invalid, for all taxation interferes more or less with production and consumption. If the State cannot tax the receipts of a transportation company in proportion to the number of tons carried by it, and on which freight has been paid, then

it cannot tax the dividends declared, for the dividends are a portion of these very receipts, and derived from the same source, viz., received from traffic intended to be sent abroad. Indeed, if the plaintiffs in error be right, it is difficult to see what is left for the State to tax. It can lay no tax which will not more or less affect commerce; more or less prevent consumption; and without consumption there can be no commerce.

There must, therefore, be some point at which all will concur, that the power of a State to impose a tax which may affect commerce, by diminishing the profits of the transporter, is valid; otherwise the States would be left without a revenue. Now where does the power of Congress to regulate commerce begin, and that of the State to impose a tax cease? The decisions heretofore made by this court afford a solution to this question. Taking the definition of a regulation of commerce which we have given, we find it to mean a rule to govern intercourse. If then any act be passed by the State amounting to a *rule*, which either directly affects the goods, or the consignor or consignee, or the transportation of the goods or their sale, it can be considered a regulation of commerce. But any act of a State which taxes the business of any of its citizens, or franchise of any corporation, or their profits, and only interferes with commerce so far as to check consumption or diminish profits, does not amount to a rule to govern intercourse, and is a legitimate exercise of the rightful power of taxation never surrendered by the State to the Federal government. Taking this, then, as a standard, around which to classify the various decisions of the courts bearing on this subject, let us examine the conclusions arrived at. In *Brown* v. *Maryland*, relied on by the plaintiffs in error, a license was imposed by Maryland on every foreign importer, *before* he could break a package or sell any foreign goods. This was a *rule* which directly affected the sale of the goods, for before the sale took place it was necessary to comply with the rule, and the cost of the license was thus made a prerequisite to engaging in foreign commerce. This was held unconstitutional, because, by making a license a

prerequisite to sale, it clogged intercourse. It was a rule which affected directly that portion of commerce which consisted in selling imported goods. Had the State of Maryland required every merchant, at the end of every year, to pay a tax on the amount of profits he derived from his business, irrespective of what part of those profits were derived from internal trade and what came from foreign trade, can it be contended that anything in its decision leads to the inference that such a tax would have been held unconstitutional? On the contrary, we have a decision of this court in *Nathan* v. *State of Louisiana** directly opposite to the idea of the unconstitutionality of such a tax as that stated. In that case the State levied a tax on the *business* of foreign exchange brokers, and it was held constitutional.

None of the decisions of this court have ever gone so far as to interfere with State taxation, except in cases in which the tax was in such a form as to primarily be a rule to govern commerce, and only a tax in its secondary effects. Applying this test, the case of *Gibbons* v. *Ogden* ceases to bear against the right of the States to impose this tax. That was nothing but a direct regulation of commerce by reason of its operating on every steamboat which, in the course of commerce, plied the Hudson River. It established a *rule* to govern intercourse between the States, by giving the right to that intercourse exclusively to the grantees of the State of New York. So also in *Almy* v. *California*, cited against us. That was the imposition by California of a stamp duty on every bill of lading of gold or silver exported. As the bill of lading was an essential part of every consignment, such a tax was equivalent to a direct tax on the gold or silver, the payment of which was necessary before the goods could become commodities of commerce. This was the establishment of a *rule to govern* the shipment of the particular articles. It was a tax only in its secondary effect: primarily it was an imposition on commercial intercourse. It had not the usual features of nearly every *bonâ fide* tax law, viz., a general im-

* 8 Howard, 73.

position of duties for the raising of revenue. It singled out the articles principally exported, and by levying the tax on them showed the intention was to clog commerce, by charging on it the cost of State expenses. It was, however, decided unconstitutional by this court, on the ground that it was a duty on exports.

Crandall v. *The State of Nevada*, also cited against us, is a striking illustration of this test. The law then in dispute levied a tax on transportation companies, at a rate *per capita* on every passenger leaving the State or passing through it. In that case, as the State looked to the carrier after the passenger had passed beyond its limits and did not directly clog commerce by establishing a rule to govern intercourse, the court was not prepared to hold it such a regulation of commerce as was contemplated by the Constitution, and only decided adversely to the law on principles entirely distinct from all connection with its being a regulation of commerce.

In *Steamship Co.* v. *Port Wardens*,* a law of the State of Louisiana taxing every vessel entering the port of New Orleans five dollars, without regard to any preference of service by officers of the State or pilots, was held unconstitutional. The effect of the tax was the same as though, before any vessel could enter the port, she was compelled to pay five dollars for the privilege of entering. This was a rule to govern intercourse, and, of course, fell within the clause referred to.

The *Passenger Cases* establish the same rule. They were directly based on the ground that the law in question established a rule to govern intercourse.

Looking next at cases in which the laws of the various States have been upheld by this court, it will be found that many of them, although complained of as regulations of commerce, were upheld as valid because they did not amount to a rule to govern intercourse, but merely affected intercourse secondarily, while their primary result was the exercise of a power undeniably vested in the State. And

* 6 Wallace, 33.

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first among these is the case of *Willson* v. *The Blackbird Creek Marsh Co.*,* decided as early as 1829, in which Chief Justice Marshall (who had already written the opinion in *Brown* v. *Maryland* and *Gibbons* v. *Ogden*) delivered the unanimous judgment of the court. In that case the bridge was erected over a navigable stream, and entirely cut off all navigation. Yet it was held to be a constitutional exercise of a power never surrendered by the State of Delaware. Although it is undisputed that the bridge interfered with intercourse, yet as it was primarily intended as a local improvement, and was an exercise of the right of the State, and its interference with commerce was the secondary effect of its erection, the act was lawful. It was not a rule to govern intercourse. So also in *City of New York* v. *Miln*,† decided eight years later. In that case, while it cannot be doubted that the imposition of penalties by New York against the captains of vessels failing to report the number of passengers, was a regulation of commerce, yet as it was not a rule to govern intercourse in its primary effect, but was the exercise of the police power of the State in the first place, and a regulation of commerce in the second place only, it was held constitutional. In *Groves* v. *Slaughter*,‡ the question of the constitutionality of an act forbidding the importation of slaves from any State into Mississippi was considered and the act sustained. It was intended as a local police measure, and while it might affect interstate commerce still it was primarily an exercise of a right conceded to the State. But stronger is the case of *Cooley* v. *Board of Wardens*,§ decided in 1851. The law of Pennsylvania, imposing upon every vessel entering the port of Philadelphia, which neglects or refuses to take a pilot, a forfeit of one-half pilotage, to go to the Society for the Relief of Disabled Pilots, was held constitutional. "The power to regulate commerce includes various subjects, upon some of which there should be a uniform rule, and upon others different rules in different localities. The power is exclusively in Congress in the former,

* 2 Peters, 245. † 11 Id. 104. ‡ 15 Id. 449. § 12 Howard, 299.

but not so in the latter." The power to regulate pilots is a regulation of commerce, but as the law was primarily local in its operations, and intended, in good faith, to be an exercise of an undoubted right of the State, its secondary effect on commerce did not make it illegal, and the decision is approved in *Crandall* v. *Nevada*, decided over sixteen years later. But still more decided is *Gilman* v. *Philadelphia*, decided in 1865, and to which we have already referred.* This settled the right of a State to erect a bridge over a navigable river, even if it does interfere with navigation, provided Congress has not legislated on the subject, and that if the act of a State does not amount to a rule to govern intercourse, it may be lawfully enacted, even if it does interfere with commerce. The statement of the distinction is clearly drawn in the words of Swayne, J., who delivered the opinion. He says:

"The States may exercise concurrent power in all cases but three: 1st. Where the power is lodged exclusively in the Federal Constitution. 2d. Where it is given to the United States and prohibited to the States. 3d. Where, from the nature and subjects of the power, it must necessarily be exercised by the Federal government exclusively."

The power here in question does not fall within either of these exceptions. It is no objection to distinct substantive powers that they may be exercised upon the same subject within their respective boundaries. In some instances their action becomes blended, in some the action of the State governments displaces the action of the Nation; in others the action of the State is void, because it seeks to reach objects beyond the limits of State authority.

The distinction between interference with commerce and a regulation of commerce is clearly recognized by the court in this case, and the case furnishes an answer to the complaint that allowing the States power to interfere with interstate commerce would lead to evils in traffic.

From the various recent decisions of the court, we think

* *Supra*, p. 249.

then that it may be considered that, whatever may have been the tenor of the earlier cases, it is now settled that there are many forms of regulations which affect commerce which it is within the powers of the States to make, not excluding the cases of bridges, pilots, quarantine and police measures, all of which have been always recognized as being vested in the States as well as Congress. That there also belongs to the States the right to pass laws which are in exercise of the reserved rights of the States, even if they be regulations of commerce, provided that the regulation be local in its nature and does not amount to a national rule, and one which uniformly affects the whole country.

Does the tax now under discussion "institute a regulation of commerce of a national character," or one which "has a uniform operation over the whole country?" Surely the dealing between the Reading Railroad and the Commonwealth of Pennsylvania as to the taxes on its business of shipping coal from the mines to Port Richmond, in Philadelphia, is not a national regulation. But a distinct argument of the proposition is fortunately rendered unnecessary by the decision in *Crandall* v. *State of Nevada*. It was there held that the tax under dispute was not such a one as to come in conflict with the constitutional provision. Now the tax in that case was similar in its operation to the one at present before the court, with the exception that the tax in the Nevada case bore much more directly on the person transported than this one does on the goods carried, and was also a discrimination against a particular class of traffic. Unlike the Nevada tax, this is uniform in its operation on all classes and makes no discrimination. The Nevada tax and the tax in Pennsylvania present a curious resemblance, and differ only in that the former one is much stronger in its bearing against the constitutional provision than the latter. Yet this court admitted in that case, that as the tax was not a uniform rule of the whole country, or national in its character, it was not in conflict with the constitutional restriction, Congress having failed to legislate upon the subject. There has been no act of Congress since passed which

bears upon the subject. If, then, the tax imposed in 1867 was not unconstitutional, how can the one now before the court be so, when it is a counterpart of the former, so far as its relations to transportation are concerned?

3. *The law in question is an exercise of the power of taxation reserved to the States under the Constitution, is equal in its operation, bonâ fide in its character, making no discrimination against non-residents, and is levied on the franchise of every corporation in proportion to its business.*

A State can levy a tax on the franchises of its own corporations. This has been repeatedly decided. The State of Pennsylvania contends that under the undeniable right to tax the franchises of her citizens she has seen fit to levy this tax. The tax is payable by the company in proportion to the amount of freight carried. Now, that this is a tax on the franchise of the company is apparent, when it is remembered that all of the receipts of the great majority of railroads in Pennsylvania are derived from freight. In the case of the Reading Railroad Company, the now plaintiff in error, their business is almost exclusively a transportation business, and the value of their franchises to themselves can be graded exactly by the amount of freight carried, for almost all their receipts are derived from freight. Can it be successfully contended that the Commonwealth could not have charged a tax on the income of this company at any rate she pleased? Yet the income is derived exclusively from freight. Why, then, can she not tax the company by amount of freight carried, at so much per 1000 pounds, as well as at so much on each dollar of income received from carrying that freight. If this company got one dollar from every 2000 pounds of freight carried, could not the State levy a tax of two cents on every dollar of income, before there should be any dividend? If she could, why can she not measure the business of the company by the amount of freight, and not by the amount of receipts, and lay a tax on the franchise of the company of two cents on each 2000 pounds?

The practical effect of the tax in question is to make its

amount vary with the amount of the freight of the different transporting companies, and grades the proportion which each shall pay to the State in accordance with the value which the franchises granted to each by the State, have been to the corporation during the period covered by the tax. Not only is this a proper exercise of the power of taxation, but it is in the form which has been especially commended by this court. The question of taxation, according to the amount of business done by a corporation, came before the court in *Society for Savings* v. *Coite*.* That was a tax levied on the gross deposits of a saving bank, in its hands on a certain day. It was contended that the United States securities held by it could not be thus taxable, as they were exempt from State taxation. The court held such a tax to be on the franchise of the corporation, and sustained it. The court said:

"Different modes of taxation are adopted in different States. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets, or property, owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period. *Experience shows that the latter mode is better calculated to effect justice among the corporations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise.*"

The business of transportation is as much the business of the railroad companies, as is that of receiving deposits the business of the savings bank. If, then, a tax on the total amount of deposits at a certain day, is a tax on the franchise, why is not a tax on the total amount of freight carried, a like tax on franchise? And the court held not only that such a tax was legal, but justly commended it as the most equitable that could be devised.

* 6 Wallace, 608; and see Provident Institution *v.* Massachusetts, Ib. 623.

Argument in favor of the tax.

But a stronger argument in favor of the State is found in the fact that it is a *bonâ fide* tax, levied by her to raise revenue in an equitable manner from the corporations which owe their existence to her dominion. The tax is levied upon every ton of goods carried, whether they be shipped by a citizen of Pennsylvania, of New Jersey, or any other State. The burdens fall equally heavily on all classes of business, and do not charge upon the foreign citizens a penny more than is charged upon our own. It may be that if a tax is illegal as levied against a citizen of another State, it cannot be made legal by levying it against a citizen of Pennsylvania. But the fallacy of the argument is found in confounding the cause and effect. It is not because it is a tax law that the act can be complained of. It is because it amounts to a regulation of commerce; and when we show that it does not amount to a regulation of commerce, but is a *bonâ fide* tax law, we show that it is constitutional. It is fallacious to start with the premise that it is illegal as to certain parties. The fact that there is no discrimination is evidence of good faith on the part of the State. It removes it from any suspicion of unfairness, and makes the plaintiff come here, not as injured parties seeking protection, but as a corporation seeking to escape from paying her share of a tax which must be borne by all its fellow-corporations. The effect of the tax, so far as traffic is concerned, is well stated in the opinion of the Supreme Court of Pennsylvania. It says:

"It is evident that it does not matter whence or whither these tons travel, so that there be no discrimination to forbid or to burden their entrance into or exit from the State; and being a tax on the benefit and the privilege of transportation on works constructed for this end, it bears equally on all. Nor can it make any difference, that the company is allowed to add this tax on its franchises to the tolls or charges on the freight itself. It is the owner of the freight who enjoys both the privilege and the facility this valuable franchise affords, and whose toll could be increased by the State to the same extent if the works were in her hands. It falls upon those who use the road, not because it is a regulation of commerce, but because it is a subject of in-

ternal regulation, to which he is bound to contribute. There is in fact and authority, a substantial distinction between an act which simply operates as a burden on commerce and one which attempts to regulate it. No one can doubt the power of a State to tax her own coal, iron, lumber, grain, and other products of her mines and soil, and the persons and occupations of those engaged in their production or their transportation, and yet these burdens eventually fall on those who consume them, whether they live in or out of the State. Yet clearly such taxation is no regulation of commerce. The State in laying a common tax on all such articles is not bound and cannot be presumed to know where they will be consumed, nor to inquire the destination of those who traffic in or transport them. If she do not discriminate between that which goes out or comes in and that which remains within, it cannot be said that she in any sense attempts to regulate commerce with other States, or to impose a duty on imports or exports. In principle, where there is no discrimination, there is no difference between a tax on a transporter, whether in gross or measured by the ton he carries, and a tax on a farmer, the manufacturer, the miner, the merchant, or the broker, measured by the business he does. Yet all the impositions are burdens which reach the consumer wherever he lives. The fallacy of the argument which insists that the burdens of internal transportation shall not be shared by the distant consumer, on the ground that it is an import or export duty, or a regulation of commerce, is seen in the fact that to exempt articles going out of the State, would be to discriminate in favor of the foreign and against the domestic consumer. Coal carried from the mines to Richmond, on the Delaware, and there disposed of, is conceded to be liable to the tax, but if intended to be sent forward to places without the State, it is said not to be liable; what is this but to impose a tax on our own citizens, which those beyond the State are not to bear? Pennsylvanians are citizens of the same Union, and entitled to its equal protection against such discrimination."

The argument is weighty. A resident of Camden, opposite Philadelphia, can have coal shipped to him from the mines, and cannot be taxed. A resident of Philadelphia must pay the tax. Hence it would follow that if the con-

struction contended for by the plaintiffs in error be correct, the citizens of Philadelphia, whose State has chartered the Reading Railroad, whose capital is to a large extent involved in it, whose authorities protect its mines, its property, and grant to it its franchise, could be underbid in their own market by a citizen of New Jersey, merely because he was a citizen of that State, which has nothing whatever to do with the continuance, existence, or safety of either the corporation or its property. Pennsylvania coal, from Pennsylvania mines, transported by a Pennsylvania company, could be bought in Camden cheaper than in Pennsylvania. The constitution never intended such a discrimination by a State against its own citizens. In *Padelford* v. *Savannah*,* the court said:

"It is not said in *Brown* v. *Maryland*, that the State must discriminate *in favor* of the foreigner, and not tax him when she taxes her own citizens. Now, what was the object of the prohibition? In a word, was its object to put foreigners in a better condition than natives? We know that the object was not to put citizens of another State in that better condition."

This point has already had the attention of this court in *Woodruff* v. *Parham*.† A tax was there levied on the gross sales at auction of auctioneers in Mobile, Alabama. It was proved that a large amount of the sales were of packages, unbroken, which came from Georgia. It was contended that a tax could not be levied by Alabama on these consignments. The court upheld the tax, and clearly showed that it was never intended by the constitution to discriminate against a citizen of a State and in favor of citizens of other States. Miller, J., says:

"The case of *Brown* v. *Maryland*, as we have already said, arose out of a statute of that State, taxing *by way of discrimination*, importers who sold, by wholesale, foreign goods."

But the view of the court on the subject of discrimination is yet more decidedly stated in *Hinson* v. *Lott*. In that case

* 14 Georgia, 438.

† 8 Wallace, 123.

Georgia levied a tax of fifty cents on each gallon of whisky brought into the State from a sister State for sale and sold in the original cask. She, also, by the same act, levied a like tax of fifty cents on every gallon of whisky manufactured and sold in the State. The first she collected as a tax, the latter as a license. When the section imposing the tax on imported liquors came before the court, Miller, J., said:

"As the act institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured within the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State."

So, also, in the present case. As the tax does not discriminate against citizens of other States, but merely charges all alike, it is not an attempt to regulate commerce, but is an exercise of the taxing power of the State.

And it is a fact worthy of note, that all the research of the learned counsel for the plaintiff in error has failed to discover a single case in which this court has overturned a State tax law, which is *bonâ fide* in its provisions, which contains no covert attempt to regulate commerce, but enacts, without discrimination, a tax alike for residents or non-residents, in proportion to the business carried on under the protection of the State which imposes the tax.

If the proposition of the plaintiff in error be correct, and the goods shipped to points outside the State be free from taxation, because the tax then would be to regulate commerce, why cannot the citizens of Pennsylvania object to paying any tax on their goods, on the ground that by freeing the non-resident and charging the resident, there is an unjust discrimination against the resident? All are citizens of one common Union, all are entitled to the same position by the Constitution of the United States. Why, then, should the Pennsylvanian be charged two cents when the citizen of New Jersey is exempt? Does not the State, by such a discrimination, regulate commerce, by putting the resident

at a disadvantage, and has he not a like right to claim protection? Such a defence to taxation, if good, would bankrupt the Commonwealth, by depriving her of all her revenue.

4. *This is a tax imposed by the State as compensation for the use of artificial works created by her authority, and in exercise of her right of eminent domain.*

It cannot be denied that the Commonwealth of Pennsylvania, had she seen fit, could have refused to allow the Reading Railroad to be built. It owes its existence entirely to her pleasure. No consideration of interstate traffic could have availed anything so far as to compel her to authorize its erection. And she may still destroy the Reading Railroad, and forfeit its franchises, unless restrained by the rights of the corporation. There is nothing in the shape of an authority vested in the United States courts which could for a moment restrain her from, to-morrow, tearing up every rail between Reading and Philadelphia. If, then, the power to regulate commerce vested in Congress, is not such a power as to compel the building of the road, or to prevent its destruction when the State sees fit, how can it be that the power to regulate commerce is such as to prevent the State charging the parties using the road? If she can refuse to create, if she can destroy, why can she not tax for the existence? A distinction between a tax and a regulation of commerce has been frequently recognized by this court.*

This view is thus ably stated in the opinion of the Supreme Court of Pennsylvania:

"Among the most important reserved State rights, and one directly connected with the question before us, is that of eminent domain. This undoubted power has been exercised in the improvement of navigable streams, and in building and establishing ferries over them, and in the construction of roads, turnpikes, canals, and railroads; and has been repeatedly recognized in authoritative decisions. Under this invaluable power the

* Passenger Cases, 7 Howard, 402, McLean, J.; 479, Taney, C. J.; Veazie v. Moor, 14 Howard, 568.

States have built up a network of railways and canals, and have improved natural channels through which the commerce of the whole Union is coursing, like the life-blood throughout the natural system. This was not done under any supposed authority to regulate interstate commerce, or to aid in the execution of the Federal power over commerce between the States; but was done under the unquestioned power of the State to improve her own resources, and to regulate her internal affairs. Yet, does any one doubt the grand and beneficial impulse given to interstate commerce by this exercise of State power? And who can doubt that the State has a right to compensation for the expenditure of her means and the benefit she has conferred on all who use her works? They were built by herself or under her franchises, and the right to exact tolls, charges, and fares for their use, is a necessary consequence of her power to construct them. Nor does it make any difference what form her compensation takes—whether that of a direct charge on the tonnage using the road, or that of a tax on the corporations who use her franchises—her right is to exact the compensation from those who use her works. To gainsay this is to deny her right of eminent domain, and her power to legislate upon her internal affairs and the creations of her own sovereignty. If these works were, as once some of them were, in her own hands, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and authorize the tax to be added to the pre-existing tolls and charges? To legislate once, is not to exhaust her power over the subject of tolls or charges, but to legislate at all is to assert her power. Whether it be called a toll or tax, what is this but to increase a charge which she can rightfully demand? The right to demand any toll or charge upon all articles transported, or fares for passage, is derived from her grant, and the power to determine their extent depends upon her discretion. It is a right of which she cannot be deprived, and of which she is the only judge, unless, perhaps, the power should be so unreasonable and oppressively exercised, as to afford evidence of a design, by a fraudulent use of the power, to interdict or ruinously affect the commerce of other States. To say, because her citizens engage in mining for an extraterritorial market, or because mer-

chandise may pass over these works out of or into the State, that to exact tolls and charges for the minerals or merchandise transported over them, or to tax the franchises of those engaged in the work, is a regulation of commerce, is to confound all just distinctions, and to destroy the most sacred right of a State. Her power to levy revenue from transportation over these works may be seen in her power over the works themselves. If compensation were denied her by way of revenue, who can dispute her power to suffer her own works to fall into decay and ruin; or, when unfettered by a charter contract, to repeal the charters under which they were built? Interstate commerce might suffer, but what power could control the act? Then, on what principle is it she cannot levy a tax on these instrumentalities, for the privileges granted, because the products carried are destined for points without, or from without to points within the State? It is carriage or destination which gives the right of toll, tax, or charge. It is not levied on them because the products go out or come in, but because they have the privilege and the benefit of transportation."

To this argument the plaintiffs, referring to it in anticipation, reply,* "that the rivers of Pennsylvania are not constructed by the State power of eminent domain," and that a tax is imposed on every ton transported within the territorial limits of Pennsylvania by every steamboat.

To this we rejoin, that all of the rivers in Pennsylvania (with the possible exception of a small part of the Alleghany) are, for the purpose of transportation, artificial highways. The Schuylkill, Susquehanna, and Lehigh, are all of them navigable only by reason of artificial works created at great expense, and that the evident intention of the act, as well as its practical workings, all show that it is only on companies owning artificial works, that the charge is to be made. The words of the act are too clear on the subject for argument. They read, that the "officers of every railroad company, steamboat company, canal company, and slack-water navigation company, and all other companies now or hereafter doing business in this State, *and upon whose* WORKS *freight*

* *Supra*, p. 245.

may be transported, whether by such company or by individuals, and whether such company shall receive compensation for transportation, for transportation and toll, or shall receive toll only, shall be," &c. It will thus be seen that it is only on companies having *works* that the tax is charged.

Reply. It is argued for the State of Pennsylvania that, if the tax in question be a regulation of interstate commerce, *it is not such a regulation as Congress alone can make; and that until Congress has legislated on the subject, the State legislation is valid.*

When we consider the circumstances which induced the people of the United States to confer upon Congress the power to regulate commerce among the several States, the evils that existed and were intended to be avoided, and the plain import of the words used in the Constitution itself, the argument is hard to maintain.

What benefit could have been expected from investing Congress with the power to regulate interstate commerce, if the States themselves were to retain the power—the exercise of which had proved so vexatious? It could not have been supposed that uniformity and system would be produced by introducing a new element of discord. If the regulations established by thirteen distinct legislatures were found to be inconvenient and oppressive, the interference of another legislature would seem to have been a most unfortunate plan of relief. The difficulty is not obviated by referring to the supremacy of the acts of Congress when constitutionally enacted. Admit that a State regulation of commerce must fall when it comes in conflict with a Federal regulation, yet it cannot be supposed that Congress was expected to adopt a system of commercial regulation which would anticipate and preclude every possible exercise of State power on the subject. Johnson, J., in his concurring opinion in *Gibbons* v. *Ogden*,* says:

"The history of the times will, therefore, sustain the opinion

* 9 Wheaton, 226.

that the grant of power over commerce, if intended to be commensurate with the evils existing and the purpose of remedying these evils, could only be commensurate with the power of the States over the subject. And this opinion is supported by a very remarkable evidence of the general understanding of the whole American people when the grant was made. There is not a State in the Union in which there did not, at that time, exist a variety of commercial regulations, concerning which it is too much to suppose that the whole ground covered by these regulations was immediately assumed by actual legislation under the authority of the Union. But where was the existing statute on this subject that a State attempted to execute? or by what State was it thought necessary to repeal these statutes? By common consent these laws dropped lifeless from their statute-books for want of the restraining power that had been relinquished to Congress."

It is true that, in the case just referred to, the decision of the court was rested upon the ground that the law of New York, which gave to Livingston and Fulton the exclusive right to navigate the waters of the State of New York, was in conflict with the laws of the United States providing for vessels to carry on the coasting trade; and this was all that it was necessary to decide. But the following extract, from the opinion of Marshall, C. J., by whom the opinion of the court was delivered, shows that the concurrent power of the States to regulate commerce was by no means recognized:

"It has been contended by the counsel for the appellant, that, as the word 'to regulate' implies in its nature full power over the thing to be regulated, it excludes necessarily the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the regulating power designs to have introduced, as that on which it has operated. There is great force in the argument, and the court is not satisfied that it has been refuted."

And again, it is said by the same eminent judge, that

"When each government (State or Federal) exercises the

power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce."

So Mr. Justice Grier said in *Norris* v. *The City of Boston*,* (one of the Passenger Cases),

"Congress has regulated commerce and intercourse with foreign nations and between the several States, by willing that it shall be free; and it is therefore not left to the discretion of each State in the Union, either to refuse a right of passage to persons or property through her territory, or to exact a duty for permission to exercise it."

The idea that both Congress and the State governments may possess and exercise the right to regulate interstate commerce is as anomalous as that of the power to direct the movement of an army being lodged in several commanders at the same time.

The power to regulate commerce among the several States is given to Congress in the same clause and in the same words by which the power to regulate commerce with foreign nations is given; and any argument against the exclusiveness of this power in the one case must equally be applicable to the other. It is impossible to suggest any distinction. The grant in each case was made in the same language and under the same circumstances. Yet who would now contend that the State of Pennsylvania can regulate its commerce with Great Britain?

It is not proposed to examine the various cases in which the extent of the jurisdiction of Congress over foreign and interstate commerce, has been discussed by the judges of the Supreme Court of the United States. There has been conflict of opinion on the subject. In the opinion of McLean, J., in *Smith* v. *Turner*† (Passenger Case), will be found a re-

* 7 Howard, 464.

† Ib., 393.

view of the previous decisions and opinions on this point. The learned judge asserts most emphatically the exclusiveness of the jurisdiction of Congress. To the same effect is the opinion of Wayne, J., in the same case, p. 410. In the course of his opinion, Judge Wayne gives a statement of the circumstances under which the case of *The City of New York* v. *Miln*,* was decided. On the question, whether the power of Congress to regulate foreign or interstate commerce in all cases and under all circumstances is exclusive, however conflicting these opinions, it may safely be stated that nothing can be found in the reported decisions of this tribunal to raise a doubt as to the unconstitutionality of any attempt on the part of the State governments to interfere with the free exchange, between the several States, of all articles that can be made the subjects of commerce, where such exchange is not in conflict with regulations established for sanitary or police purposes.

The distinction suggested by the judge who delivered the opinion of the majority of the court, in *Cooley* v. *The Board of Wardens*,† that "whatever subjects of this power are in their nature national, or admit only of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress," if applied to the present case would seem to conclude the question. The right of passage for persons or goods through, from, or into the several States of the Union, is one of national importance, and especially a fit subject for national regulations, and it has been regulated by being left free and untrammelled. Whether the distinction referred to is to be considered as authoritatively established, may well be doubted. It appears to have commanded the assent of the majority of the court in the case in which it was announced, and to have led to a decision in favor of the validity of our Pennsylvania pilot laws, although they were admitted to be regulations of commerce. But in the case of *The Steamship Company* v. *Port Wardens*‡ (which the other side seek

* 11 Peters, 102. † 12 Howard, 311. ‡ 6 Wallace, 31.

to evade, but a decision which was approved in *Crandall* v. *Nevada*, and *Hinson* v. *Lott*,* on which they rely), we find it decided that

"A statute of a State enacting that the masters and wardens of a port within it should be entitled to demand and receive, in addition to other fees, the sum of five dollars, whether called out to perform any service or not, for every vessel arriving in that port, is a regulation of commerce within the meaning of the Constitution, and also a duty on tonnage, and is unconstitutional and void;"

and the reasoning on which this decision is based seems quite inconsistent with the theory that the States have any concurrent power to regulate interstate commerce, except so far as it may be incidentally affected by quarantine or other like provisions.

Mr. Justice STRONG delivered the opinion of the court.

We are called upon, in this case, to review a judgment of the Supreme Court of Pennsylvania, affirming the validity of a statute of the State, which the plaintiffs in error allege to be repugnant to the Federal Constitution.

The case presents the question whether the statute in question,—so far as it imposes a tax upon freight taken up within the State and carried out of it, or taken up outside the State and delivered within it, or, in different words, upon all freight other than that taken up and delivered within the State,—is not repugnant to the provision of the Constitution of the United States which ordains "that Congress shall have power to regulate commerce with foreign nations and among the several States," or in conflict with the provision that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The question is a grave one. It calls upon us to trace the

* 8 Wallace, 152.

line, always difficult to be traced, between the limits of State sovereignty in imposing taxation, and the power and duty of the Federal government to protect and regulate interstate commerce. While, upon the one hand, it is of the utmost importance that the States should possess the power to raise revenue for all the purposes of a State government, by any means, and in any manner not inconsistent with the powers which the people of the States have conferred upon the General Government, it is equally important that the domain of the latter should be preserved free from invasion, and that no State legislation should be sustained which defeats the avowed purposes of the Federal Constitution, or which assumes to regulate, or control subjects committed by that Constitution exclusively to the regulation of Congress.

Before proceeding, however, to a consideration of the direct question whether the statute is in direct conflict with any provision of the Constitution of the United States, it is necessary to have a clear apprehension of the subject and the nature of the tax imposed by it. It has repeatedly been held that the constitutionality, or unconstitutionality of a State tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid. This was decided in the cases of *Bank of Commerce* v. *New York City*,* in *The Bank Tax Case*,† *Society for Savings* v. *Coite*,‡ and *Provident Bank* v. *Massachusetts*.§ In all these cases it appeared that the bank was required by the statute to pay the tax, but the decisions turned upon the question, what was the subject of the tax, upon what did the burden really rest, not upon the question from whom the State exacted payment into its treasury. Hence, where it appeared that the ultimate burden rested upon the property of the bank invested in United States securities, it was held unconstitutional, but where it rested upon the franchise of the bank, it was sustained.

Upon what, then, is the tax imposed by the act of August 25th, 1864, to be considered as laid? Where does the sub-

* 2 Black, 620. † 2 Wallace, 200. ‡ 6 Id. 594. § Ib. 611.

stantial burden rest? Very plainly it was not intended to be, nor is it in fact, a tax upon the franchise of the carrying companies, or upon their property, or upon their business measured by the number of tons of freight carried. On the contrary, it is expressly laid upon the freight carried. The companies are required to pay to the State treasurer for the use of the Commonwealth, "on each two thousand pounds of freight so carried," a tax at the specified rates. And this tax is not proportioned to the business done in transportation. It is the same whether the freight be moved one mile or three hundred. If freight be put upon a road and carried at all, tax is to be paid upon it, the amount of the tax being determined by the character of the freight. And when it is observed that the act provides "where the same freight shall be carried over and upon different but continuous lines, said freight shall be chargeable with tax as if it had been carried upon one line, and the whole tax shall be paid by such one of said companies as the State treasurer may select and notify thereof," no room is left for doubt. This provision demonstrates that the tax has no reference to the business of the companies. In the case of connected lines thousands of tons may be carried over the line of one company without any liability of that company to pay the tax. The State treasurer is to decide which of several shall pay the whole. There is still another provision in the act which shows that the burden of the tax was not intended to be imposed upon the companies designated by it, neither upon their franchises, their property, or their business. The provision is as follows: "Corporations whose lines of improvements are used by others for the transportation of freight, and whose only earnings arise from tolls charged for such use, are authorized to add the tax hereby imposed to said tolls, and to collect the same therewith." Evidently this contemplates a liability for the tax beyond that of the company required to pay it into the treasury, and it authorizes the burden to be laid upon the freight carried, in exemption of the corporation owning the roadway. It carries the tax over and beyond the carrier to the thing carried. Improve-

ment companies, not themselves authorized to act as carriers, but having only power to construct and maintain roadways, charging tolls for the use thereof, are generally limited by their charters in the rates of toll they are allowed to charge. Hence the right to increase the tolls to the extent of the tax was given them in order that the tax might come from the freight transported, and not from the treasury of the companies. It required no such grant to companies which not only own their roadway but have the right to transport thereon. Though the tolls they may exact are limited, their charges for carriage are not. They can, therefore, add the tax to the charge for transportation without further authority.* In view of these provisions of the statute it is impossible to escape from the conviction that the burden of the tax rests upon the freight transported, or upon the consignor or consignee of the freight (imposed because the freight is transported), and that the company authorized to collect the tax and required to pay it into the State treasury is, in effect, only a tax-gatherer. The practical operation of the law has been well illustrated by another† when commenting upon a statute of the State of Delaware very similar to the one now under consideration. He said, "The position of the carrier under this law is substantially that of one to whom public taxes are farmed out—who undertakes by contract to advance to the government a required revenue with power by suit or distress to collect a like amount out of those upon whom the tax is laid. The only imaginable difference is, that, in the case of taxes farmed out, the obligation to account to the government is voluntarily assumed by contract and not imposed by law, as upon the carrier under this act; also, that different means are provided for raising the tax out of those ultimately chargeable with it."

Considering it, then, as manifest that the tax demanded by the act is imposed, not upon the company, but upon the

* *Vide* Boyle *v.* The Reading Railroad Company, 54 Pennsylvania State, 310; Cumberland Valley Railroad Co.'s Appeal, 62 Id. 218.

† Chancellor Bates in Clarke *v.* Philadelphia, Wilmington, and Baltimore Railroad Co.

freight carried, and because carried, we proceed to inquire whether, so far as it affects commodities transported through the State, or from points without the State to points within it, or from points within the State to points without it, the act is a regulation of interstate commerce. Beyond all question the transportation of freight, or of the subjects of commerce, for the purpose of exchange or sale, is a constituent of commerce itself. This has never been doubted, and probably the transportation of articles of trade from one State to another was the prominent idea in the minds of the framers of the Constitution, when to Congress was committed the power to regulate commerce among the several States. A power to prevent embarrassing restrictions by any State was the thing desired. The power was given by the same words and in the same clause by which was conferred power to regulate commerce with foreign nations. It would be absurd to suppose that the transmission of the subjects of trade from the State to the buyer, or from the place of production to the market, was not contemplated, for without that there could be no consummated trade either with foreign nations or among the States. In his work on the Constitution,* Judge Story asserts that the sense in which the word commerce is used in that instrument includes not only traffic, but intercourse and navigation. And in the *Passenger Cases*,† it was said: "Commerce consists in selling the superfluity, in purchasing articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in transporting the merchandise from the seller to the buyer to gain the freight." Nor does it make any difference whether this interchange of commodities is by land or by water. In either case the bringing of the goods from the seller to the buyer is commerce. Among the States it must have been principally by land when the Constitution was adopted.

Then, why is not a tax upon freight transported from State to State a regulation of interstate transportation, and,

* § 1057.

† 7 Howard, 416.

therefore, a regulation of commerce among the States? Is it not prescribing a rule for the transporter, by which he is to be controlled in bringing the subjects of commerce into the State, and in taking them out? The present case is the best possible illustration. The legislature of Pennsylvania has in effect declared that every ton of freight taken up within the State and carried out, or taken up in other States and brought within her limits, shall pay a specified tax. The payment of that tax is a condition, upon which is made dependent the prosecution of this branch of commerce. And as there is no limit to the rate of taxation she may impose, if she can tax at all, it is obvious the condition may be made so onerous that an interchange of commodities with other States would be rendered impossible. The same power that may impose a tax of two cents per ton upon coal carried out of the State, may impose one of five dollars. Such an imposition, whether large or small, is a restraint of the privilege or right to have the subjects of commerce pass freely from one State to another without being obstructed by the intervention of State lines. It would hardly be maintained, we think, that had the State established custom-houses on her borders, wherever a railroad or canal comes to the State line, and demanded at these houses a duty for allowing merchandise to enter or to leave the State upon one of those railroads or canals, such an imposition would not have been a regulation of commerce with her sister States. Yet it is difficult to see any substantial difference between the supposed case and the one we have in hand. The goods of no citizen of New York, New Jersey, Ohio, or of any other State, may be placed upon a canal, railroad, or steamboat within the State for transportation any distance, either into or out of the State, without being subjected to the burden. Nor can it make any difference that the legislative purpose was to raise money for the support of the State government, and not to regulate transportation. It is not the purpose of the law, but its effect, which we are now considering. Nor is it at all material that the tax is levied upon all freight, as well that which is wholly

internal as that embarked in interstate trade. We are not at this moment inquiring further than whether taxing goods carried because they are carried is a regulation of carriage. The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State. Nor is a rule prescribed for carriage of goods through, out of, or into a State any the less a regulation of transportation because the same rule may be applied to carriage which is wholly internal. Doubtless a State may regulate its internal commerce as it pleases. If a State chooses to exact conditions for allowing the passage or carriage of persons or freight through it into another State, the nature of the exaction is not changed by adding to it similar conditions for allowing transportation wholly within the State.

We may notice here a position taken by the defendants in error, and stoutly defended in the argument, that the tax levied, instead of being a regulation of commerce, is compensation for the use of the works of internal improvement constructed under the authority of the State and by virtue of franchises granted by the State; in other words, that it is a toll for the use of the highways, a part of which, in right of her eminent domain, the State may order to be paid into her treasury. We are asked, if the works were in her own hands, if she were the owner of them, what provision in the Federal Constitution would forbid her to increase her revenue by an increase of the charge of transportation over them? When in the hands of creatures exercising her franchises, what clause in any instrument forbids her to tax the franchises, and to authorize the tax to be added to existing tolls and franchises?

That this argument rests upon a misconception of the statute is to our minds very evident. We concede the right and power of the State to tax the franchises of its corporations, and the right of the owners of artificial highways, whether such owners be the State or grantees of franchises from the State, to exact what they please for the use of their ways.

That right is an attribute of ownership. But this tax is not laid upon the franchises of the corporation, nor upon those who hold a part of the State's eminent domain. It is laid upon those who deal with the owners of the highways or means of conveyance. The State is not herself the owner of the roadways, nor of the motive power. The tax is not compensation for services rendered by her or by her agents. It is something beyond the cost of transportation or the ordinary charges therefor. Having no ownership in the railroads or canals the State has no title to their income, except so far as she reserved it in the charters of the companies. Tolls and freights are a compensation for services rendered, or facilities furnished to a passenger or transporter. These are not rendered or furnished by the State. A tax is a demand of sovereignty; a toll is a demand of proprietorship. The tax levied by this act is therefore not a toll. It is not exacted in compensation for the use of the roadway; and if it were, the right to make terms for the use of the roadway is in the grantee of the franchises, not in the grantor. But, in truth, the State has no more right to demand a portion of the tolls which the grantees of her franchises may exact than she would have to demand a portion of the rents of land which she had sold. She may tax by virtue of her sovereignty, and measure the tax by income, but the income itself is beyond her reach. All this, however, is abstract and apart from the case before us. That the act of 1864 was not intended to assert a claim for the use of the public works, or a claim for a part of the tolls, is too apparent to escape observation. The tax was imposed upon freight carried by steamboat companies, whether incorporated by the State or not, and whether exercising privileges granted by the State or not. It reaches freight passing up and down the Delaware and the Ohio Rivers carried by companies who derive no rights from grants of Pennsylvania, who are exercising no part of her eminent domain; and, as we have noticed heretofore, the tax is not proportioned to services rendered, or to the use made of canals or railways. It is the same, whether the transportation be long or short. It must there-

fore be considered an exaction, in right of alleged sovereignty, from freight transported, or the right of transportation out of, or into, or through the State—a burden upon interstate intercourse.

If, then, this is a tax upon freight carried between States, and a tax because of its transportation, and if such a tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the Constitution of the United States. It is not necessary to the present case to go at large into the much-debated question whether the power given to Congress by the Constitution to regulate commerce among the States is exclusive. In the earlier decisions of this court it was said to have been so entirely vested in Congress that no part of it can be exercised by a State.* It has, indeed, often been argued, and sometimes intimated, by the court that, so far as Congress has not legislated on the subject, the States may legislate respecting interstate commerce. Yet, if they can, why may they not add regulations to commerce with foreign nations beyond those made by Congress, if not inconsistent with them, for the power over both foreign and interstate commerce is conferred upon the Federal legislature by the same words. And certainly it has never yet been decided by this court that the power to regulate interstate, as well as foreign commerce, is not exclusively in Congress. Cases that have sustained State laws, alleged to be regulations of commerce among the States, have been such as related to bridges or dams across streams wholly within a State, police or health laws, or subjects of a kindred nature, not strictly commercial regulations. The subjects were such, as in *Gilman* v. *Philadelphia*,† it was said "can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively." However this may be, the rule has been asserted with great clearness, that whenever the subjects over which a power to regulate commerce is asserted are in their

* Gibbons *v.* Ogden, 9 Wheaton, 1; Passenger Cases, 7 Howard, 283.
† 3 Wallace, 713.

nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress.* Surely transportation of passengers or merchandise through a State, or from one State to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. The produce of Western States may thus be effectually excluded from Eastern markets, for though it might bear the imposition of a single tax, it would be crushed under the load of many. It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government.

In *Almy* v. *The State of California*,† it was held by this court that a law of the State imposing a tax upon bills of lading for gold or silver transported from that State to any port or place without the State, was substantially a tax upon the transportation itself, and was therefore unconstitutional. True, the decision was rested on the ground that it was a tax upon exports, and subsequently, in *Woodruff* v. *Parham*,‡ the court denied the correctness of the reasons given for the decision; but they said at the same time the case was well decided for another reason, viz., that such a tax was a regulation of commerce—a tax imposed upon the transportation of goods from one State to another, over the high seas, in conflict with that freedom of transit of goods and persons between one State and another, which is within the rule laid down in *Crandall* v. *Nevada*,§ and with the authority of Congress to regulate commerce among the States.

* Cooley *v.* Port Wardens, 12 Howard, 299; Gilman *v.* Philadelphia, *supra*; Crandall *v.* The State of Nevada, 6 Wallace, 42.

† 24 Howard, 169. ‡ 8 Wallace, 123. § 6 Id. 35.

In *Crandall* v. *The State of Nevada*, where it appeared that the legislature of the State had enacted that there should "be levied and collected a capitation tax of one dollar upon every person leaving the State by any railroad, stage-coach, or other vehicle engaged or employed in the business of transporting passengers for hire," and required the proprietors, owners, and corporations so engaged to make monthly reports of the number of persons carried, and to pay the tax, it was ruled that though required to be paid by the carriers, the tax was a tax upon passengers, for the privilege of being carried out of the State, and not a tax on the business of the carriers. For that reason it was held that the law imposing it was invalid, as in conflict with the Constitution of the United States. A majority of the court, it is true, declined to rest the decision upon the ground that the tax was a regulation of interstate commerce, and therefore beyond the power of the State to impose, but all the judges agreed that the State law was unconstitutional and void. The Chief Justice and Mr. Justice Clifford thought the judgment should have been placed exclusively on the ground that the act of the State legislature was inconsistent with the power conferred upon Congress to regulate commerce among the several States, and it does not appear that the other judges held that it was not thus inconsistent. In any view of the case, however, it decides that a State cannot tax persons for passing through, or out of it. Interstate transportation of passengers is beyond the reach of a State legislature. And if State taxation of persons passing from one State to another, or a State tax upon interstate transportation of passengers is unconstitutional, *a fortiori*, if possible, is a State tax upon the carriage of merchandise from State to State, in conflict with the Federal Constitution. Merchandise is the subject of commerce. Transportation is essential to commerce; and every burden laid upon it is *pro tanto* a restriction. Whatever, therefore, may be the true doctrine respecting the exclusiveness of the power vested in Congress to regulate commerce among the States, we regard it as established that no State can impose a tax upon freight transported from

State to State, or upon the transporter because of such transportation.

But while holding this, we recognize fully the power of each State to tax at its discretion its own internal commerce, and the franchises, property, or business of its own corporations, so that interstate intercourse, trade, or commerce, be not embarrassed or restricted. That must remain free.

The conclusion of the whole is that, in our opinion, the act of the legislature of Pennsylvania of August 25th, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void.

JUDGMENT REVERSED, and the record is remitted for further proceedings

IN ACCORDANCE WITH THIS OPINION.

Mr. Justice SWAYNE (with whom concurred Mr. Justice DAVIS), dissenting.

I dissent from the opinion just read. In my judgment, the tax is imposed upon *the business* of those required to pay it. The tonnage is only the mode of ascertaining the extent of the business. That no discrimination is made between freight carried wholly within the State, and that brought into or carried through or out of it, sets this, as I think, in a clear light, and is conclusive on the subject.

NOTE.

AT the same time with the preceding case was adjudged another, that of

ERIE RAILWAY COMPANY *v.* PENNSYLVANIA.

A case, like the preceding one, in error to the Supreme Court of Pennsylvania. The plaintiff in error, in the present case, was a corporation created by the State of New York, which by acts

of the Pennsylvania legislature of February 16th, 1841, and March 26th, 1846, was authorized to construct its railroad through a portion of Pennsylvania, paying for the privilege the annual sum of $10,000, and being subjected to taxation on so much of its stock as equalled the cost of construction of that part of its road situate in Pennsylvania, in the same manner and at the same rate as other similar property was, or might be, subject.

Under an act of Assembly of the State, of August 25th, 1864, a tax was levied upon freight carried upon that portion of the road situate in Pennsylvania, either taken up within the State and carried out, or received by the company in another State for the sole purpose of being brought within it, and actually so brought. The question now was, whether that act, so far as it taxed such freight, was constitutional. The Supreme Court of Pennsylvania had held that it was. The case being brought here, was elaborately and ably argued by *Messrs. W. W. McFarland and J. W. Simonton, for the plaintiff in error; and by Mr. Wayne McVeigh, contra, for the Commonwealth of Pennsylvania.* Of necessity the arguments were to some extent similar to those meant to be reported in the preceding case; but on both sides they were presented with fresh aspects, and with varied illustrations.

Mr. Justice STRONG gave the judgment of the court.

He stated briefly that the question presented in the case was the same which the court had considered and answered in the preceding one; and that for the reasons given in the opinion of the court there, the act, so far as it taxed the sort of freight above mentioned, was to be held unconstitutional. As in the preceding case, therefore, the judgment of the Supreme Court of Pennsylvania was reversed, and the record remitted for further proceedings in conformity with the opinion of this court.

STATE TAX ON RAILWAY GROSS RECEIPTS.

[READING RAILROAD COMPANY *v.* PENNSYLVANIA.]

1. A statute of a State imposing a tax upon the gross receipts of railroad companies is not repugnant to the Constitution of the United States, though the gross receipts are made up in part from freights received for transportation of merchandise from the State to another State, or into the State from another.
2. Such a tax is not a regulation of interstate commerce.
3. Nor is it a tax on imports or exports.
4. Nor is it a tax upon interstate transportation.
5. A distinction made between a tax upon freights carried between States, because of their carriage, and a tax upon the fruits of such transportation after they have become intermingled with the other property of the carrier.

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

By an act of the legislature of Pennsylvania, passed on the 23d day of February, 1866, entitled "An act to amend the revenue laws of the Commonwealth," a tax was imposed upon the gross receipts of certain companies. The second section was as follows:

"In addition to the taxes now provided by law, every railroad, canal, and transportation company incorporated under the laws of this Commonwealth, and not liable to the tax upon income under existing laws, shall pay to the Commonwealth a tax of three-fourths of one per centum upon the gross receipts of said company; the said tax shall be paid semi-annually upon the first days of July and January, commencing on the first day of July, 1866; and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer, or other proper officer of said company, to transmit to the auditor-general a statement, under oath or affirmation, of the amount of gross receipts of the said company during the preceding six months; and if such company shall refuse, or fail, for a period of thirty days after such tax becomes due, to make said return, or to pay the same, the amount thereof, with an addition of ten per centum

thereto, shall be collected for the use of the Commonwealth, as other taxes are recoverable by law from said companies."

Under this statute the accounting officers of Pennsylvania stated an account between the Commonwealth and the Reading Railroad Company, for tax on the gross receipts of the company, for the half year ending December 31st, 1867. The company, as stated in a preceding case,* was a corporation created by the State of Pennsylvania. Its road was between Philadelphia and the coal regions of Pennsylvania, and one large source of the company's profit was the transportation on the road of coal from the coal regions to a place near Philadelphia, called Port Richmond, or to the Schuylkill Canal, from both which places most of it went to States other than Pennsylvania.

The account, as stated by the accounting officers of the Commonwealth, was based on returns made by the company, which discriminated between receipts from freight transported to points within, and receipts from freight exported to points without, the State of Pennsylvania. The latter were returned under protest against their liability to taxation, and the tax assessed against *these* receipts made the subject of the present controversy. The company, in refusing to pay, alleged that the act of February 23d, 1866—so far as it taxed that portion of the gross receipts which were derived from transportation from the State to another State, or into the State from another,—was unconstitutional and void, because, among other reasons, it was in conflict with the fourth paragraph of the eighth section of the first article of the Constitution of the United States, which ordains that—

"Congress shall have power to regulate commerce with foreign nations and among the several States."

And with the second paragraph of the tenth section of the same article, which ordains that—

"No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

* See *supra*, 234.

The Supreme Court of Pennsylvania adjudged that the act was not in conflict with either of the clauses of the Constitution relied on; and to this, its judgment, the present writ of error was taken.

Messrs. James E. Gowen and R. A. Lamberton, for the plaintiff in error:

We assume that the position taken by us in the case of *The State Freight Tax**—the position, namely, that a State tax upon freight generally is unconstitutional, as applied to the transportation of merchandise from one State to another—will be sustained by the judgment of this court. Setting out, then, as with a postulate, that *such* a tax is unconstitutional, we say:

1st. *There is no difference, in principle, between a freight tax regulated by reference to the articles transported and such a tax levied in the shape of a percentage of the money received for transportation.*

Is it not unreasonable to say that a tax of two cents per ton on the transportation of coal is unconstitutional, and yet that a tax of one per cent. on every two dollars (or two cents) paid for the transportation of coal is constitutional? If State taxation of interstate commerce is forbidden, a tax on the transportation of a ton of freight from one State to another must be equally illegal, whether the sum to be paid is specially mentioned or is left to be ascertained by a simple arithmetical calculation. The great object of the constitutional provision giving Congress the power to regulate commerce between the States was to prevent the States from embarrassing the intercourse which was intended should freely exist between these bodies, designed to be united for many purposes into one nation, with equal rights and privileges conferred upon all. If any one could tax the commodities carried it could exclude their passage through the State or across its lines. Is not a tax imposed on the amount

* *Supra*, 237–245. The case had just been argued.

of freight received by a transportation company the same in effect as one charged against the article carried? If the State can charge three-fourths of one per cent. on the money paid for freight, it can charge fifty per cent. on all money received, and although it can undoubtedly tax its own citizens who are represented in its legislative bodies to any extent that the law-makers may see proper, it cannot thus increase the price of transportation to the people of other States.

2d. *A tax upon the gross receipts of a transportation company is necessarily a tax upon transportation.*

In the *Bank of Commerce* v. *The Commissioners of Taxes*,* it was held that Federal securities held by a bank in New York, as part of the bank's capital, could not be constitutionally taxed under a law of that State which took the actual value of the entire capital stock as the basis of taxation, although it was strongly urged that the Federal securities were not specifically and *eo nomine* taxed; that no discrimination was made between them and other property; and that, in fact, the tax was upon the aggregate value of the property of the bank, irrespective of the character of the component parts of that property. This court, however, unanimously refused to admit that the law of New York did not tax Federal loans, because the tax was imposed indiscriminately upon all the property of the bank.

So a tax upon the gross receipts of a company is, necessarily, a tax upon its receipts from transportation, or any other source; but, when the company is a transportation company, and the tax is chargeable upon the gross receipts of transportation companies only, it is plain that the tax was practically intended to be a tax on gross receipts from transportation, and on nothing else. The gross receipts of a transportation company must, in nearly every case, be receipts from transportation alone.

The *Bank Tax Case*† was but an affirmance of the principle on which the case we refer to was ruled. It was there

* 2 Black, 620.

† 2 Wallace, 200.

held that a tax on *a valuation equal to the amount of the capital stock of a bank, paid in, or secured to be paid in*, was really and substantially a tax upon that portion of the capital stock which consisted of the loans of the United States, notwithstanding it was strenuously urged that the tax was the same, in substance, as a tax of a specific sum upon the franchises and privileges of the bank, irrespective of the character of its investments, or, to use the language of Denio, C. J., in *Utica* v. *Churchill*,* a tax "like that annexed to the franchise as a royalty for the grant," and notwithstanding the form of the tax appears to have been specially devised to obviate the objections sustained in the case of *The Bank of Commerce* v. *The Commissioners*.

Messrs. F. Carroll Brewster and Lewis Waln Smith, contra:

Even if we conceded, which we do not, the unconstitutionality of the tax on freight generally—the matter just now argued in the preceding case—the unconstitutionality of the tax on gross receipts generally by no means follows.

First. The tax of three-fourths of one per cent. on all gross receipts of a transportation company is not a tax on property, but on the franchises of the corporation.

This question came before this court in the case of the *Society for Savings* v. *Coite*,† and in *Provident Institution* v. *Massachusetts*.‡ The identity between the taxes there and the one here, so far as the effect on the corporations was concerned, will be noticed at once. The tax being, therefore, on the franchises of the corporation, and not on the property, it is clearly not included in the prohibited regulation of commerce, even according to the pretensions of the plaintiffs in error.

Second. Even if the tax on gross receipts be considered as a tax on property, it is still constitutional, or within the power of the State so to tax it.

In *Woodruff* v. *Parham*,§ the State levied a tax on the

* 33 New York, 240. † 6 Wallace, 594. ‡ Ib. 611. § 8 Wallace, 123.

gross sales of an auctioneer. He set up that these sales, which were of goods in unbroken packages from other States, were exempt. The court decided they were taxable. To the same effect is *Hinson* v. *Lott.** These cases establish this, as far as adjudication can establish anything, that the States have a right to tax the gross receipts of a citizen transacting business, be the receipts derived from what source soever, and that such a tax is not unconstitutional, provided that the tax does not institute any discrimination against non-residents.

If constitutional, it is not necessary for us to explain why the Commonwealth of Pennsylvania has seen fit to levy, in regard to some corporations in her borders, a tax on gross receipts rather than on something else for which she might have taxed them, yet, as showing the propriety of this sort of tax, sometimes, we may, perhaps, take the freedom to say a word further to the court on this subject.

The greater portion of the revenues of Pennsylvania are derived from the taxes levied on corporations. There are various forms of these taxes. In some cases they are levied on the capital stock; in most, perhaps, on net earnings, or income. The Commonwealth adapts the form of the tax to the particular kind of corporation, so that its collection can be facilitated. Experience has shown her that it is better to charge a mining company a large percentage, as three per cent. on net earnings, and to charge a railroad company a small one, as three-fourths of one per cent., on gross receipts. The reason why the gross receipts are selected as a basis of taxation of a railroad company, was doubtless because the State found that a large number of railroads were expending their receipts in improvements, and charging these as expenses. The cost of every improvement was deducted from the "net earnings," and while thus enriching themselves the railroad companies were avoiding taxation. The State, therefore, takes a low percentage on the gross receipts of railroads, and taxes them, whether they are expended in improve-

* 8 Wallace, 148.

ments or declared as a dividend. Such a course is both just to the corporation, and politic on the part of the State.

Reply: There is nothing in *The Society for Savings* v. *Coite*, to indicate that the court meant to question the authority of the cases which we have cited from 2d Black and 2d Wallace. It was held in *The Society for Savings* v. *Coite*, that a statute of a State requiring savings societies authorized to receive deposits, but without authority to issue bills, and *having no capital stock or stockholders*, to pay annually into the State treasury a sum equal to three-fourths of one per cent. on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property.

The court, while admitting that the tax would have been unconstitutional, as to deposits invested in Federal securities—if it could be considered a tax on the property represented by such securities—held, that it was not a tax on the property, but on the franchises or privileges of the defendant corporation. The facts of the corporation having no capital stock (its charter authorizing it to improve deposits for the benefit of its depositors), of its investments really belonging to its depositors, and of the tax being assessed not upon the actual value of the deposits, were all considered as showing that the tax was not imposed on the property, but on the functions, franchises, or corporate privileges of the defendant.

The succeeding case of *The Provident Institution* v. *Massachusetts*, is to the same effect.

Neither tends to prove that a tax on the gross receipts of a transportation company is not a tax upon transportation, nor that a tax upon interstate transportation is not a tax upon, and a regulation of, interstate commerce.

That the tax upon the gross receipts of railroad, canal, and transportation companies, imposed by the Pennsylvania statute, was intended to be a tax upon their franchises, can hardly be asserted in face of the fact that most other incorporated companies in the State are taxed, confessedly, upon their net earnings or income. The value of a franchise

Reply.

depends upon the profit derived from it; and the gross receipts of a railroad or canal company are not the measure of the profit made. But, in truth, the question is not, whether a tax which is alleged to operate as a regulation of commerce between the States or with foreign nations, is or is not a tax upon persons, property, trades or occupations, but whether it does really operate as a regulation of such commerce; since it is practically impossible for any State to collect a tax except from persons or property within her territory. It was contended that the tax upon importers in *Brown* v. *Maryland*,* was not a tax upon imports, but upon a business or occupation carried on in Maryland; that the tax on bills of lading in *Almy* v. *California*,† was a stamp tax, and not a duty on exports; and it might have been, and probably was, urged in *Hays* v. *The Pacific Mail Steamship Company*,‡ that the State of California had an undoubted right to tax ships as well as all other property within her territory. In *Crandall* v. *Nevada*,§ the tax chargeable against the carriers of passengers leaving the State was defended as a tax upon the business of carriers within the State.

When the court decided, in *The Savings Society* v. *Coite*, and in *The Provident Institution* v. *Massachusetts*, that the taxes there in question were charged upon the business of the corporation, and not upon their property, the unexpressed premise of the argument no doubt was, that such taxes did not practically interfere with the power of the United States to borrow money; just as in *Nathan* v. *Louisiana*,‖ a State tax on exchange and money brokers was held not to interfere with the power of Congress to regulate commerce. "Under the law," said McLean, J., in the last-mentioned case, "every person is free to buy or sell bills of exchange as may be necessary in his business transactions, but he is required to pay the tax if he engages in the business of a money or exchange broker." But can it be said that the power of Congress to regulate commerce between the States, and its actual regulation of it by leaving it free

* 12 Wheaton, 419. † 24 Howard, 169. ‡ 17 Id. 596.
§ 6 Wallace, 36. ‖ 8 Howard, 73.

and unrestricted, are not interfered with by a State regulation which exacts a certain sum for every passenger and every bale of goods that cross her boundary? or can it be reasonably said that every person is free to pass or repass, or to send his goods, without being taxed, provided he does not use the railroads or canals of the State?

Mr. Justice STRONG delivered the opinion of the court.

The question is whether the act of the legislature of Pennsylvania passed February 23d, 1866, under which a tax was levied upon the Philadelphia and Reading Railroad Company of three-quarters of one per cent. upon the gross receipts of the company, during the six months ending December 31st, 1867, is in conflict with the third clause of the eighth section, article first, of the Constitution of the United States, which confers upon Congress power to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes;" or whether it is in conflict with the second clause of the tenth section of the same article, which prohibits the States, "without the consent of Congress, from laying any imposts or duties on imports or exports, except what may be absolutely necessary for executing their inspection laws." It was claimed in the State courts that the act is unconstitutional so far as it taxes that portion of the gross receipts of companies which are derived from transportation from the State to another State, or into the State from another, and the Supreme Court of the State having decided adversely to the claim, the case has been brought here for review.

We have recently decided in another case between the parties to the present suit, that freight transported from State to State is not subject to State taxation, because thus transported. Such a burden we regard as an invasion of the domain of Federal power, a regulation of interstate commerce, which Congress only can make. If then a tax upon the gross receipts of a railroad, or a canal company, derived in part from the carriage of goods from one State to another is to be regarded as a tax upon interstate trans-

portation, the question before us is already decided. The answer which must be given to it depends upon the prior question, whether a tax upon gross receipts of a transportation company is a tax upon commerce, so far as that commerce consists in moving goods or passengers across State lines. No doubt every tax upon personal property, or upon occupations, business, or franchises, affects more or less the subjects, and the operations of commerce. Yet it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the Constitution. We think it may safely be asserted that the States have authority to tax the estate, real and personal, of all their corporations, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and to the same extent. We think also that such taxation may be laid upon a valuation, or may be an excise, and that in exacting an excise tax from their corporations, the States are not obliged to impose a fixed sum upon the franchises or upon the value of them, but they may demand a graduated contribution, proportioned either to the value of the privileges granted, or to the extent of their exercise, or to the results of such exercise. No mode of effecting this, and no forms of expression which have not a meaning beyond this can be regarded as violating the Constitution. A power to tax to this extent may be essential to the healthy existence of the State governments, and the Federal Constitution ought not to be so construed as to impair, much less destroy, anything that is necessary to their efficient existence. But, on the other hand, the rightful powers of the National government must be defended against invasion from any quarter, and if it be, as we have seen, that a tax on goods and commodities transported into a State, or out of it, or a tax upon the owner of such goods for the right thus to transport them, is a regulation of interstate commerce, such as is exclusively within the province of Congress, it is, as we have shown in the former case, inhibited by the Constitution.

Is, then, the tax, imposed by the act of February 23d,

1866, a tax upon freight transported into, or out of, the State, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property, that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage-coach, a railroad car, or a canal, or steamboat, its tendency is to increase the cost of transportation. Still it is not a tax upon transportation, or upon commerce, and it has never been seriously doubted that such a tax may be laid. A tax upon landlords as such affects rents, and generally increases them, but it would be a misnomer to call it a tax upon tenants. A tax upon the occupation of a physician or an attorney, measured by the income of his profession, or upon a banker, graduated according to the amount of his discounts or deposits, will hardly be claimed to be a tax on his patients, clients, or customers, though the burden ultimately falls upon them. It is not their money which is taken by the government. The law exacts nothing from them. But when, as in the other case between these parties, a company is made an instrument by the laws to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company; laid upon a fund which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and, indeed such a tax cannot be, until the expiration of each half-year, and until the money received for freights, and from other sources of income, has actually come into the company's

hands. Then it has lost its distinctive character as freight earned, by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon interstate transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the fruits of such transportation after they have become intermingled with the general property of the carrier, than there is for denying her power to tax goods which have been imported, after their original packages have been broken, and after they have been mixed with the mass of personal property in the country. That such a tax is not unwarranted is plain. Thus, in *Brown* v. *Maryland*,* where it was ruled that a State tax cannot be levied, by the requisition of a license, upon importers of foreign goods by the bale or package, or upon other persons selling the same by bale or package, Chief Justice Marshall, considering the dividing line between the prohibition upon the States against taxing imports and their general power to tax persons and property within their limits, said that "when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State." This distinction in the liabilities of property in its different stages has ever since been recognized.† It is most important to the States that it should be. And yet if the States may tax at pleasure imported goods, so soon as the importer has broken the original packages, and made the first sale, it is obvious the tax will obstruct importation quite as much as would an equal impost upon the unbroken packages before they have gone into the markets. And this is so, though no discrimination be made.

There certainly is a line which separates that power of the Federal government to regulate commerce among the

* 12 Wheaton, 419–441.

† Waring *v.* The Mayor, 8 Wallace, 122; Pervear *v.* The Commonwealth, 5 Id. 479.

States, which is exclusive, from the authority of the States to tax persons' property, business, or occupations, within their limits. This line is sometimes difficult to define with distinctness. It is so in the present case; but we think it may safely be laid down that the gross receipts of railroad or canal companies, after they have reached the treasury of the carriers, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation. It is not denied that net earnings of such corporations are taxable by State authority without any inquiry after their sources, and it is difficult to state any well-founded distinction between the lawfulness of a tax upon them and that of a tax upon gross receipts, or between the effects they work upon commerce, except perhaps in degree. They may both come from charges made for transporting freight or passengers between the States, or out of exactions from the freight itself. Net earnings are a part of the gross receipts.

There is another view of this case to which brief reference may be made. It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same.

Influenced by these considerations, we hold that the act of the legislature of the State imposing a tax upon the plaintiffs in error equal to three-quarters of one per cent. of their gross receipts is not invalid because in conflict with the power of Congress to regulate commerce among the States. And under the decision made in *Woodruff* v. *Par-*

ham,* it is not invalid because it lays an impost or duty on imports or exports.

JUDGMENT AFFIRMED.

Mr. Justice MILLER (with whom concurred Justices FIELD and HUNT), dissenting.

The principles announced in the case of the tax on the ton of freight, and the argument by which those principles are supported, meet my full approval. They lie at the foundation of our present Federal Constitution. The burdens which States, possessed of safe and commodious harbors, imposed by way of taxes called imposts upon the transit of merchandise through those ports to their destination for consumption in other States, were the cause as much as any one class of grievances of the formation of that Constitution; and the reluctance of the little State of Rhode Island to give up the tax which she thus levied on the commerce of her sister States through the harbor of Newport, then the largest importing place in the Union, was the reason that she refused for nearly two years to ratify that instrument.

The clauses of the Constitution which forbid the States to levy duties on imports, and which gave to Congress the right to regulate commerce, were designed to remedy that evil, and have always been supposed to be sufficient for that purpose. The one is the complement of the other, and something more. The first forbids the States to levy the tax on goods imported from abroad. The second places the entire control of commerce, with the exception of such as may be begun and completed within a single State, under the control of Congress. That commerce which is carried on with foreigners, or with the Indian tribes, or between citizens of different States, is under the jurisdiction of the General Government.

The opinion which affirms the tax of so much per ton on

* 8 Wallace, 123.

freight carried from one State to another to be a tax upon transportation, and therefore a regulation of the commerce among the several States forbidden by the Constitution, receives the approbation of all the members of this court except two. And it is there declared that any tax upon the freight so transported, or upon the carrier on account of such transportation, is within the prohibition.

Is the tax in the *present* case also within the evil intended to be remedied by the commerce clause of the Constitution?

It seems to me that to hold that the tax on freight is within it, and that on gross receipts arising from such transportation is not, is "to keep the word of promise to the ear and break it to the hope." If the State of Pennsylvania, availing herself of her central position across the great line of necessary commercial intercourse between the east and the west, and of the fact that all the ways of land and water carriage must go through her territory, is determined to support her government and pay off her debt by a tax on this commerce, it is of small moment that we say she cannot tax the goods so transported, but may tax every dollar paid for such transportation. Her tax by the ton being declared void, she has only to effect her purpose by increasing correspondingly her tax on gross receipts. In either event the tax is one for the privilege of transportation within her borders; in either case the tax is one on transportation.

That the tax on gross receipts comes not only ultimately, and in some remote way, but directly out of the freight transported, it is hardly worth while to argue. The railroad company makes precisely the same calculation in making its business profitable in relation to the cost and expenses of transportation, and the price to be demanded for it, in regard to this tax, that it does in reference to the tax on the ton of freight, and it imposes this additional burden for the benefit of the State in fixing the price of transportation.

The tax does not depend on the profits of the companies. It is the same whether the profits or the losses preponderate in a given year. A road may do a large carrying trade at a loss, but the State says, nevertheless, "for every dollar that

you receive for transportation I claim one cent or half a cent."

It is conceded that railroads may be taxed as other corporations are taxed on their capital stock, on their property, real and personal, and in any other way that does not impose necessarily a burden on transportation between one State and another. But a railroad or canal company differs from corporations for banking, insurance, or manufacturing purposes in this, that while their business is only remotely, or incidentally, connected with commerce, *the business of roads and canals, namely, transportation of persons and property, is itself commerce.* So much of said commerce as is exclusively within the State is subject to its regulations by taxation or otherwise, but that which carries goods from or to another State is exempted by the Constitution from its control.

I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce. And that this was the purpose of the framers of our Constitution I have no doubt; and I have just as little doubt that the full recognition of this principle is essential to the harmonious future of this country now, as it was then. The internal commerce of that day was of small importance, and the foreign was considered as of great consequence. But both were placed beyond the power of the States to control. The interstate commerce to-day far exceeds in value that which is foreign, and it is of immense importance that it should not be shackled by restrictions imposed by any State in order to place on others the burden of supporting its own government, as was done in the days of the helpless Confederation.

I think the tax on gross receipts is a violation of the Federal Constitution, and therefore void.

CASE OF THE STATE TAX ON FOREIGN-HELD BONDS.

[RAILROAD COMPANY *v.* PENNSYLVANIA.]

1. The power of taxation of a State is limited to persons, property, and business within her jurisdiction. All taxation must relate to one of these subjects.
2. Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the State, in which the company was incorporated, they are property beyond the jurisdiction of that State. A law of Pennsylvania, passed on the 1st of May, 1868, which requires the treasurer of a company, incorporated and doing business in that State, to retain five per cent. of the interest due on bonds of the company, made and payable out of the State to non-residents of the State, citizens of other States, and held by them, is not, therefore, a legitimate exercise of the taxing power of the State. It is a law which interferes between the company and the bondholder, and, under the pretence of levying a tax, impairs the obligation of the contract between the parties.
3. The exemption from taxation by the State of Pennsylvania of bonds thus issued to and held by non-residents of that State, citizens of other States, is not affected by the fact that the bonds are secured by a mortgage, executed simultaneously with them, upon property situated in that State. A mortgage there, though in the form of a conveyance, is a mere security for a debt, and transfers no estate in the mortgaged premises. It simply creates a lien upon them, and only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce the payment of his demand. This right has no locality independent of the party in whom it resides.
4. The tax laws of a State can have no extra-territorial operation; nor can any law of a State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the State.

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

The plaintiff in error, in this case, the Cleveland, Painesville, and Ashtabula Railroad Company, was incorporated by an act of the legislature of Ohio, passed in 1848, and authorized to construct a railroad from the city of Cleveland, in that State, to the line of the State of Pennsylvania. Under

this act and its supplement, passed in 1850, the road was constructed. By an act of the legislature of Pennsylvania, passed in 1854, the company was authorized to construct a railroad from the city of Erie, in that State, to the State line of Ohio, so as to connect with this road from Cleveland, and also to purchase a railroad already constructed between those points. This grant of authority was subject to various conditions, which the company accepted, and under its provisions the road between the points designated was constructed, or the one already constructed was purchased, and connected with the road from Cleveland, so that the two roads together formed one continuous line between the cities of Cleveland and Erie. The whole road between those places was ninety-five and a half miles in length, of which twenty-five miles and a half were situated in the State of Pennsylvania, and the rest, seventy miles, were situated in the State of Ohio. The company, so far as it acted in Pennsylvania under the authority of the act of her legislature, has been held by her courts to be a separate corporation of that State, and as such subject to her laws for the taxation of incorporated companies.* But there was only one board of directors who managed the affairs of both companies as one company, and had the entire control of the whole road between Cleveland and Erie.

In 1868 the funded debt of the company amounted to $2,500,000 and was in bonds of the company secured by three mortgages, one for $500,000, made in 1854, one for $1,000,000, made in 1859, and one for $1,000,000, made in 1867. Each of the mortgages was executed upon the entire road, from Erie, in Pennsylvania, to Cleveland, in Ohio, including the right of way and all the buildings and other property of every kind connected with the road. The principal and interest of the bonds first issued were payable in the city of Philadelphia; the principal and interest of the other bonds were payable in the city of New York. All the bonds were executed and delivered in Cleveland, Ohio,

* 29 Pennsylvania State, 781.

and nearly all of them were issued to, and have been ever since held and owned by non-residents of Pennsylvania and citizens of other States. The interest was at 7 per cent.

On the 1st of May, 1868, the legislature of the State of Pennsylvania passed an act entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers;" the eleventh section of which provided as follows:

"The president, treasurer, or cashier of every company, except banks or savings institutions, incorporated under the laws of this Commonwealth, doing business in this State, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors, a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January in each and every year, to the State treasurer for the use of the Commonwealth; and every president, treasurer, or cashier as aforesaid shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor-general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors during the year ending on that day; and thereupon the auditor-general and State treasurer shall proceed to settle an account with said corporation as other accounts are now settled by law."

The treasurer of the company, under this act, made a report in May, 1869, showing that during the previous year the company had paid interest on its funded debt of $2,500,000, at the rate of 7 per cent., amounting to $175,000. Upon this report the auditor-general and State treasurer "settled an account" against the company, finding that it owed to the State the sum of $2336.50 for the tax on the interest which the company had paid.

In reaching this conclusion these officers apportioned the interest upon the debt owing by the company according to the length of the road, assigning to the part in the State of Pennsylvania an amount in proportion to the whole indebtedness which that part bears to the whole road. There was

Statement of the case.

no law, however, in existence at the time directing or authorizing this proceeding.

From the settlement thus made the company appealed, under the law of the State, to the Court of Common Pleas of one of her counties, specifying various objections to the settlement, and among others substantially the following:

That the greater portion of the bonds of the company having been issued upon loans made and payable out of the State, to non-residents of Pennsylvania, citizens of other States, and being held by them, the act in question, in authorizing the tax upon the interest stipulated in the bonds, so far as it applied to the bonds thus issued and held, impaired the obligation of the contracts between the bondholders and the company, and is therefore repugnant to the Constitution of the United States, and void.

The contest in the Court of Common Pleas took the form of a regular judicial proceeding, a declaration having been filed by the attorney-general on behalf of the State against the company as for a debt and the company having joined issue by a plea of non-assumpsit and payment. The Common Pleas sustained the validity of the alleged tax against the objections of the company, and verdict and judgment passed in favor of the State. On error to the Supreme Court of the State the judgment was affirmed, and the case is brought here for review under the second section of the amendatory Judiciary Act of 1867.

The judgment of the Supreme Court of Pennsylvania in the case now brought here, was rested, it may be well to say, upon a prior decision of that court; one made in *Maltby* v. *Reading and Columbia Railroad Co.** That case was thus: An act of the legislature of Pennsylvania of April 29th, 1844, by its 32d section, laid a tax on "mortgages, *money owing by solvent debtors*, whether by promissory notes, penal or single bill, bond or judgment;" and a following section required the commissioners of the county to assess *a tax of three mills on every dollar of the value* of property made liable

* 52 Pennsylvania State, 140.

by the 32d section to taxation. Several years prior to 1864, the Reading and Columbia Railroad Company, a corporation of Pennsylvania, issued bonds payable with semi-annual interest at 7 per cent. On the 30th of April, 1864, the legislature of Pennsylvania passed an act which required the president, &c., of any corporation which pays interest on which a State tax is imposed, "before payment of the same to retain the State tax," and pay the same to the treasurer of the State. Maltby, a holder of certain coupons, due before 1864, presented them to the railroad company for payment. The company insisted on retaining the tax of three mills on each dollar of the bonds. On suit by Maltby, a non-resident of Pennsylvania, he asserted that the tax on "money owing by solvent debtors" was a tax on the debt in the hands of its holder, in other words, in the hands of the creditor, and not in the hands of the debtor; and that he, the holder in this case, being a non-resident of Pennsylvania, the debt followed his person and could not be taxed; moreover, that the tax, if it taxed the debt in the hands of the creditor, impaired the obligation of contracts. The Supreme Court of Pennsylvania decided all three points against Maltby, the creditor.

Woodward, C. J., for the said court, in answering the argument that the holder of the bond was a non-resident of the State, and the tax on the debt was therefore illegal, and the other argument, to wit, that the retention of the tax out of the coupon violated the obligation of a contract, said:

"*As to the non-residence of the holder of the loan.* It is undoubtedly true that the legislature of Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents. Our land taxes have always been imposed without regard to the domicile of the owner, and so have the taxes of stocks in banks and other incorporated companies. Stocks and loans are personal property, and the domicile of the owner determines the rights of succession to such property, though its *situs* at the time of his death determines the right of administration, but the legislative power of taxation does not

depend upon these distinctions. There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but where the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner who is required to pay the tax resides elsewhere. The duties of sovereign and subject are reciprocal, and any person who is protected by government in his person or property may be compelled to pay for that protection.

"The principle of taxation as the correlative of protection, perfectly just in itself, is as applicable to a non-resident as to a resident owner, because civil government is essential to give value to any form of property, without regard to the ownership, and taxation is indispensable to civil government. What would this plaintiff's loan be worth if it were not for the franchises conferred upon the company by the Commonwealth, franchises which are maintained and protected by the civil and military power of the Commonwealth? Is it not apparent that the intrinsic and ultimate value of the loan as an investment rests on State authority—that it is the State which made it property and preserves it as property? Then it would seem that this kind of property, more than any other, ought to contribute to the support of the State government. And I suppose it is upon this ground that the legislature discriminates between corporation loans and private debts as objects of taxation. The artificial debtor, itself a creature of the legislative power, and all its functions derived from legislative grant, is so dependent upon the government, it lives and moves and has its being so entirely by the favor of the government, that not only what it owns, but what it owes also, is thought fit to be taxed, whilst only the possessions of the natural person, and not his debts, are taxed.

"But, it may be said, and indeed was urged in argument, that the plaintiff's loan as personal property follows his person, and is property for all purposes only in the place where he has his domicile. For some purposes, as already intimated, it is undoubtedly subject to the law of the domicile, and yet in a very high sense it is also property here in Pennsylvania. It was admitted in argument that corporation stocks are property here though owned beyond our jurisdiction, and this is a necessary consequence of the final ruling which a long-vexed question in the

Supreme Court of the United States received in the case of *The Ohio and Mississippi Railroad Company* v. *Wheeler*,* where it was held that stockholders in railroad companies become presumptively citizens of the State which creates the corporation. Property has been defined to be the right or interest which one has in lands or chattels, and so domestic is this peculiar species of property that it domesticates the owner. But loans are not stocks, and yet the loans and stock of a railroad company resemble each other in many respects. Both are subscribed under the authority of a special law, and both are so far capital that they are employed for the same general purposes. The certificate of stock, which the plaintiff as a citizen of Rhode Island may hold for shares in this company, is mere paper evidence of property existing here; it is not the thing signified, it is only evidence of it. Is the bond which the plaintiff holds anything more? He cannot enforce it where he lives; he must come here to gather its fruits. It is founded upon and derives its value from a mortgage, but that mortgage is here, and the franchises and properties which the mortgage binds are here within our jurisdiction. The bond signifies his right to receive so much money out of the mortgaged estate, but that estate not only belongs to our jurisdiction, but was in part created by our authority, and the power to raise the mortgage, like all the franchises of the company, was conferred by State authority.

"Now, although loans and stocks are distinguishable for many purposes, yet the legislature committed no very great solecism in treating loans as taxable property within our jurisdiction. The tax may be thought to be extravagant, especially in view of the taxation to which the owner is exposed in the place of his residence, but that is a consideration for legislative attention. The point we rule upon this part of the case is, that corporation loans, though in some sense mere debts, are like moneys at interest, taxable as property, and moneys at interest have long been taxed in Pennsylvania.

"*Then, has the company the right to deduct the tax from the coupons?* This, it is said, violates the faith of the obligation, and renders all such legislation void. How far modern tax laws shall be permitted to impair and alter private contracts is a great question, which must be decided ultimately by the Su-

* 1 Black, 286.

preme Court of the United States. I have my own private opinions, which would probably be found to differ from a majority of this court. Perhaps the sound conclusion is that governmental taxation, a thing always to be anticipated when contracts are made, does not impair the obligation of contracts, within the meaning of the constitutional inhibition. If this be conceded as a principle, then the mode of collecting the tax, whether by a government agent, a debtor corporation or manufacturer, is mere machinery, and involves no principle whatever. For the present, therefore, and speaking for the court, I lay it down that the acts of Assembly, to which I have referred, are constitutional and valid; that they tax the loan as property found here in Pennsylvania, and that they appoint the debtor corporation the collector of that tax for the benefit of the State government."

Messrs. J. E. Gowen and J. W. Simonton, for the plaintiff in error:

I. It being admitted in Maltby's case, above quoted, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizens of another State," that is to say, we suppose, cannot impose on such citizens any tax assessed against them personally, the question is, whether debt due from a citizen of Pennsylvania to a citizen of New York is either actually or technically situated within the limits of the State of Pennsylvania? The Supreme Court of Pennsylvania holds that in the case of bonds issued by railroads, incorporated in Pennsylvania, it is. Now, of course, a debt has no actual or tangible *situs;* and the technical *situs* must necessarily be determined by some technical rule, maxim, or theory. But what rule, theory, or maxim refers the *situs* of a debt, viewed as personal property, to the domicile of the debtor and not that of the creditor? The general rule as to the *situs* of personal property undoubtedly is that it follows the person of the owner. *Mobilia personam sequuntur* is a legal axiom. No court more fully than the Supreme Court of Pennsylvania has declared, that the domicile of the owner is, for all purposes of taxation, the *situs* of choses in action and other intangible personal property. In *McKeen*

v. *The County of Northampton*,* it was held that shares of stock in a corporation of another State, held by a citizen of Pennsylvania, were taxable in Pennsylvania. The court say:

"The defendant below being a citizen of this State, it is clear he is subject personally to its power to tax, and that all his property accompanying his person, or falling legitimately within the territorial jurisdiction of the State, is equally within the authority. The interest which an owner of shares has in the stock of a corporation is personal. Whithersoever he goes it accompanies him, and when he dies his domicile governs its succession."

So in *Short's Estate*.† There Mr. Short, a resident of Philadelphia, owned a vast sum in stocks and corporations of other States, and bonds of the State of Kentucky, and a bank deposit in New York, but all were held to be subject to the Pennsylvania collateral inheritance tax. Gibson, C. J., says for the court:

"That Mr. Short's property out of the State subjected him to personal liability for tax assessed on it here in his lifetime is not to be doubted. The general rule is that the *situs* of personal property follows the domicile of the owner of it, insomuch that even a creditor cannot reach it in a foreign country, except by attachment or some other process provided by the local law; certainly not by a personal action without appearance or something equivalent to it."

It may be that personal property which has an actual *situs* cannot be withdrawn from the taxing powers of the State *within* whose jurisdiction it is actually situated, but this can have no application to the intangible property known as choses in action, which have no actual *situs*, and can have no legal *situs* other than that of their owner. If it is a principle of general jurisprudence that a debt is property, having a taxable *situs* where the debtor resides, what are the consequences? Necessarily that the extent to which the taxing

* 49 Pennsylvania State, 519. † 16 Id. 63.

power of a State may be applied to debts due from its citizens to non-residents can have no limit, except that of the debts themselves. "It is admitted," said Marshall, C. J., in *McCulloch* v. *The State of Maryland*,* "that the power of taxing the people and their property is essential to the very existence of the government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation." But the legislature does not act upon its constituents when it taxes the income of non-resident foreigners. They have not "the influence of the constituents over their representatives," referred to by Chief Justice Marshall; and it is not going too far to say that that influence is not likely to be exerted against the imposition of a tax which relieves the constituents themselves from a burden which they would otherwise have to bear. Considerations of comity would avail but little against the material advantages offered by such a system of taxation. Retaliation by other States or sovereignties, if effective, might induce a conviction of its impolicy, if not of its injustice; but other States or sovereignties might not be in a position to retaliate with effect. The State of Pennsylvania would hardly be deterred from taxing the money due by her corporations to citizens of Great Britain, by the levy of a retaliatory tax in Great Britain upon all money due by British corporations to citizens of Pennsylvania. But it is especially in a country like ours—composed of so many States independent in sovereignty, but yet so closely connected by the commercial relations of their citizens—that the evils of this new theory of taxation would be most severely felt. Could New York be expected to submit patiently to taxation by Pennsylvania of all money owing by citizens of the latter State to citizens

* 4 Wheaton, 428.

of the former? What would be thought of an attempt on the part of the State of Pennsylvania to hold citizens of New York personally responsible for the payment of taxes assessed on the debts due them by the citizens of Pennsylvania?

When we remember, too, that the choses in action, the debts due to a citizen, are always taxable in the jurisdiction within which he is domiciled, the taxation of this species of property in other jurisdictions not only imposes an intolerable burden upon the taxpayer, but impairs the resources from which the revenue of the State of which he is a citizen is derived. The bonds of corporations of other States form no inconsiderable portion of the wealth of citizens of many of the States; but this wealth may be destroyed by taxation in the States where the business of the corporations is carried on. Nor is such a result improbable. Many corporations owe their corporate existence to the concurrent legislation of several States; and if each State should tax the non-resident creditors of the corporation, even at the same rate at which resident creditors are taxed, the accumulation of taxes might well destroy the value of the property taxed. The Philadelphia, Wilmington, and Baltimore Railroad Company is chartered by the States of Pennsylvania, Maryland, and Delaware. It has issued many bonds at 6 per cent. interest. Those bonds are held to a large extent in Massachusetts. Suppose that each of the three States just named should require a tax of 2 per cent. on the par value of the principal of these loans, to be deducted from the 6 per cent. interest due to the Massachusetts holders, what would be the value of their securities, either to themselves or to the State of Massachusetts? If every State within whose territory one or more of the numerous railroads worked by the Pennsylvania Railroad Company happen to lie, should insist upon its right to levy a tax upon the interest paid by that corporation to its non-resident creditors, as an equivalent for the protection afforded by the laws of the State to the operations of the company, the officers of the company might, after retaining the whole interest from the creditors, be

compelled to solve the difficult problem of dividing the whole into parts greater in the aggregate than the whole.

II. The section of the act in question of Pennsylvania, so far as it provides for the collection of a tax from interest due to citizens and residents of other States, conflicts with the clause of the Constitution which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."*

In *Ward* v. *Maryland*,† the right "to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens," is said to be one of the privileges and immunities "plainly and unmistakably" secured and protected by this clause of the Constitution. Now does this act really subject the citizens of other States to taxation, from which the citizens of Pennsylvania are exempt? *Primâ facie*, this might not seem to be so; since the act requires the tax to be collected from all creditors to whom interest is payable by corporations, without regard to their citizenship or residence. But this equality is apparent only; since, unlike the Pennsylvania creditors, the creditors who are citizens of other States receive no equivalent for the taxes which they are compelled to pay, and are taxed on account of their ownership of property which is neither actually nor legally situate in the State of Pennsylvania. The civil rights of a New York creditor of a Pennsylvania corporation are not protected by the State of Pennsylvania, and why should he be required to contribute a part of the expense of maintaining the government of that State? It is idle to say that the State of Pennsylvania accords to him the right to sue in her courts; a similar right is accorded to foreigners by every civilized community on the face of the earth; but no one ever supposed that non-resident foreigners were thereby rendered taxable under the laws of each community which recognized such a right.

The levy of a tax by the British government upon either the persons or property of citizens of the United States, as

* Section 2, Article 4.

† 2 Wallace, 418.

an equivalent for the right of citizens of the United States to sue in the courts of Great Britain, would hardly be submitted to; and yet the wrong done would not be of so aggravated a character as that which would result from the imposition of a tax by the State of Pennsylvania upon the persons or property of the citizens of other States of this Union for the privilege of suing in the courts of Pennsylvania. This must be apparent, when it is considered that the Constitution of the United States, in securing to the citizens of each State all the privileges and immunities of citizens in the several States, undoubtedly secures the right to sue in the courts of the respective States; that this right can neither be withheld by any State, nor made the pretext for taxing the persons upon whom it has been conferred, and that citizens of other States are not obliged to pursue their claims to the courts of the respective States in which their debtors reside, but can always have ample remedy in the courts of the United States.

It is not of course meant to be contended that the property of non-residents actually within the State should be exempt from taxation. A citizen of New York has no reason to complain if his real estate or his merchandise in Pennsylvania is taxed to support the government which protects it. He receives an equivalent for the tax; and if the ownership of the property does not entitle him to representation in the legislature of Pennsylvania, it is because property in Pennsylvania, no matter to whom belonging, is not entitled to representation. But if, as we submit is true, a debt due from a citizen of Pennsylvania is neither actually nor theoretically property *in* Pennsylvania, the taxation of such a debt as against a New York creditor is taxation without protection of either the taxpayer's person or property, and without representation; and no citizen of Pennsylvania is, under such circumstances, taxed by the laws of Pennsylvania.

III. The section, so far as it provides for the collection of a tax from interest due to citizens and residents of other States, impairs the obligation of the contracts between the railroad company and such citizens and residents of other States, and is therefore repugnant to the Constitution of the

United States and void. It requires the officers of the debtor corporation to withhold a part of the interest stipulated to be paid to such citizens of other States, and to pay the same into the treasury of the State.

A tax law, therefore, which does accomplish this result impairs the obligation of a contract, and is prohibited by the Constitution, and the only question in the case is, was the non-resident citizen of another State, whose rights under the contract are affected, so situated with relation to the law-making power, that he was bound to anticipate, and contract with reference to, the passage of such a law?

It may well be that all citizens of any given State, in entering into contracts to be performed within such State, are bound to have regard to the laws of the State, then in force, which relate to or bear upon the subject; as well as to the fact that there are certain classes of laws, such as tax laws and police laws, which may be constitutionally applied to prior contracts; but a citizen of one State, entering into a contract lawful in his own State, *which is to be performed there*, is not bound in contracting to have any reference to the laws of another State, present or future, whether they be tax laws or laws of any other kind.

An illustration of this principle is given in the effect of State insolvent laws. Thus, citizens of a given State, entering into a contract to be performed in such State, are bound by the fact of the existence of an insolvent law; but one who is a citizen of another State, even though contracting in the State where such law exists, with one of its citizens, is not bound to have any regard to such law, and his rights cannot be affected by it, owing to the clause in the Constitution of the United States prohibiting any State from passing any law impairing the obligation of contracts. The State law has no jurisdiction over him, and his contract is not affected by it, because he is not a citizen of such State. This was adjudged in *Ogden* v. *Saunders*,* and in *Baldwin* v. *Hale*.†

In *Baldwin* v. *Hale* the principle of *Ogden* v. *Saunders* was

* 12 Wheaton, 213.

† 1 Wallace, 223.

affirmed and applied to the case of a debt not only contracted, but expressly made payable, in the State in which the debtor resided, and where he afterwards obtained his discharge as an insolvent.

It would seem plain that the principle on which these decisions are based applies *a fortiori* to State tax laws. The argument that the obligation of a contract should be regulated by the law of the place where the contract was made, and where one of the contracting parties resides, and still continues to reside, is not without plausibility. But what can be said in favor of extending the operation of the tax laws of a State to citizens of other States who happen to have debtors residing in the State which imposes the tax? Such a theory has no foundation, either in the practice of civilized nations or in the speculative opinions of juridical writers.

IV. But it is said, by the Supreme Court of Pennsylvania, that though the bondholder is beyond the jurisdiction of the State, his property, when the bond is secured by a mortgage, is within it.

But he does not own the property of the corporation which owes him the money, nor anything that has an actual *situs* within the State. The property mortgaged belongs to the debtor. It is as well settled as anything can be, in Pennsylvania, whatever the doctrine may be elsewhere, that a mortgage is only a lien or incumbrance on the land mortgaged, and that the mortgagee has no estate in the land.

If the non-resident creditor own neither the land bound nor the money lent, but merely the bond and mortgage, the choses in action which follow the person of the owner, and are actually in his possession without the State, we submit that he owns nothing within the jurisdiction of the State. Neither does he need, as has been argued, to invoke the aid of the courts of the State to reap the fruits of his security in case of the non-payment of the interest or principal of the bonds. The courts of the United States have ample jurisdiction and power to give the non-resident bondholder all the judicial aid he may need.

These considerations have led the courts of those States where this question has been raised, to decide in favor of the position taken by the plaintiff in error.*

V. The case of *Maltby* v. *Reading and Columbia Railroad*, if it were rightly decided and of authority in this court, has slight bearing on the question of a violation of a contract. There the law laying the tax was in force when the bond was issued. Here it was not. The tax here is not laid under the act there referred to of 1844 (the three mills tax), but under a different law, one of 1868, and passed *after* the bond was issued. The tax is a tax of 5 per cent. on the interest; which, on a 7 per cent. bond, which these bonds were, gives a different result from one of three mills on the dollar of principal.

Messrs. F. Carroll Brewster and J. W. M. Newlin, contra:

The opinion of the Supreme Court of Pennsylvania in Maltby's case presents our views so forcibly that all that we can say will add little to its argument. Still we may say:

1. The place of residence of the bondholders is quite unimportant. The tax does not discriminate against non-residents, and further, it is levied neither on the security—the road—nor on the chose in action—the bond,—but upon the *interest* payable by the defendant, a Pennsylvania corporation, which it is directed to withhold and pay to the State. This interest-money is in the actual possession of the corporation, and it is undeniable that it might be made a garnishee and the money be attached in its hands by the creditors of the bondholders. Even if the tax were directly upon the chose in action the proposition advanced by the plaintiff in error, that the thing taxed has no *situs* of its own, but follows the domicile of the non-resident holder and cannot be taxed elsewhere, is founded on a fiction of law which is not applicable to the questions of taxation.

* See State of Nevada *v.* Earl, 1 Nevada State, 397; Davenport *v.* The Mississippi and Missouri Railroad Co., 12 Iowa, 539; The State *v.* Ross, 3 Zabriskie, 517; People *v.* Eastman, 25 California, 603.

Argument in favor of the tax.

In *Green* v. *Van Buskirk*,* this court, speaking of the *situs* of personal property, said:

"But this fiction is by no means of universal application, and as Judge Story says, 'yields whenever it is necessary for the purpose of justice that the actual *situs* of the thing should be examined;' . . . . and always yields to laws for attaching the estate of non-residents, because such laws necessarily assume that property has a *situs* entirely distinct from the owner's domicile."

In *Catlin* v. *Hull*,† one H., who resided in New York, owned certain property, consisting of debts due from solvent debtors, resident in Vermont, evidenced by promissory notes; and he appointed the plaintiff, who was also a resident of Vermont, his agent, to control and manage the property, and collect and re-lend from time to time, as he should think proper, and allowed the plaintiff a specified salary for so doing. It was held that the legislature of this State had power to enact a law, subjecting property so situated to taxation, and that the property was taxable under the statute of the State. The court say:

"It is insisted that the property of Hammond, of which the plaintiff has the care, as his agent, cannot be considered as legally existing in this State, and that this is an attempt to tax property when neither the property nor the owner is within the State, and within the jurisdiction of our laws. We think, however, that this doctrine is quite too refined and artificial to be put to any practical use.

"It is undoubtedly true that, by the general acknowledged principles of public law, personal chattels follow the person of the owner, and that upon his death they are to be distributed according to the law of his *domicile*, and in general any convey-

* 7 Wallace, 139; and see St. Louis *v.* The Ferry Company, 11 Wallace, 428.

† 21 Vermont, 158; and see Hoyt *v.* Tax Commissioners, 23 New York, 226, 230, p. 232-3; City of New Albany *v.* Meekin, 3 Indiana, 481; Faxton *v.* McCosh, 12 Iowa, 529; Taylor, Admr. *v.* St. Louis County Court, 47 Missouri, 594; People *v.* Home Insurance Company, 29 California, 533; People *v.* Gardner, 51 Barbour, 352.

ance of chattels, good by the law of his own *domicile*, will be good elsewhere. But this rule is merely a legal fiction, adopted from considerations of general convenience and policy, for the benefit of commerce, and to enable persons to dispose of their property at their decease, agreeably to their wishes, without being embarrassed by their want of knowledge in relation to the laws of the country where the same is situated. But even this doctrine is to be received and understood with this limitation, that there is no positive law of the country where the property is in fact, which contravenes the law of his domicile, for if there is, the law of the owner's domicile must yield to the law of the State where the property is in fact situate. We do not consider this doctrine in relation to the *situs* of personal chattels, and relating to its transfer and distribution, as at all conflicting with the actual jurisdiction of the State where it is situate, over it, or with their right to subject it, in common with other property of the State, to share the burden of the government by taxation."

2. *The Pennsylvania acts do not impair the obligation of the contract of the company with its bondholders.* The corporation pays no less interest, but a part of it is diverted to the State as a tax on the bondholder, who is made, in common with the citizens of the State, to pay for the value given to his property here through the grant of the franchises of the corporation and the protection afforded to it by the State.

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

The question presented in this case for our determination is whether the eleventh section of the act of Pennsylvania of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the State, issued to and held by non-residents of the State, citizens of other States, is a valid and constitutional exercise of the taxing power of the State, or whether it is an interference, under the name of a tax, with the obligation of the contracts between the non-resident bondholders and the corporation. If it be the former, this court cannot arrest

the judgment of the State court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar in its essential particulars to that of *The Railroad Company* v. *Jackson*, reported in 7th Wallace. There, as here, the company was incorporated by the legislatures of two States, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one State to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both States. Coupons for the different instalments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either State. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the District of Maryland. That court, the chief justice presiding, instructed the jury that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned

justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another State, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that State. It was the fact that the bonds were held by a non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed, like natural persons, upon

their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth, which is recognized upon its simple statement.

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the State, they are property beyond the jurisdiction of the State. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the State. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The Act of Pennsylvania of May 1st, 1868, falls within this description. It directs the treasurer

of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the Commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contribution levied upon property held in other States, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of *Maltby* v. *The Reading and Columbia Railroad Company*, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the Common Pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that State. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the State because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizen of another State, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our State government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the Commonwealth, and

as an investment rests upon State authority, and, therefore, ought to contribute to the support of the State government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the company could not enforce it except in that State, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the State which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the State, or that the non-resident had any property in the State which was subject to taxation within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was

both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court. In *Witmer's Appeal** the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it, and no more than liens." And in that State all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In *Rickert* v. *Madeira*,† the court said: "A mortgage must be considered either as a chose in action or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment; and that it is but a chose in action, a mere evidence of debt, is apparent from the whole current of decisions."‡

Such being the character of a mortgage in Pennsylvania, it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that State owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the State when held by a resident therein, but when held by a non-resident it is as much beyond the jurisdiction of the State as the person of the owner.

It is undoubtedly true that the actual *situs* of personal

* 45 Pennsylvania State, 463. † 1 Rawle, 329.

‡ Wilson *v.* Shoenberger's Executors, 31 Pennsylvania State, 295.

property which has a visible and tangible existence, and not the domicile of its owner, will, in many cases, determine the State in which it may be taxed. The same thing is true of public securities consisting of State bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property, consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several States, which accord with the views we have expressed. In *Davenport* v. *The Mississippi and Missouri Railroad Company*,* the question arose before the Supreme Court of Iowa whether mortgages on property in that State held by non-residents could be taxed under a law which provided that all property, real and personal, within the State, with certain exceptions not material to the present case, should be subject to taxation, and the court said:

"Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the State, but, the mortgage itself being personal property, a chose in action, attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the State. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the State, and if not they are not the subject of taxation."

In *People* v. *Eastman*,† the question arose before the Supreme Court of California whether a judgment of record in

* 12 Iowa, 539.

† 25 California, 603.

Mariposa County upon the foreclosure of a mortgage upon property situated in that county could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. "The mortgage," said the court, "has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every county in the State; and if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party, without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the State, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Maltby* v. *Reading and Columbia Railroad Company*, particularly the case of *McKeen* v. *The County of Northampton*,* and the case of *Short's Estate*,† but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Penn-

* 49 Pennsylvania State, 519. † 16 Id. 63.

sylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this court.* A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State.

JUDGMENT REVERSED, and the cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

Mr. Justice DAVIS, with whom concurred Justices CLIFFORD, MILLER, and HUNT, dissenting.†

NOTE.

AT the same time with the adjudication as to the tax in the preceding case was adjudged the validity of the tax in the cases of two other railroad companies, to wit: The Pittsburg, Fort Wayne, and Chicago; and the Delaware, Lackawanna, and Western, both writs of error against the State of Pennsylvania, and to judgments of the Supreme Court of that State. The tax levied in these last two cases upon the bonds of non-residents of the State was three mills on the dollar of capital, to be paid out of the interest; and the law laying the tax, a law of 1844, was in existence when the bonds were issued. In the previous case it will be remembered that the tax levied was five per cent. upon the interest of the bonds, and the law levying it was not in such existence. The last two cases, therefore, resembled the case of

* Ogden *v.* Saunders, 12 Wheaton, 214; Baldwin *v.* Hale, 1 Wallace, 223.

† See their opinion, *infra*, note following, pp. 327-8.

Maltby v. *Reading and Columbia Railroad*, the particulars of which are stated *supra*.*

Mr. Justice FIELD, who delivered the judgment of the court, in the additional two cases now mentioned, as in the first one, said that the cases involved the same questions that had been considered and decided in the previous case, that of the Cleveland, Painesville, and Ashtabula Railroad; and that "the difference in the mode of the assessment of the tax did not affect the principle decided."

Upon the authority of the case cited, the judgments in these two cases, now mentioned, were accordingly REVERSED, and the causes remanded for further proceedings, Justices CLIFFORD, MILLER, DAVIS, and HUNT dissenting; and Mr. Justice DAVIS saying, for himself and them, in all the cases, as follows:

"I cannot agree to the opinion of a majority of my brethren in these cases. That the tax in question is valid and binding, both on the corporation and its creditor, is clearly settled in *Maltby* v. *The Philadelphia and Reading Railroad Company*, and that, too, whether the creditor resides in Pennsylvania or elsewhere. As the highest court of the State has decided that the act of 1844 authorized the imposition of the tax in controversy, and as that act was in force when the bonds and mortgages were issued, I cannot see how any principle of the Federal Constitution is violated, nor can I see how this court can reach the conclusion it does in these cases without denying to the State government the right to construe its own local laws. This right has been recognized so often and in such a variety of ways, that it is no longer an open question. Indeed this court in *Railroad Company* v. *Jackson* has expressly recognized the binding force of the construction which the Supreme Court in Pennsylvania has put on the act of 1844. Mr. Justice Nelson, delivering the opinion of the court, said:

"'It has been argued for the plaintiff, that the acts of the legislature of Pennsylvania, when properly interpreted, do not embrace the bonds or coupons in question; but it is not important to examine the subject, for it is not to be denied, as the courts of the State have expounded these laws, that they authorized the deduction, and, if no other objection existed against the tax, the defence would fail.'

* Pp. 303–307.

"I am also of opinion, that a State legislature is not restrained by anything in the Federal Constitution nor by any principle which this court can enforce against the State court, from taxing the property of persons which it can reach and lay its hands on, whether these persons reside within or without the State."

FOWLER *v.* RAPLEY.

Under the landlord and tenant law of the District of Columbia, as regulated by the act of Congress of February 22d, 1867, the "tacit lien" given by the act upon certain of the tenant's personal chattels, on the premises, attaches at the commencement of the tenancy to any such chattels then on the premises, and continues to attach to them into whosesoever hands the chattels may come during the time allowed by the act for instituting proceedings, unless the lien is displaced by the removal of the chattels, or by the sale of them by the tenant in the ordinary course of mercantile transactions. It is not displaced by a sale of the stock in mass, while they remain in mass, to a person who knew that the premises were leased, and continues to occupy them, selling in the ordinary way the goods; nor even by a second sale of that sort.

APPEAL from the Supreme Court of the District of Columbia; the case being thus:

An act of Congress of February 22d, 1867,* abolishes the right of distress in the District of Columbia, and enacts that

"Instead of it the landlord shall have a tacit lien upon such of the tenant's personal chattels, upon the premises, as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due, and until the termination of any action for such rent brought within said three months. And this lien may be enforced—

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

"*Second.* By judgment against the tenant, and execution to

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* 14 Stat. at Large, 404.

be levied on said chattels or any of them, *in whosesoever hands they may be found;* or,

"*Third.* By action against the purchaser of any of said chattels, with notice of the lien, in which action the plaintiff may have judgment for the value of the chattels purchased by the defendant, but not exceeding the rent in arrear and damages."

In this condition of the statutory law the firm of Stackpole & Hall engaged in selling lumber and ice, at wholesale and retail, in the city of Washington, on the 1st of July, 1867, rented a wharf, in the said city, for the purpose of a lumber-yard and ice-houses, from one Rapley, at the monthly rent of $100. Stackpole & Hall carried on their business, on the premises, until the 23d of November, 1867, when they sold out their stock of ice and lumber to one Perkins, *rent being at this time due, and in arrear from the 1st day of the preceding August.* Perkins immediately took possession of the stock and of the premises, and continued the business until the 14th of January, 1868, when, *there having been no discharge of the arrears of rent*, he sold the stock, and delivered the same to one Fowler, who immediately took possession of the premises, and continued the business thereon.

On the 24th of January, 1868, Rapley sued Stackpole & Hall for rent in arrear, to wit, $100 per month for the months of August, September, October, November, and December, 1867, and caused an attachment to be issued under the act of Congress above quoted, and under the same the marshal seized upon part of the property which had belonged to Stackpole & Hall, and had been by them sold to Perkins, and by Perkins to Fowler, and which had not been removed from the premises.

Both Perkins and Fowler knew, at the time of their respective purchases, that the premises were rented premises, but neither of them had notice otherwise than by implication from the facts above set forth, that the rent was in arrear.

Upon this case, which was stated for the opinion of the court below, that court, on a writ of replevin issued by Fowler against Rapley and the marshal for the seized prop-

erty, gave judgment for the defendants. This judgment Fowler now brought here for review.

Mr. Enoch Totten, for the plaintiff in error:

1. *By the two sales of property the landlord's lien was discharged.*

The case states that while each of the purchasers knew that the premises were rented, neither of them knew that rents were in arrear. The landlord, it seems, had permitted the rents to remain in arrear six months, and then without taking any action to secure his money, allowed a sale of all the chattels to be made to an innocent purchaser. He stood, stupidly gazing, until this purchaser had parted with his money and was in lawful possession of the property. Then he seizes it.

The statute declares positively what the remedy shall be against a purchaser of chattels on the premises *with* notice of the lien, and gives no remedy against a purchaser *without* notice. This necessarily leads to the construction that a *bonâ fide* sale, without notice, discharges the property from the operation of the lien.

And so in *Webb* v. *Sharp*,* where this court enforced a landlord's lien as against a subsequent mortgagee, Bradley, J., says:

"Goods sold in the ordinary course of business *undoubtedly* become discharged from the lien, otherwise business could not be safely carried on."

2. *Even if the chattels were taken by the purchasers with notice of the lien, it was unlawful for the landlord to proceed against the property by attachment.*

The statute authorizes this process to be used for the purposes, only, of holding the property for judgment after the rent has become due, and to prevent a sale or removal thereof. In cases where a sale has been perfected, the remedy is explicitly pointed out in the third subdivision of the said section. The landlord must resort to his action at

* 13 Wallace, 14.

law against the purchaser, instead of seizing the chattels by attachment.

Messrs. T. J. Miller and R. T. Merrick, contra:

The landlord's lien, under the act of 1867, attaches at the commencement of the tenancy, or whenever personal chattels, owned by the tenant and subject to execution for debt, are brought on the rented premises.

This lien once attaching continues upon the chattels to which it attaches, into whosesoever hands they may come during the time limited for instituting proceedings; unless, *probably* where the chattels are disposed of by the tenant *in the ordinary course of mercantile transactions.*

In providing a personal remedy "*by action against any purchaser of any of said chattels with notice of the lien,*" the law, by implication, permits the landlord, when proceeding against the chattels *in specie*, to reach them into whosesoever hands they may be found, whether the holder had notice of the lien or not.

The plaintiff, as assignee of the unexpired term and of the personal chattels on the premises, was put upon inquiry as to the terms and conditions of the tenancy; he was therefore bound to know the charges upon the goods that existed by reason of the tenancy; and he can occupy with respect to the landlord's right—as such—to the goods on the premises, no better position than did his assignor.

Decisions of the courts of Iowa, Missouri, Alabama, and Arkansas in interpreting statutes of those States,* nearly similar in their provisions to the act of Congress now under consideration, sustain these views.†

At common law a purchaser of goods and chattels takes them subject to the same liens which existed against the vendor.‡

* Iowa Code, §§ 1270–1271; Missouri Revised Statutes, 1613; Arkansas Revised Statutes, 679; Clay's Alabama Digest, 505.

† Grant *v.* Whitwell, 9 Iowa, 153; Powell *v.* Hadden's Ex'r, 21 Alabama, 745; Sevier *v.* Shaw, 25 Arkansas, 417; Smith *v.* Meyer, Ib. 609.

‡ Man *v* Shiffner, 2 East, 523; Godin *v.* London Assurance Company, 1 Burrow, 489; Burton *v.* Smith, 13 Peters, 464.

Restatement of the case in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Congress, on the twenty-second of February, 1867, abolished the power previously claimed and exercised as of common right by every landlord in this District, of seizing by his own authority the personal chattels of his tenant for rent arrear, and instead of it, provided that the landlord shall have a tacit lien upon such of the tenant's personal chattels upon the premises as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due and until the termination of any action for such rent brought within said three months.*

Hall & Stackpole, on the first day of July, 1867, rented a wharf, situated in this city, of the first named defendant, for a site for ice-houses and for a lumber yard, at the monthly rent of one hundred dollars. As lessees they took possession of the premises, and carried on there the business of buying and selling lumber and ice until the twenty-third of November following, when they sold out their entire stock of lumber and ice to J. M. Perkins, as appears by the written agreement which is made a part of the case. Perkins immediately took possession of the premises and of the stock embraced in the sale, and continued the business until the fourteenth of the succeeding January, when he sold all that remained of the stock and delivered the same to the plaintiff. At the time of the first sale rent was due from the lessees from the first day of August of that year. On the twenty-fourth of January of the next year the lessor sued the lessees for rent in arrear, to wit, for one hundred dollars per month for the months of August, September, October, November, and December of the previous year, and caused an attachment to be issued under section twelve of the before-mentioned act of Congress, and it appears that the marshal, who is the other defendant, under that process attached the property which is the subject of controversy in this case. By the agreed statement it also appears that the property so attached was a part of the stock which had be-

* 14 Stat. at Large, 404.

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longed to Hall & Stackpole, and had been by them sold to Perkins, and which was sold by Perkins to the plaintiff, and that it had not been removed from the premises at the time of the attachment. Both of the purchasers knew at the time of their respective purchases that the premises were rented premises, but neither of them had special notice of that fact, or any notice thereof, except by implication from the facts set forth, and that the rent was in arrear. Five hundred and thirty tons of ice were attached by the marshal, of the alleged value of two thousand dollars, and the plaintiff sues the defendants for wrongfully taking and unjustly detaining the ice, claiming the same as his property, and that the same should be taken from the defendants and delivered to him, or if eloigned, that he may have judgment for the value of the ice and all *mesne* profits and damages, which he estimates at one thousand dollars, exclusive of costs.

Two pleas were pleaded by the defendants: (1.) That they were not guilty. (2.) That the goods and chattels were not the property of the plaintiff; that they were attached on the described premises as the property of the lessees of the same to answer to the first-named defendant for rent due to him and unpaid by the lessees in the sum of five hundred dollars. Issue was joined on those pleas, and the cause, by consent of parties, was referred. Subsequently the referee, having heard the parties, made an award in favor of the defendants. Exceptions to the report or award of the referee were filed by the plaintiff, and the court, after argument, passed an order that the award be set aside and vacated, holding that the award was based upon an erroneous construction of the act of Congress.

By the twelfth section of the act it is provided, that instead of the right to seize the tenant's personal chattels for rent in arrear, the landlord shall have a tacit lien upon such chattels situated on the premises as are subject to execution for debt, to commence with the tenancy and continue for three months after the rent is due. Pursuant to that enactment the referee decided that the lien commenced with the tenancy, that it

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attached immediately to the chattels in question, and that it continued for three months after the rent became due, or until the termination of an action brought to recover the rent within three months; that the only conditions are that the chattels shall belong to the tenant at the commencement of the tenancy, or at any time during its continuance, if within three months after the rent falls due, and that the chattels shall be on the premises, and be subject to execution. Contrary to the views of the plaintiff, the referee held that the sales of the chattels did not displace the lien or impair the right of the lessor; that the lien, when it once attached, continued for the period prescribed by the act of Congress, and that the sales, without removing the ice from the premises, did not extinguish the lien or affect the validity of the attachment. Dissatisfied with the order of the court setting aside and vacating the award of the referee, the defendants appealed to the court sitting in general term, where the judgment of the subordinate court was affirmed. Judgment was accordingly entered for the plaintiff in the sum of fifty dollars, with costs of suit. Two days afterwards the parties filed in the case an agreed statement of facts, the substance of which has already been reproduced, and the parties having been again heard, the court decided that there was manifest error in the proceedings, and reversed the judgment, and entered judgment for the defendants, and for a return of the ice replevied, and for the costs of their defence. Whereupon the plaintiff sued out a writ of error, and removed the cause into this court.

Based on the agreed statement of facts, the plaintiff assigned two errors, as follows: (1.) That by the two sales of the property the lien was discharged. (2.) That the landlord was not authorized by the act of Congress to proceed by attachment against the chattels, they having been twice sold.

Congress abolished the right of distress previously claimed and exercised in such cases as of common right, and instead of it provided that the landlord should have a tacit lien upon such of the personal chattels of the tenant situated upon the

premises as were subject to execution for debt, and enacted that the lien should commence with the tenancy, and continue for three months after the rent became due, and until the termination of any action for such rent brought within said three months. Provision is also made by the same section of the act, that the lien may be enforced by the landlord in three ways: (1.) By attachment to be issued upon affidavit that the rent is due and unpaid, or if not due, that the defendant is about to remove or sell all or some of said chattels. (2.) By judgment against the tenant, and execution to be levied on said chattels, or any of them, in whosesoever hands they may be found. (3.) By action against any purchaser of any of said chattels, in which action he may have judgment for the value of the chattels, not exceeding the rent in arrear and damages.

He elected in this case to adopt the first mode, and sued out an attachment to enforce the lien on the ice in controversy, which was upon the premises, and was clearly subject to execution for debt, and had been there before the rent fell due, and remained there when the attachment was issued.

Beyond doubt the tenants owned the ice, and they sold it and the remainder of their term, with all their other personal property, to the grantor of the plaintiff, and he transferred the goods in bulk, and all the other personal property on the premises, together with the unexpired term, to the present plaintiff, who took possession of the whole personal property, and entered upon the premises, and continued the business under the lease.

Repeated decisions in other jurisdictions have settled the question, that the lien in such cases attaches at the commencement of the tenancy, or whenever personal chattels owned by the tenant and subject to execution for debt are brought on the rented premises.* Statutory liens without possession have the same virtue that existed in common law

* Grant *v.* Whitwell, 9 Iowa, 153; Carpenter *v.* Gillespie, 10 Id. 592; Doane *v.* Garretson, 24 Id. 351; Powell *v.* Hadden, 21 Alabama, 748; Sevier *v.* Shaw, 25 Arkansas, 417; Smith *v.* Meyer, Ib. 609.

liens accompanied by possession.* Liens like the one in the case before the court are upon the chattels in bulk, or the stock in mass and not in detail, or rather the lien is displaced where the goods are sold in the usual course of trade carried on by the tenant, provided they are duly delivered, and do not remain on the premises.† Purchasers of goods and chattels take them at common law, subject to the liens which existed against the vendor, and the same rule applies in a case arising under the act of Congress in question, where the purchase is of the stock in mass, which is not removed from the premises, or with knowledge of the lien, and not in the usual course of trade.‡ Sales of the stock in mass, which is not removed, or not made in the ordinary course of trade on the premises, and with knowledge of the lien, are subject to that rule under this provision, and the landlord may have his remedy for the same "in whosesoever hands they may be found." Personal chattels sold in the ordinary course of trade on the premises, without knowledge of the lien, are not subject to the lien, or, in other words, the lien in respect to such sales, where the goods are removed from the premises, is displaced, and the purchaser takes a perfect title to the property discharged of the lien. Goods sold in the ordinary course of trade, said this court,§ undoubtedly become discharged from the lien, because if it were not so, business could not be safely carried on; but the court held, in the same case, that the lien created by that act of Congress commences with the tenancy, and continues for three months after the rent is due, which cannot be true for any practical effect if it be admitted that the sale of the personal property in bulk, when not removed from the premises, and not in the usual course of trade, prevents the landlord from levying on the chattels

* Grant *v.* Whitwell et al., 9 Iowa, 153.

† Ib.; Carpenter *v.* Gillespie, 10 Id. 592; Doane *v.* Garretson, 24 Id. 351.

‡ Man *v.* Shiffner, 2 East, 523; Godin *v.* London Assurance Co., 1 Burrow, 489; Burton *v.* Smith, 13 Peters, 483.

§ Webb *v.* Marshal, 13 Wallace, 15; Knox *v.* Porter et al., 18 Missouri, 243.

"in whosesoever hands they may be found." Unquestionably the lien, when it once attaches, continues to attach to the chattels into whosesoever hands the chattels may come during the time allowed for instituting proceedings, unless the lien is displaced by the removal of the goods, or by the sale of the chattels by the tenant in the ordinary course of mercantile transactions. Support to that view is found in the fact that the act of Congress, in providing a personal remedy by action against the purchaser with notice of the lien, evidently intends to permit the landlord to reach the chattels in whosesoever hands they may be found, if the chattels were not sold in the usual course of business.

JUDGMENT AFFIRMED.

UNITED STATES v. THOMAS.

1. A collector or receiver of public money, under bond to keep it safely and pay it when required, is not bound to render the money at all events, but is excused if prevented from rendering it by the act of God or the public enemy, without any neglect or fault on his part.
2. Such collector or receiver is a bailee of the government, and by the common law is only bound to due diligence and only liable for negligence or dishonesty; but by the policy of the acts of Congress on the subject a more stringent accountability is exacted.
3. The measure of this enhanced accountability is particularly to be found in the official bond required of these officers, the condition of which requires the payment of the moneys that come to their hands as and when directed; the performance of which condition can only be excused by an overruling necessity.
4. The late rebellion being a public war, the forcible seizure by the rebel authorities of public moneys in the hands of loyal government agents, against their will and without their fault or negligence, was a sufficient discharge from their obligations in reference to said moneys.

ERROR to the Circuit Court for the Middle District of Tennessee.

The United States sued Thomas and others as the principal and sureties on the official bond of the said Thomas, as surveyor of the customs for the port of Nashville, Ten-

nessee, and depositary of public moneys at that place. The condition of the bond was in the usual form, that he should faithfully execute and discharge the duties of his office, according to law, and should well, truly, and faithfully keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by act of Congress, all the public money collected by him or otherwise placed in his possession and custody, till the same should be ordered by the proper department, or officer, to be transferred or paid out; and when such orders for transfer or payment were received, should faithfully and promptly make the same as directed, and should perform all other duties as fiscal agent of the government which might be imposed by any act of Congress or regulation of the Treasury Department, &c. The breach alleged was, that certain public moneys were collected by Thomas in his official capacity, and were placed in his possession and custody, of which a balance of $4880 remained in his hands on the 27th of April, 1861, which he did not keep safely, but which he paid out to persons not entitled thereto, whereby it was wholly lost; and that although the said sum was ordered by the proper department and officer to be transferred and paid out, he failed and refused to transfer or pay it out, as so required. The defendants, besides performance, pleaded seizure of the moneys in question by the rebel authorities by the exercise of force, which Thomas was unable to resist, and against his will and consent, he being a loyal citizen, endeavoring faithfully to perform his duty. Upon the trial, evidence was adduced tending to support this plea, and the court charged the jury that if they believed from the evidence that, at the time the demand was made by the insurgents for the surrender by Thomas of the effects in his hands belonging to the government, there was an organized insurrection in the State of Tennessee, and in the city of Nashville, against the government of the United States, with a force sufficient to compel obedience to the orders and demands of the governor who led and controlled such insurrection, and that in this state of things the demand was made upon Thomas to sur-

render said effects; and if they further believed that Thomas was acting in good faith, and surrendered the effects in his hands only in the honest belief that he would be imprisoned and the effects seized by force, and had good reason to apprehend that and other violence to his person; and if they believed that the threatened force would be applied to compel the surrender, then the court was of opinion that the seizure and appropriation of the government effects in his hands would be by public enemies of the United States, and would relieve him from liability for the same, notwithstanding the condition of his bond; but if they believed that Thomas was one of the insurrectionists, or willingly co-operated with them in their lawless acts against the government, the jury might infer that he was willing that the effects in controversy should fall into the hands of the rebel authorities, and he would not be relieved from the obligations of his bond. To this ruling an exception was taken, and whether the ruling was correct in law was the point now before this court.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error:

Performance of an express contract is not excused by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and though beyond his control. This law was declared in England years ago, in the old case of *Paradine* v. *Jane.** It is emphatically thus reasserted there of late time in *Ford* v. *Cotesworth*:†

"We think it firmly established, both by decided cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification, to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control."

The rule was equally enforced in this country in *Dermott* v. *Jones*,‡ and has been applied by this and other courts to

* Aleyn, 26. † 4 Law Reports, Q. B. 134. ‡ 2 Wallace, 1.

the cases of official bonds under circumstances undistinguishable in principle from the present, in *United States* v. *Prescott*,* *United States* v. *Dashiel*,† *United States* v. *Keehler*,‡ *Boyden* v. *United States*,§ *United States* v. *Bevans*,‖ *Muzzy* v. *Shattuck*,¶ *Commonwealth* v. *Comly*,** and *State* v. *Harper*.††

In *Boyden* v. *United States*, the court observes:

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

Mr. Henry Cooper, *contra*:

We concede that it is no defence to an action on the official bond of a receiver of public moneys, conditioned to keep safely the public moneys, that the money was feloniously stolen, as in the cases of *United States* v. *Prescott*, or of *United States* v. *Dashiell*, or paid over by the officer voluntarily to a creditor of the government, without authority from the United States, but under a statute of the Confederate States, as was the case in the case of the *United States* v. *Keehler*, or where the officer is overpowered and robbed, as in the case of *United States* v. *Boyden*, or where an officer is in default, and such default concurs with the acts of a public enemy, and contributes to or facilitates the wrong, or renders it possible, by which the money is lost, as was the case of *United States* v. *Bevans*.‡‡ The principles settled in these cases have no application to the present case. In none of them does it appear that it was impossible to have prevented the loss. And to have excused the officers, under the circumstances, might have opened the door to fraud. But here we have this case: The officer was a loyal citizen

* 3 Howard, 578.
§ 13 Wallace, 17.
** 3 Barr, 372.
† 4 Wallace, 185.
‖ Ib. 56.
†† 6 Ohio State, 607.
‡ 9 Id. 83-88.
¶ 1 Denio, 233.
‡‡ 13 Wallace, 56.

of the United States, with her property in Tennessee, and Tennessee and the United States were public enemies, waging war. The public property of the latter is found within the territory of the former; the commanding general has the right to determine whether or not he will seize it; it is subject to seizure, and he orders Thomas to surrender it; the latter finds himself without protection, and is bound to submit to such laws as the ruler of the territory chooses to impose. If he had been ordered by the United States to transfer the effects to the loyal States he could not possibly have obeyed the order, nor could the United States have enforced it. Those who here gave the order were at the head of a government of paramount force. In such a case it is not only a necessity, but the duty of parties who reside in such territory to yield obedience to the ruling power in all civil and local matters.*

It was not necessary that actual violence should have been used to constitute duress. Moral compulsion was sufficient.†

Mr. Justice BRADLEY delivered the opinion of the court.

This case brings up squarely the question whether the forcible seizure, by the rebel authorities, of public moneys in the hands of loyal government agents, against their will, and without their fault or negligence, is, or is not, a sufficient discharge from the obligations of their official bonds. This precise question has not as yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the government in the hands of a public officer, against his will, and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty, and to have the property forthcoming when required?

* Thorington *v.* Smith, 8 Wallace, 11.

† Brown *v.* Pierce, 7 Wallace, 214; Baker *v.* Morton, 12 Id. 156.

The question is thus stated in its double aspect, namely: first, in regard to the obligation arising from official duty; and, secondly, in regard to that arising from the bond, because the condition of the latter is twofold,—that the principal shall faithfully discharge his official duties, and that he shall pay the moneys of the government that may come into his hands as and when it shall be demanded of him. It is contended that the latter branch of the condition has a more stringent effect than the former, and creates an obligation to pay, at all events, all public money received.

That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and aside from such a bond as exists in this case, seems almost self-evident. If it is not, then every military commander who ever lost a battle, or was obliged to surrender his ship or fort, or other public property, added a civil obligation to his military misfortune. And as it regards this question, it is difficult to perceive any distinction between the loss of one kind of property and another. If the property belongs to the government, the loss falls on the government; if it belongs to individuals, it falls on them.

The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desirable, it must be prescribed by statute or exacted by express stipulation.

The ordinary rule will be found illustrated by a number of analogous cases.

It is laid down by Justice Story that officers of courts having the custody of property of suitors are bailees, and

liable only for the exercise of good faith and reasonable diligence, and not responsible for loss occurring without their fault or negligence.* Trustees are only bound to exercise the same care and solicitude with regard to the trust property which they would exercise with regard to their own. Equity will not exact more of them.† They are not liable for a loss by theft without their fault.‡ But this exemption ceases when they mix the trust-money with their own, whereby it loses its identity, and they become mere debtors.§ Receivers, appointed by the court, though held to a stricter accountability than trustees, on account of their compensation, are nevertheless not liable for a loss without their fault; and they are entitled to manage the property and transact the business in their hands in the usual and accustomed way.‖ A marshal appointed by a court of admiralty to take care of a ship and cargo is responsible only for a prudent and honest execution of his commission.¶ "Every man," says Sir William Scott, "who undertakes a commission incurs all the responsibility that belongs to a prudent and honest execution of that commission. Then the question comes, What is a prudent and honest execution of that commission? The fair performance of the duties that belong to it. . . . He must provide a competent number of persons to guard the property; having so done he has discharged his responsibility, unless he can be affected with fraud, or negligence amounting in legal understanding to fraud."** A postmaster is bound to exercise due diligence, and nothing more, in the care of matter deposited in the post-office. He is not liable for a loss happening without his fault or negligence. Soon after the

* Story on Bailments, § 620. † Ib.; Lewin on Trusts, 332, 3d ed. ‡ Ib. § Ib. and 2 Story's Equity Jurisprudence, § 1270, and see §§ 1268, 1269; also 2 Spence's Equity Jurisprudence, 917, 921, 933, 937; Wren *v.* Kirton, 11 Vesey, 381; Utica Insurance Co. *v.* Lynch, 11 Paige, 520.

‖ Knight *v.* Ld. Plymouth, 3 Atkyns, 480; Rowth *v.* Howell, 3 Vesey, 566; Lewin on Trusts, 332, 3d ed.; Edwards on Receivers, 573–599; White *v.* Baugh, 3 Clark & Finnelly, 44.

¶ The Rendsberg, 6 Robinson, 142.

** 6 Robinson, 154; see also Burke *v.* Trevitt, 1 Mason, 96, 100.

organization of the government post it was attempted to charge the Postmaster-General to the same extent as the common carriers who had previously carried the mails; and the question was elaborately argued in the great case of *Lane* v. *Cotton et al.*,* and Lord Chief Justice Holt strenuously contended for that view; but it was decided that the postmaster was only liable for his own negligence; and this case was followed by Lord Mansfield and the whole court, three-quarters of a century later, in the case of *Whitfield* v. *Le Despencer*.†

In certain cases, it is true, a more stringent accountability is exacted; as in the case of a sheriff, in reference to prisoners held by him in custody, where the law puts the whole power of the county at his disposal, and makes him liable for an escape in all cases, *except* where it is caused by an act of God or the public enemy.‡ The exception which thus qualifies the severest exaction of official responsibility known at the common law is worthy of particular notice. The reason for applying so severe a rule in cases of escape is probably founded in motives of public safety. Chief Justice Gibson, in *Wheeler* v. *Hambright*,§ says: "The strictness of the law in this respect arises from public policy." Lord Chief Justice Holt, in his dissenting opinion in *Lane* v. *Cotton*, also held that the sheriff was responsible in the same strict manner for goods seized in execution; but he cited no authority for the opinion, and the general rule of responsibility is certainly much short of that.

The basis of the common-law rule is founded on the doctrine of bailment. A public officer having property in his custody in his official capacity is a bailee; and the rules which grow out of that relation are held to govern the case. But the legislature can undoubtedly, at its pleasure, change

* 1 Lord Raymond, 646.

† Cowper, 754; see Story on Bailments, § 463; Dunlop *v.* Munroe, 7 Cranch, 242.

‡ 33 Hen. VI, p. 1; Brooke's Abridgment, *tit.* Dette, 22; Dalton's Sheriff, 485; Watson on Sheriffs, 140.

§ 9 Sergeant & Rawle, 396.

the common-law rule of responsibility. And with regard to the public moneys, as they often accumulate in large sums in the hands of collectors, receivers, and depositaries, and as they are susceptible of being embezzled and privately used without detection, and are often difficult of identification, legislation is frequently adopted for the purpose of holding such officers to a very strict accountability. And in some cases they are spoken of as though they were absolute debtors for, and not simply custodians of, the money in their hands. In New York, in the case of *Muzzy* v. *Shattuck*,* the court, after a careful examination of the statutory provisions respecting the duties and liabilities of a town collector, came to the conclusion (contrary to its previous decision in *The Supervisors* v. *Dorr*),† that he was liable as a *debtor*, and not merely as a *bailee*, for the moneys collected by him, and consequently that he could not excuse himself, in an action on his bond, by showing that, without his fault, the money had been stolen from his office.

Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility. The mere prescription of duties has nothing to do with the question as to what shall constitute the rule of responsibility in the discharge of those duties, or a legal excuse for the non-performance of them, or a discharge from their obligation. The common law, which is common reason, prescribes that; and statutes, in subordination to their terms, are to be construed agreeably to the rules of the common law.‡

The acts of Congress with respect to the duties of collectors, receivers, and depositaries of public moneys, it must be conceded, manifest great anxiety for the due and faithful discharge by these officers of their responsible duties, and

* 1 Denio, 233. † 25 Wendell, 440.

‡ Bacon's Abridgment, *tit.* Statute, I, 4.

for the safety and payment of the moneys which may come to their hands. They are expressly required to keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as specially allowed by law, all the public money collected by them, or in their possession or custody, till ordered by the proper department or officer to be transferred or paid out; and where such orders for transfer or payment are received faithfully and promptly to make the same as directed.* To obviate all excuse for casual losses, it is provided that they shall be allowed, under the direction of the Secretary of the Treasury, all necessary additional expenses for clerks, fire-proof chests or vaults, or other necessary expenses of safekeeping, transferring, and disbursing said moneys.† And it is expressly made embezzlement and a felony, for an officer charged with the safekeeping, transfer, and disbursement of the public moneys, to convert them to his own use, or to use them in any way whatever, or to loan them, deposit them in bank, or to exchange them for other funds except as ordered by the proper department or officer.‡ Every receiver of public money is required to render his accounts quarter-yearly to the proper accounting officers of the treasury, with the vouchers necessary to the prompt settlement thereof, within three months after the expiration of each quarter, subject, however, to the control of the proper department.§ Besides this, all such officers are required to give bonds with sufficient sureties for the due discharge of all these duties.‖ And upon making default and being sued, prompt judgment is directed to be given, and no claim for a credit is to be allowed unless it has been first presented to the accounting officers of the treasury for examination and disallowed, or unless it be shown that the vouchers could not be procured for that purpose, by reason of absence from the country, or some unavoidable accident.¶

These provisions show that it is the manifest policy of the

* 9 Stat. at Large, 61, § 9.
† Ib. 62, § 13.
‡ Ib. 63, § 16.
§ 3 Id. 723, § 2.
‖ 1 Id. 705; 2 Id. 75; 9 Id. 60, 61, &c.
¶ 1 Id. 514, §§ 3, 4.

law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability. The legislative anxiety on the subject culminates in requiring them to enter into bond with sufficient sureties for the performance of their duties, and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the non-production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public money except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same. In the leading case of *The United States* v. *Prescott** (which was an action on a similar bond to that now under consideration), the court say: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond, and the principles which are founded on public policy." After reciting the condition of the bond, the court adds, with a greater degree of generality, we think, than the case before it required, "The obligation to keep safely the public money is absolute, without any condition, express or implied; and nothing but the payment of it, when required, can discharge the bond."

This broad language would seem to indicate an opinion that the bond made the receiver and his sureties liable at all events, as now contended for by the government. But that case was one in which the defence set up was that the money was stolen, and a much more limited responsibility than

* 3 Howard, 587.

that indicated by the above language would have sufficed to render that defence nugatory. And as the money in the hands of a receiver is not his; as he is only custodian of it; it would seem to be going very far to say, that his engagement to have it forthcoming was so absolute, as to be qualified by no condition whatever, not even a condition implied in law. Suppose an earthquake should swallow up the building and safe containing the money, is there no condition implied in the law by which to exonerate the receiver from responsibility?

We do not question the doctrine so strongly urged by the counsel for the government, that performance of an express contract is not excused by reason of anything occurring after the contract was made, though unforeseen by the contracting party, and though beyond his control—with the qualification, however, that the thing to be done does not become physically impossible; as, to cultivate an island which has sunk in the sea. It was thus decided in the leading case of *Paradine* v. *Jane*.* The law on this subject is well stated by Sergeant Williams,† where he says: "When the law creates a duty, and the party is disabled to perform it without any default of him, and he has no remedy over, the law will excuse him; as in waste, if a house be destroyed by tempest, or by enemies, the lessee is excused; so, in escape, if a prison be destroyed by tempest or enemies, the gaoler is excused. But where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

It is contended that the bond, in this case, has the effect of such a special contract, and several cases of actions on official bonds have been cited to support the proposition. Those principally relied on are the cases of *United States* v. *Prescott*, just cited; *Muzzy* v. *Shattuck*,‡ *Commonwealth* v. *Comly*,§ *The State* v. *Harper*,‖ and the recent cases of

* Aleyn, 26; Metcalf on Contracts, 212.
† 2 Saunders, 422 (a) note.
‡ 1 Denio, 233.
§ 3 Barr, 372.
‖ 6 Ohio State, 607.

Dashiel, Keehler, and Boyden in this court. It must be conceded that the language used by the court, not only in the case already referred to, but in some of the other cases cited, seems to favor the rule contended for. But in none of them was the defence of overruling necessity interposed. They were all cases of alleged theft, or robbery, or some other cause of loss, which would have been insufficient to exonerate a common carrier from liability. They all concur in establishing one point, however, of much importance, that a bond with an unqualified condition to account for and pay over public moneys enlarges the implied obligation of the receiving officer, and deprives him of defences which are available to an ordinary bailee; but they do not go the length of deciding that he thereby becomes liable at all events; although expressions looking in that direction, but not called for by the judgment, may have been used.

The case of *United States* v. *Prescott* has already been sufficiently adverted to. The next, in order of time, was that of *Muzzy* v. *Shattuck*, which was decided the same year, 1845, and in which the Supreme Court of New York construed the statutes of that State as making the town collector a *debtor* for the amount of taxes to be collected by him, and held him liable on his bond notwithstanding the money was stolen. Here again the result arrived at was correct; but the reasoning by which it was attained may be fairly questioned. The statutes of the State, however, may have justified the view which was taken in that case.

The next case is that of *The Commonwealth* v. *Comly*, decided in 1846. That was an action on the bond of a collector of tolls, and the same defence (of theft) was interposed. Chief Justice Gibson refers to the case of *United States* v. *Prescott*, and remarks, that "the responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond." So in the case of *The State* v. *Harper et al.*, which was an action on the official bond of a county treasurer, conditioned for the payment of all moneys that should come to his hands for State,

county, or township purposes; and larceny of the money being pleaded, the court say: "By accepting the office, the treasurer assumes upon himself the duty of receiving and safely keeping the public money, and of paying it out according to law. His bond is a contract that he will not fail, upon any account, to do these acts;" and the defence of larceny was overruled.

It is unnecessary to examine the cases further in detail. It appears from them all (except perhaps the New York case) that the official bond is regarded as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract, by which they assume additional obligations with regard to the safe-keeping and payment of those moneys, and as an indication of the policy of the law with regard to the nature of their responsibility. But, as before remarked, the decisions themselves do not go the length of making them liable in cases of overruling necessity. On the contrary, in the last reported case on the subject, that of *Bevans* v. *United States*,* Mr. Justice Strong, delivering the opinion of this court, says: "It may be a grave question whether the forcible taking of money belonging to the United States, from the possession of one of her officers or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a State, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to the United States." These observations show that the particular question raised in this case has been reserved by the court after its most mature consideration of the subject.

So much stress has, in almost every case, been laid upon the bond as forming, either directly or indirectly, the basis of a new rule of responsibility, that it seems especially important to ascertain what are the legal obligations that spring

* 13 Wallace, 56.

from such an instrument. The learned judges in the great generality of the remarks made in some of the cases referred to, with regard to the liability of a receiving officer, and especially of his sureties, by virtue of his bond, have evidently overlooked what we conceive to be a very important and vital distinction between an absolute agreement to do a thing and a condition to do the same thing, inserted in a bond. In the latter case the obligor, in order to avoid the forfeiture of his obligation, is not bound at all events to perform the condition, but is excused from its performance when prevented by the law or by an overruling necessity. And this distinction, we think, affords a solution to the question involved in this case.

The following extract from Coke on Littleton expresses the law on this subject, which is repeated by Blackstone and other modern authorities: "In all cases," says Lord Coke, "where a condition of a bond, recognizance, &c., is possible at the time of making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, &c., there the obligation, &c., is saved. But if the condition of a bond, &c., be impossible at the time of the making of the condition, the obligation, &c., is single."*

Of course the above rule does not apply to a money bond given for a debt, where the condition is simply for the payment of a less sum of money than the penalty; for there, as the books say, the condition is of the same nature as the obligation itself, and not collateral to it.† The bond in suit is not such a money bond. The condition of an official bond is collateral to the obligation or penalty; it is not based on a prior debt, nor is it evidence of a debt; and the duty secured thereby does not become a debt until default be made on the part of the principal. Until then, as we have

* Co. Litt., 206 (a); 2 Thomas's Co. Lit. 22; Shepherd's Touchstone, 372; 2 Blackstone's Commentary, 340, 341; Bacon's Abridgment, *tit.* Condition (N), (Q); Comyn's Digest, *tit.* Condition, D, 1.

† 1 Rolle's Abridgment, 448; Viner's Abridgment, "Condition," (D, e); Panel *v.* Nevel, Dyer, 150 (a).

seen, he is a bailee, though a bailee resting under special obligations. The condition of his bond is, not to pay a debt, but to perform a duty about and respecting certain specific property which is not his, and which he cannot use for his own purposes. In the case of *Farrar and Brown* v. *United States*,* the question being whether sureties were liable for defaults made prior to the giving of the bond, the court say: "For any sums paid to Rector (the principal) prior to the execution of the bond, there is but one ground on which the sureties could be held answerable to the United States, and that is the assumption that he still held the money in bank or otherwise. If still in his hands, he was up to that time *bailee of the government;* but on the contrary hypothesis he had become a *debtor or defaulter* to the government, and his offence was already consummated." That is, as custodian of the money he is bailee of the government—not a debtor. What makes him a debtor or defaulter is the very question at issue. When he becomes such, then he and his sureties are liable until the amount is paid, as we held in the late case of Bevans, before referred to. Until then, neither he nor they are liable on the bond.

We think that the case is within the law as laid down by Lord Coke, and that the receiver, and especially his sureties, are entitled to the benefit of it; and that no rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part.

JUDGMENT AFFIRMED.

Justices SWAYNE, MILLER, and STRONG dissented; Justice MILLER for himself saying as follows:

The case of *United States* v. *Prescott*† arose on a certificate of division of opinion of the Circuit judges, on the question whether "the felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, with-

* 5 Peters, 373.

† 3 Howard, 578.

out any fault or negligence on his part, discharged him and his sureties, and may be set up as a defence to an action on his official bond."

This question the court, without dissent, answered in the negative. The ruling was based, in the opinion of the court, on two grounds, clearly stated:

1. That the receiver, or other depositary of public funds in such cases, could not avail himself of the ordinary circumstances which would discharge a bailee for hire, by reason of an imperative principle of public policy. This policy was founded in the danger of collusive defences which the depositary could easily manage so as to make a strong case, and which the government could have no means of rebutting, however false or simulated it might be. And it was thought better to hold the party to the absolute payment or delivery of the money, than to open the door to such frauds.

2. That the depositary and his sureties, having given a bond, the condition of which was an express contract to pay or deliver, they were bound by that contract, according to the rigid terms which the law annexes to such covenants or promises.

In the subsequent case of *United States* v. *Morgan*,* the same question is decided on precisely the same grounds.

The case of *United States* v. *Dashiel*† was decided with merely a reference to the doctrine of the two cases just cited.

The case of *United States* v. *Keehler*‡ asserts the same doctrine and applies it to an action on a postmaster's bond, who had paid the money to an agent of the Confederate States on an order made by the insurrectionary government directing him to do so.

When the case of *United States* v. *Dashiel* came before the court I was not satisfied with the doctrine of the former cases. I do not believe now that on sound principle the bond should be construed to extend the obligation of the depositary beyond what the law imposes upon him, though

* 11 Howard, 154. † 4 Wallace, 182. ‡ 9 Id. 83.

it may contain words of express promise to pay over the money. I think the true construction of such a promise is to pay when the law would require it of the receiver, if no bond had been given; the object of taking the bond being to obtain sureties for the performance of that obligation. Nor do I believe that prior to these decisions there was any principle of public policy recognized by the courts, or imposed by the law, which made a depositary of the public money liable for it, when it had been lost or destroyed without any fault of negligence or fraud on his part, and when he had faithfully discharged his duty in regard to its custody and safe-keeping. Such were my opinions when, as a member of the court, I took part in the decision of *United States* v. *Dashiel*. But either no other judge shared those opinions, or, if any one did, he felt bound by the two previous decisions. I therefore acquiesced.

I understand the opinion in the present case to be directed to two points: 1. Mainly to undermining the ground on which the prior decisions on this subject rest. And, 2d. To establishing a distinction between this case and those.

As regards the first point. If the opinion or judgment of the court were based upon a frank overruling of those cases, and an abandonment of the doctrines on which they rest, I should acquiesce in that, though I did not in conference approve the judgment. But if the opinion of the court is to be construed as permitting those cases to stand as law while the principles on which alone they can be defended are weakened by its argument, I must express my dissent from that view of the case. And still more strongly do I dissent from the distinction attempted to be drawn between this case and those. If a theft or a robbery in time of profound peace can be so easily simulated, and the collusion can be so successful, that public policy requires that no such defence be listened to, I leave it to any ordinary understanding to say how much more easily the pretence of force by the rebels can be arranged and proved by consenting parties, and how much more difficult for the government to disprove such collusive arrangements than in the other case mentioned.

Syllabus.

The Congress of the United States, recognizing the law as laid down in the former decisions of this court, provided by the act of March 3, 1865, for such cases of hardship as it thought worthy of relief. Unless, therefore, the doctrine be reviewed and placed on such basis of sound principle as would do justice in all cases, I see no reason to make exceptions in favor of persons who, like the present defendant, holding by virtue of his office the money of the United States, delivered it into the hands of its enemies, without the application of the slightest personal violence, or a moment's imprisonment, or any attempt to seize his person or property, on the ground that they were able to do these things and threatened to do them. Such excuse, easily made, easily proved, hard to be confuted, is, in my judgment, much weaker than that of theft admitted to be without fault or fraud on the part of the depositary.

GRAND CHUTE *v.* WINEGAR.

[AT LAW.]

1. On an issue of fact raised by a plea in abatement, where the defendant holds the affirmative of the issue, and where the evidence (introduced by the defendant himself) is all in favor of the plaintiff, positive and uncontradicted, the court properly instructs the jury when it directs them, as matter of law, to find the issue for the plaintiff.
2. To a suit on a bond the defendant, it would seem, may well enough plead both *nil debet* and *non est factum*. At least there is apparently no inconsistency in the pleas. It would therefore be a mistake in a court to strike out a plea of *non est factum* because inconsistent with a plea of *nil debet;* and if any prejudice occurred to the defendant by such striking out, there would be difficulty in sustaining a judgment rendered for the plaintiff. However, where it was plain that though such a plea was technically struck out, no evidence was rejected on account of its absence, but that the defendant litigated every question of fact as fully as if that pleading had remained, and that though much evidence offered by the defendant was rejected, none was so rejected because of the absence of a proper plea, this court refused to reverse.

Statement of the case.

3. A plea in bar, which is, in substance, the same as a plea in abatement, already passed on by a jury against the party setting it up, is properly stricken out by the court before trial.
4. In a suit against a municipal corporation by a *bonâ fide* holder of its bonds, whose title accrued before maturity, the corporation cannot show by way of defence, if the legal authority of the corporation to issue the bonds is sufficiently comprehensive, a want of compliance on its part with formalities required by the statute authorizing the issue of the bonds, or show fraud in their own agents in issuing them. The cases of *Woods* v. *Lawrence County* (1 Black, 386); *Mercer County* v. *Hacket* (1 Wallace, 83); *Gelpcke* v. *The City of Dubuque* (Ib. 175); and *Meyer* v. *The City of Muscatine* (Ib. 384), acted upon as settling the law on this point.

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

By the first section of an act of the 10th of February, 1854, the legislature of Wisconsin authorized the boards of supervisors of Grand Chute, Greenville, Hortonia, and certain other towns along the course of a contemplated plank-road in Wisconsin, named the Wolf River Branch Plank-road, to subscribe in behalf of said towns or any of them, "*under the restrictions and conditions hereinafter named,*" to the capital stock of the said plankroad company, *such amounts*, not exceeding $10,000, for any one town, *as may be declared by the board of directors of said company necessary for the completion of said road at the time of such subscription*, and to pay for the same in bonds of the town or towns so subscribing, payable in fifteen years from the date thereof with interest, at a rate not exceeding ten per cent. per annum, payable annually, at such place within or without the boundaries of this State as shall be therein named.

Subsequent sections of the act read thus:

"SECTION 6. No bonds shall be issued by any town in pursuance of this act, unless a majority of the votes cast in said town, at the election hereinafter mentioned, shall be in favor of the same.

"SECTION 7. A special election shall be called and held in each of the towns before named, for the purpose of carrying this act into effect within six months after the passage of this act. At

such election, those voting in favor of the subscription of stock, and the issuing of bonds in accordance with the provisions of this act, shall put in ballots having inscribed on them the words 'FOR THE ROAD,' and those voting against such subscription and issue of such bonds, shall put in ballots inscribed with the words 'AGAINST THE ROAD.' Notice of such election shall be given for two weeks successively next preceding said election, in some newspaper printed in the county where the town so voting is situated. And such elections and the canvass thereof, shall be held at the same place, and conducted by the same persons, and in the same manner in all respects as the annual town meetings of each town."

On the 12th of March, 1855, certain bonds were issued in form thus:

[No. 5.]

TOWN OF GRAND CHUTE BOND.

Whereas, the legislature of the State of Wisconsin, on the tenth day of February, A.D. 1854, passed an act authorizing and empowering the board of supervisors of the town of Grand Chute to subscribe, for the town of Grand Chute, ten thousand dollars to the capital stock of the Wolf River Branch Plankroad Company, and to pay for the same in the bonds of the town, payable in fifteen years; and whereas the said board of supervisors, at a meeting of their board, did agree, by resolutions of said board, to subscribe the sum of $10,000 to the stock of the Wolf River Branch Plankroad Company, and that the said town issue bonds to the amount of said subscription to the said plankroad company, and that the said bonds be signed by the chairman of said board, under the seal of said town:

Now, therefore, for the *purpose of carrying out the provisions of the said act of the legislature*, and in accordance with the resolutions of the said board as aforesaid:

Know all men by these presents that the town of Grand Chute, in the county of Outagamie, and State of Wisconsin, is held and firmly bound unto the Wolf River Branch Plankroad Company, or bearer, in the sum of ONE THOUSAND DOLLARS, lawful money of the United States of America, to be paid to said plankroad company, or bearer, or their successors or assigns, for which full payment, well and truly to be made, the said

town binds itself firmly by these presents, and hereby pledges, irrevocably, the said stock and the proceeds thereof. Dated the 12th day of March, A.D. 1855. Sealed with the seal of said town.

The condition of the above obligation is such, that if the said town of Grand Chute shall pay, or cause to be paid, to the said Wolf River Branch Plankroad Company, or their successors or assigns, or to the bearer hereof, the just and full sum of one thousand dollars in fifteen years from the 12th day of March, A.D. 1855, with interest annually at the rate of 10 per cent. per annum until paid, said principal and interest to be paid at Appleton, in the State of Wisconsin, then the above obligation to be void; otherwise to remain in full force and virtue.

[SEAL.] THEODORE CONKEY,
Chairman of Board of Supervisors town of Grand Chute.

To the bond were annexed fifteen coupons, in form thus:

[No. 1.]

The town of Grand Chute will pay to the holder hereof, eighty-eight and $\frac{35}{100}$ dollars on the first day of February, 1856, at Appleton, Wisconsin, on the presentation hereof, being the interest due that day on the bond of said town, No. 5.

THEODORE CONKEY,
Chairman.

Nine of these bonds with the coupons being in the control or ownership of one Winegar, he brought suit against the town of Grand Chute in April, 1870, in the court below, describing himself as "a citizen of the State of New York." The town of Grand Chute pleaded in abatement, to the effect that the Circuit Court of the United States had no jurisdiction over the action for the reason that at the time of the commencement of the action, a portion of the bonds ($5500) sought to be recovered, were held and owned by one Henry Hewett, and the residue by one Theodore Conkey; that Conkey and Hewett were the real plaintiffs in interest in the action, that they were citizens of the State of Wisconsin, and, therefore, that the court could not take cognizance of the action. The plea in abatement further alleged that the bonds were not issued in good faith

or for any valuable consideration, but were procured and issued by the fraudulent contrivance of Hewett, Conkey, and one Reeder Smith, who was the president of the plank-road company for whose benefit the bonds were authorized to be issued, and the substance of the fraud was briefly stated. Issue was joined on this plea, and the deposition of the plaintiff, Winegar, was himself taken *by the defendant* to prove the affirmative of it. Winegar swore that he purchased the bonds of Goodwin, as the agent of Hewett, at the First National Bank of Union Springs, Cayuga County, N. Y., for $5100, payable $2500 in one year, and $2600 payable in two years, with 7 per cent. interest. That he had negotiated for the bonds a year and a half or two years before he purchased; that he purchased the bonds in January, 1870; purchased them for speculation; that he "had no reason to believe that they were any other than good and valid bonds;" that he "so believed at the time he made the purchase; that the purchase was made by him in good faith and without any knowledge or information that they were other than good and valid bonds; that he in equal good faith gave his notes, and that they would be met;" that he lived at Union Springs, Cayuga County, N. Y.; that he was the teller of a bank there, and had lived there for nearly four years before he brought the suit. He testified also that he never had the bonds in his possession, that he had a bill of sale of them, and they were subject to his order, and that the bill of sale was signed by Goodwin as the agent of Hewett, the seller. The court directed the jury on this evidence—the only evidence taken on the issue raised by the plea in abatement—to find the issue for the plaintiff. An exception was taken to the direction.

After this decision of the plea in abatement, the plaintiff asked for final judgment in his favor on the verdict, which the court declined to grant. Thereupon the town of Grand Chute put in nine special pleas, of which certain ones only need be mentioned.

1st. *Nil debet.*

2d. *Non est factum.*

3d. That the act authorizing the town of Grand Chute to subscribe for plankroad stock and issue bonds in payment, "was not published pursuant to the constitution and laws of said State of Wisconsin, at or prior to the time of the calling, holding and canvass of the special election prescribed by said act, to wit: on the 20th day of May, 1854."

4th. That the town of Grand Chute was not authorized to subscribe to the stock of the plankroad in question.

5th. That the board of directors of the plankroad company had not declared, as the 1st section of the act required them to do, what "amount was necessary for the completion of the road."

7th. That no special election, such as the act prescribed, had been called or held, previous to the issue of the bonds.

8th. That Hewett owned $5500 of the bonds in suit, that Conkey owned the residue, and that they, and not Winegar, were the real parties in interest in the action. That the bonds were not issued in good faith or for any valid consideration, but were procured by fraud, deception, and by collusion between Hewett, Conkey, and Reeder Smith, president and general agent of the plankroad company, in pursuance of a corrupt agreement, whereby Smith received a contract at an extravagant price and Conkey received the privilege of paying off the workmen from his store at a large profit; that a change in location was made to the injury of the road, but for the benefit of the conspirators; that Hewett signed a writing purporting to bind him, and that the bonds were fraudulently delivered to Hewett before he had performed any part of the work or even commenced it. The plea was a very long plea, covering nearly four pages of twice as much type as one of the ordinary pages of these Reports; it amplified all the above matter; inserted copies of the agreement with Hewett, and specified the mode and manner in which the fraud was alleged to have been effected.

[The reader will observe that this eighth plea resembled the plea in abatement already mentioned.]

9th. That the bonds were not executed and delivered to the plankroad company for the purpose of carrying out the

provisions of any act of the legislature, or for a valid consideration; that the company did not sell the same to *bonâ fide* holders for a valuable consideration; that the same had not passed from hand to hand like other negotiable securities, and had not as such come to the hands of the plaintiff: that they were a part of $10,000 of bonds procured to be issued by fraud and deception, and by collusion between Conkey, chairman of the town board, Smith, president of the plankroad company, and Hewett, a contractor, and divers other persons, and in pursuance of a conspiracy for the purpose of defrauding the defendant and the creditors and stockholders of the plankroad company. The plea contained other allegations of the same general character.

These pleas being filed, the plaintiff moved the court to strike off the second of them, as inconsistent with the first; and also to strike off the eighth, as embracing the same matter as was in the plea in abatement. This motion the court granted, the defendant excepting.

The plaintiff then filed replications to the first and fourth pleas, and demurred to the third, fifth, seventh, and ninth. The court sustained the demurrers.

On the trial of the issues of fact, the plaintiff offered to read the act of the Wisconsin legislature, of February 10th, 1854, in evidence, and the defendant objected, because it had no applicability to the case, and did not authorize the issuing of the bonds. The court, however, allowed the act to be read, and also the bonds and coupons.

The plaintiff, after having put in his bonds and coupons, here rested.

The defendant, on its part, offered to read in evidence the deposition of the plaintiff, Winegar, it being the same that was read on the issue in abatement. The plaintiff objected, on the ground that the same was *incompetent, irrelevant, and immaterial*, and that the same was not admissible under the pleadings. The court sustained the objection, and ruled out the deposition; the defendant excepting.

The defendant then offered the record of a suit brought in the court below, October 21st, 1861, in the name of Henry

Decker, Jr., against the town of Grand Chute, on some of the same coupons which appeared in this action; the record being offered to show that the bonds and coupons were in litigation at that early date. The record showed a suit begun, carried on to a certain point, and then before trial *discontinued*. The court ruled the record out *on the ground of irrelevancy;* the defendant excepting.

The defendant then offered the record of a suit brought in the Circuit Court of Wisconsin, November 17th, 1856, in the name of the Wolf River Branch Plankroad Company, for the use of Henry Hewett, against the town of Grand Chute; also, the record of an action brought in the same court, August 28th, 1857, in the name of the *State of Wisconsin, ex rel. Henry Hewett* v. *The Board of Supervisors of the Town of Grand Chute;* also, the record of an action brought in the same court, September 9th, 1857, in the name of *Henry Hewett* v. *The Town of Grand Chute*, together with the certified copy of the opinion of the Supreme Court of the State of Wisconsin, on appeal in the action, given September 10th, 1858; all being offered to show the pendency of actions involving the validity of the same bonds and coupons in question in this action, prior to the time that this plaintiff, Winegar, pretended to have become the *bonâ fide* owner, holder, and bearer of the said bonds and coupons, and that, therefore, it was impossible for him to be what he professed to be.

[The said suits showed that the subject-matter of this action was in litigation before and at the several times when the said several suits were pending, and that the said suits were discontinued several years before this action was brought.]

The plaintiff's counsel objected to all this evidence *on the ground of irrelevancy;* and the court ruled it out, the defendant excepting.

The defendant's counsel then offered in evidence a bill in equity, filed in the court below on the 5th day of August, 1870, wherein the town of Grand Chute was complainant, and Winegar, Hewett, Conkey, and Goodwin defendants,

and also offered in evidence all the papers and records in the case, including the demurrer to the bill of complaint.

This bill was one charging that the bonds and coupons now in suit had been issued without authority, in violation of law, and in fraud of the town of Grand Chute, by Goodwin, Hewett, and Conkey; that, for the reasons set forth in the bill, they had no legal force or validity; that the transfer of the same to Winegar was colorable merely; that he was a man of no responsibility; that he paid no valuable consideration on the pretended purchase; that he knew all the facts in relation to their issue, and that he never had any right or title to said pretended bonds, or to any of them. It further alleged that Winegar was a citizen of the State of New York, and that the other defendants were citizens of Wisconsin, and that Winegar had commenced an action in the Circuit Court of the United States for Wisconsin against the town of Grand Chute, to recover the amount of the said nine bonds. The bill prayed that an injunction might be issued restraining Winegar and his confederates from the further prosecution of the bonds, and that the same be adjudged to be fraudulent and void, and be decreed to be cancelled. The record offered showed that the bill had been demurred to; that no injunction had issued on the bill, and that the bill itself had been dismissed. The plaintiff objected to the evidence *on the ground of irrelevancy and immateriality*, and because it was inadmissible under the pleadings. The court ruled out the evidence deciding that the same was "not proper:" the defendant excepting: the court equally ruling out the record when in addition it showed an appeal, undetermined, to this court.*

The defendant then offered town records of Grand Chute, and evidence to show that some of the facts recorded in them as true about these bonds were not true; and that after a location of the road had been actually fixed on, it had been changed to a different one, for the benefit of persons interested in the bonds, and to the disadvantage of the

* See *infra*, p. 373.

Town of Grand Chute; and that persons who were interested in having the bonds issued had by fraudulent means procured them to be issued. But the court refused to let any of the evidence, or any of the same sort, of which there was a good deal, go in; there being nothing in any of it tending to show that the plaintiff had anything to do with any of these alleged frauds; ever knew of them before he got his bonds, or was other than a *bonâ fide* holder of them for value.

Under instructions of the court the jury found a verdict for the plaintiff; and judgment going accordingly, the defendant brought his numerous exceptions already mentioned here.

Mr. G. W. Lakin, for the plaintiff in error:

1. The court erred in peremptorily ordering a verdict for the plaintiff on the issue raised by the plea in abatement. The defendant went into the enemy's camp for testimony. He extorted from the plaintiff a few facts reluctantly given. It was the constitutional right of the defendant that the jury should weigh the testimony and return a verdict agreeably to their convictions. To instruct the jury "to find the issue for the plaintiff," was an arbitrary infringement of that common law and constitutional right.

2. The court erred in ordering the second plea, that of *non est factum*, to be struck out. The alleged reason was that it was inconsistent with the first plea. But the law of pleading does not require that one separate and independent plea shall be consistent with another separate and independent plea. Each plea stands or falls by its merits. The reason which was the basis of the ruling, if it were true, would be no sufficient reason. But it is not true. How is *nil debet* inconsistent with *non est factum?* The defendant "owes nothing"—the bonds "are not its deed." It owes nothing, *because* the bonds are not its deed—because they are a forgery, a fraud, were made without authority. So far from being inconsistent, the second plea is a logical reason for the first.

3. The court erred equally in striking out the eighth plea.

Its object, end, and aim were different from the object, end, and aim of the plea in abatement. One sought to abate; the other to bar. It set forth facts sufficient to bar. The plea in abatement, so far as it did more than set up the pretended citizenship of Winegar, was surplusage.

4. The court erred in sustaining a demurrer to the third plea, which sets up the non-publication of the act of the legislature under which the bonds purport to have been issued.*

5. The court erred in sustaining a demurrer to the fifth plea. The act, under and by virtue of which the plaintiff pretends that the bonds were issued, and which act is referred to on the face of the bonds and in the declaration as the only foundation thereof, limits all concerned. The subscriptions are not to exceed $10,000, and, before they can exceed one dollar, a prerequisite is interposed. It must be ascertained definitely, in due form, by the declaration of the board of directors, what sum is necessary for the completion of the road. Until that is done there is no authority to subscribe a dollar. Such declaration, by the act, is designated as the corner-stone of the contemplated edifice. The plea declares its non-existence. The legislative act must be followed, or else it may as well be dispensed with altogether. No one pretends that, without it, the bonds would be legal, or good for anything. How can they be valid without any attempt at complying with its most prominent and essential provision; that which may be denominated its jurisdictional provision?

6. The court erred in sustaining a general demurrer to the seventh plea, which alleges that no special election, such as is prescribed in said act of February 10th, 1854, was called or held, previous to the issue of the bonds, &c. The act absolutely prohibits the issuing of any bonds, until that election is had. And here it stands admitted on the record that no election was had. And the court overrides the law, and adjudges that no election was necessary. To adjudge that

* The Town of Rochester *v.* The Alfred Bank, 13 Wisconsin, 432.

no act at all was necessary as a foundation for the issue of the bonds would be as reasonable.

7. There was error in sustaining a general demurrer to the ninth plea. The demurrer admits the truth of all that is alleged in the plea. It places Winegar in no better position for a recovery than are the real parties who stand behind him. And it then shows the numerous acts of fraud, collusion, and conspiracy which taint the whole thing and render the paper void. Even if Winegar were the actual purchaser of the void bonds, which were issued without authority of law, he could not recover. *Marsh* v. *Fulton County** decides that point and disposes of the case.

So the case of *Smith* v. *Sac County*,† the bonds sued on there belonged to the same class as the bonds here. In that case the bonds were fair on their face, and payable to bearer. But Meservy, a contractor to whom they issued, and the county judge had a fraudulent understanding about them. After the negotiable paper had been "concocted" and the official seal affixed by the judge, one of the $1000 bonds was immediately presented by Meservy to him. This court says:

"That the bonds should turn up in the possession of some one else was to be expected. But, to hold that after all this was shown in defence, such holder should have judgment on these bonds, without any proof that he purchased them for value, or that he gave any consideration for them at all, is, in our judgment, pushing the doctrine which gives sanctity to negotiable paper beyond any just principle or any decided case."

The court held the bonds void. There was no element of fraud in that case which does not appear in the case at bar. "That the bonds should turn up in the possession of some one else" (Winegar) "was to be expected." Conkey, Hewett & Co. had long been scheming. They at last conceived the plan of having the bonds *transferred for value*. And the plaintiff was selected as the transferee, *and his notes the value*. In *Smith* v. *Sac County* all forms and precedents were ob-

* 10 Wallace, 680.

† 11 Id. 139.

served in the creation of the bonds. The proper officer issued, sealed, and delivered them to Meservy, the contractor, who immediately bestowed one of them, of the denomination of $1000, on the judge.

8. The court erred in allowing the bonds and coupons to be read in evidence. Without some valid act of the legislature with which the bonds can be identified as their foundation, and as their authority for being issued, they are surely void.

9. The court erred in ruling out the deposition of the plaintiff, Winegar, offered to be read by the *defendant* at the trial. It was certainly competent for the defendant to show on the trial that the plaintiff had notice of the nature, character, and the frauds connected and identified with the bonds; when, where, and how he came by them; whether he gave any, and what value for them? The defendant had a legal right to testimony of the plaintiff when he spoke on these points, and to make the most of it, as coming from the party whose interest was largely in favor of a recovery. Whatever spark of testimony could be obtained from it, which pointed the other way, could be fastened upon. A few such sparks were evolved; and the defendant had a right to them, and to point them out, and to urge them to the jury. "Incompetency," "irrelevancy," "immateriality," and "inadmissibility," were the alleged grounds of rejecting the testimony. But it is clear that nothing beyond those naked terms was ever manifested to the parties, or to their counsel, to show why the testimony of the adverse party was thus summarily rejected.

10. There was error in rejecting the several records offered in evidence by the defendant, which showed that coupons of these bonds had been repeatedly litigated in courts of record without a recovery ever being had upon them. The records show what defences were interposed, and that the character of these bonds and coupons was made public very soon after their issue.

11. There was error in rejecting the bill in equity, and the records in the case, on the equity side of the court below. That bill was filed in the same court in which the action at

law was pending. It commenced at the root of the fraud and traced it connectedly down. It proceeded against all the fraudulent parties. The bill sought to have the bonds cancelled of record. No clearer case of fraud brought home to and identified with the plaintiff in the action at law, Winegar, the pretended owner of the bonds, can be stated than is stated in the bill. The equity suit covered the whole ground. The demurrer admitted the truth of every allegation; and why, with the whole bill thus admitted to be true, the court ruled out the bill and the whole record, we know not.

12. There was error in ruling out the town records, and the proof offered of the changing of the location of the road for the benefit of the parties who procured the issuing of the bonds. And in ruling out the offer to show that the bonds were procured to be issued by fraudulent means, by persons who were interested in their being issued, and error in other rulings, as well as in the charge of the court to return a verdict for the plaintiff.

Mr. H. L. Palmer, contra.

Mr. Justice HUNT delivered the opinion of the court.

The first alleged error of which complaint is now made is the direction of the court to the jury that they find the issue for the plaintiff on the plea of abatement where issue had been joined and testimony taken. The defendant held the affirmative of the issue, and attempted to sustain his case by calling Winegar, the plaintiff on the record.

Winegar swore that he had purchased the bonds on which the suit was brought of Goodwin; that he was the absolute owner of them; that he gave for them his notes for $5100, payable in one and two years, at seven per cent. interest, and that the purchase was made in good faith, with no knowledge or information that the bonds were not valid and with no reason to believe they were not. He testified also that he never had the bonds in his possession, that he had a bill of sale of them, and they were subject to his

order, and that the bill of sale was signed by Goodwin as the agent of Hewett, the seller.

There was no evidence here that would have justified a finding by the jury that Winegar was not the *bonâ fide* owner for value of the bonds in suit. He was the defendant's witness, and no other witness was called upon the issue. If the jury had found otherwise it would have been the duty of the judge to set aside the verdict as unsupported by evidence and in hostility to all the evidence given. There was no error in this charge.

Upon the decision of the plea in abatement the plaintiff asked for final judgment in his favor upon the verdict. Of the refusal to comply with this request, the plaintiff makes complaint, but as he ultimately succeeded in the suit, that result wipes out all exceptions on his part. Upon this refusal the defendant interposed nine special pleas. The plaintiff moved to strike from the record the second of the said pleas as being inconsistent with the fact, and this motion was granted. The first of the said pleas was that the defendant did not owe the moneys demanded or any part thereof in manner and form as the plaintiff had complained against it. The second plea was that the said supposed writings were not, nor were any of them, the deed of the defendant. It is not easy to see the inconsistency of these two defences. If the defendant had never executed the bonds, it would be very likely it did not owe the moneys in them agreed to be paid. So again it might well be that if it did not owe the money it had never executed the bonds. If not an error in striking out the second plea, there certainly was an erroneous reason given for it. If any prejudice had occurred to the defendant from striking out the plea of *non est factum* there would be difficulty in sustaining the judgment. But the record shows none. Indeed it is evident that although the plea was technically excluded, no evidence was rejected on account of its absence, but that the defendant litigated every question of fact as far and as fully as it would have done if this pleading had remained. Numerous offers of evidence were indeed objected to by the

plaintiff and rejected by the court, but the objection was, in a few instances, only based on the character of the pleadings and then in connection with the objection of irrelevancy and incompetency. In no instance was the rejection placed upon the absence of a proper plea. The objection was sometimes expressed to be on the ground of the irrelevance and immateriality of the evidence offered, and in the remaining instances it is evident, from the nature of the offers, that the objection and decision were upon that ground. Among these were the offers of the pleadings in the equity suit still undecided, and again after its dismissal, and including his own bill of complaint, also the book of records of the town clerk's office, also the location of the plankroad, also that it was changed to a different route for the benefit of the parties who procured the issuing of the bonds, and much other evidence of a similar character. It does not appear that any evidence on the point of the actual signing and delivering of the bonds was rejected by the court, or that any harm was sustained by the defendant, from the absence of his plea of *non est factum.*

A further answer to this objection is given in the plaintiff's brief, to wit: that the allowance of double pleas and defences is not a matter of absolute right, but of discretion in the court, and that the courts constantly exercise their discretion in controlling this privilege by disallowing sham or inconsistent pleas.*

The eighth plea was, on motion of the plaintiff, stricken out for the avowed reason that it embraced the same matters as had already been set up and passed upon in the plea in abatement. The pleas are the same in substance and effect. The eighth plea contains the same matter which is in the fifth, though in the eighth it is set forth with much fulness of detail, giving copies of the agreement with Hewett, and specifying the mode and manner in which the fraud, which both the pleas set up, was alleged to have been effected.

* See the language of Mr. Justice Story in Ex parte Davenport, 6 Peters, 661.

The two pleas are, however, as has been already said, the same in substance and effect. A party having his plea in abatement passed upon by a jury, and found against him, is not permitted to set up the same matter in bar and again to go to the jury upon it.*

Numerous objections were taken, and in a variety of forms, which fall within the principles of *Knox County* v. *Aspinwall*,† *Mercer County* v. *Hackett*,‡ and *Meyer* v. *The City of Muscatine*.§ The most of the objections, which we have already referred to, were decided not upon the pleadings, but upon the principle of these cases. In *Knox County* v. *Aspinwall* Mr. Justice Nelson thus states the question: "The main ground of the defence relied upon to defeat the recovery is, that the defendant, the board of commissioners, possessed no authority to execute, or to authorize to be executed, the bonds in question, and hence that they are obligations not binding upon the County of Knox, which this board represents. Our chief inquiry, therefore, will be whether or not these several obligations were executed and put into circulation as evidence of indebtedness by competent legal authority." Upon the inquiry thus put the decision is stated by the reporter in the following language: "Where the statute of a State provided that the board of commissioners of a county should have power to subscribe for railroad stock, and issue bonds therefor, in case a majority of the voters of the county should so determine after a certain notice should be given of the time and place of election, and the board subscribed for the stock and issued the bonds, purporting to act in compliance with the statute, it is too late to call in question the existence or regularity of the notices in a suit against them by the holders of the coupons attached to the bonds, who were innocent holders. In such a suit, according to the true interpretation of the statute, the board were the proper judges whether or not a majority of the votes of the county had been cast in favor of the sub-

* 1 Chitty on Pleading, 457 a; Coxe *v.* Higbee, 6 Halsted, 395.
† 21 Howard, 539. ‡ 1 Wallace, 83. § Ib. 384.

scription. The bonds on their face import a compliance with the law under which they were issued, and the purchaser was not bound to look further for evidence of a compliance with the condition of the grant of the power."

In *Woods* v. *Lawrence County*,* it was held that where the statute requires the grand jury to fix the amount of a subscription to railroad stock, and to approve of it, and upon their report being filed empowers commissioners to carry the same into effect by making its subscription in the name of the county, and if these things be done agreeably to the law, the county cannot afterwards deny its obligation to pay the amount subscribed. In a suit brought to recover the arrears of interest on such bonds, it is not necessary for the holder to show that the grand jury fixed the manner and terms of paying for the stock; nor is it a defence for the county to show that the grand jury omitted to do so. It is enough that the manner and terms of payment were agreed upon between the company and the commissioners. In a suit brought upon the coupons by a *bonâ fide* holder, his right to recover is not affected by the fact that the railroad company sold the bonds at a discount of twenty-five per cent. contrary to the charter, which forbids the sale of them at less than their par value.

In *Mercer County* v. *Hackett*,† it was held that where a county issues its bonds payable to bearer, and solemnly pledges the faith and credit and property of the county, under authority of an act of the Assembly, referred to on the face of the bonds by date, and the bonds pass into the hands of a *bonâ fide* holder for value, the county is bound to pay them; that it is no defence that the act of the Assembly referred to on the face of the bonds authorized their issue only on, and subject to, certain "limitations, restrictions, and conditions," which have not been formally complied with, nor that the bonds were sold at less than par when the act authorizing their issue declared that they should in "no case," nor "under any pretence," be so sold, and that

* 1 Black, 386.

† 1 Wallace, 83.

the bonds are in the nature of negotiable instruments. The same principles are announced in *Gelpcke* v. *The City of Dubuque*,* and in *Meyer* v. *The City of Muscatine*.† In the latter case the court say that if the legal authority was sufficiently comprehensive, a *bonâ fide* holder for value has a right to presume that all precedent requirements have been complied with.

By the act of February 10, 1854, the legislature of Wisconsin authorized the supervisors of the town of Grand Chute to make a plankroad subscription to the amount of ten thousand dollars. The bonds in question were signed by the chairman of the board of supervisors of that town, and recited that the subscription had been made by the supervisors of the town, and that these bonds were issued in pursuance thereof for the purpose of carrying out the provisions of that act. The plaintiff was the *bonâ fide* holder for value of the bonds in suit, and his title accrued before their maturity. The cases cited are an answer to the numerous offers to show want of compliance with the forms of law, or to show fraud in their own agents. There are some other exceptions which it is not necessary to consider in detail.

After a careful examination of the whole case, we are of the opinion that the judgment should be

AFFIRMED.

GRAND CHUTE *v.* WINEGAR.

[IN EQUITY.]

A municipal corporation, obligors in a bond, cannot ask relief in equity that the obligee be enjoined from proceeding at law, and that the bond be surrendered, when his bill alleges that the bond was issued without authority, in violation of law and in fraud of the town; that the obligee

* 1 Wallace, 175. † Id. 384.

Statement of the case.

knew this when he took it; that the obligee's possession is merely colorable, and that he gave no value for it, and never had any right or title to the bond. Such allegations show a complete defence to the bond at law; and a judgment against the obligee at law would give as full protection every way to the obligor as a decree in equity.

APPEAL from the Circuit Court for the Eastern District of Wisconsin.

The town of Grand Chute, in Wisconsin, filed its bill on the equity side of the court below against one Winegar; three other persons, Goodwin, Hewett, and Conkey, being also made defendants. It set forth that Winegar had brought suit on the law side of the same court against the town to recover from it the amount of certain bonds—nine in number, and for the sum of $8500 in all—purporting to have been issued by the said town; that the bonds were issued without authority, in violation of law, and in fraud of the town, by the other defendants, Goodwin, Hewett, and Conkey; that for reasons set forth in the bill the bonds had no legal force or validity; that the transfer of them to Winegar was colorable merely; that he paid no valuable consideration on the pretended purchase; that though he had given his notes for them, he was a bankrupt and altogether "irresponsible in a financial point of view;" that he knew all the facts in relation to the issue, and that he never had any right or title to the said pretended bonds, or to any of them. It was further alleged that Winegar was a citizen of the State of New York, and that the other defendants were citizens of Wisconsin. The bill prayed that an injunction might be issued restraining Winegar and his confederates from the further prosecution of suit on the bonds, and that the bonds themselves might be adjudged to be fraudulent and void, and be decreed to be cancelled. To this bill the defendants demurred. The demurrer was sustained in the court below, and the complainant now appealed to this court.

Mr. G. W. Lakin, for the appellant; Mr. H. L. Palmer, contra.

Mr. Justice HUNT delivered the opinion of the court.

The inquiry at once suggests itself upon reading the bill in this case, why does the plaintiff file it? Can any relief be had in this suit which could not be obtained in the suit sought to be enjoined? It is an elementary principle of equity law that, when full and adequate relief can be obtained in a suit at law, a suit in equity cannot be maintained. In *Hipp* v. *Babin** the court say: "The bill in this case is in substance and legal effect an ejectment bill. The title appears by the bill to be merely legal, the evidence to support it appears from documents accessible to either party, and no particular circumstances are stated showing the necessity of the court's interfering, either for preventing suits or other vexation, or for preventing an injustice irremediable at law. In *Welby* v. *Duke of Rutland*,† it is stated that the general practice of courts of equity in not entertaining suits for establishing legal titles, is founded upon clear reasons, and the departing from that practice where there is no necessity for so doing, would be subversive of the legal and constitutional distinctions between the different jurisdictions of law and equity. . . . . Agreeably hereto, the established and universal practice of courts of equity is to dismiss the plaintiff's bill if it appears to be grounded on a title merely legal, and not cognizable by them, notwithstanding the defendant has answered the bill and insisted on matter of title." After citing numerous other authorities, the matter is thus summed up: "And the result of the argument is, that whenever a court of law is competent to take cognizance of a right and has power to proceed to a judgment which affords a plain, adequate, and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury." The right to a trial by jury is a great constitutional right, and it is only in exceptional cases and for specified causes that a party may be deprived of it. It is in vindication of this great principle, and as declaratory of the

* 19 Howard, 271.

† 2 Brown's Parliamentary Cases, 42.

common law, that the Judiciary Act of 1789, in its sixteenth section, declares "that suits in equity shall not be sustained in either of the courts of the United States in any case where adequate and complete remedy may be had at law."*

A demurrer having been interposed to the present bill, all of its allegations are to be taken as true. This is so both in favor of the plaintiff and against him. It seems quite clear upon the statements of the bill that the defence to the suit at law upon the bonds is adequate and complete. Thus, the bonds, it is alleged, were issued without authority and in fraudulent violation of the duty of those having the subject in charge. It is not suggested that there is any difficulty, either legal or practical, in establishing these facts by competent proof. If proven, they furnish as complete a defence to the suit at law to recover the amount of the bonds as they do in equity. In each suit the question arises, were they received by Winegar before their maturity, without knowledge of the defence, and for a valuable consideration by him paid on the purchase thereof? To cut off the defence, interposed by the town, all of these facts must exist. The absence of any of them destroys the endeavor to exclude the defence. In other words, if Winegar received the bonds after their maturity, or if he had knowledge of the facts constituting the defence to them, or if he did not pay value on their purchase, the defence is admissible and its effect distinctly presented. Now, upon the allegations of the bill, each and all of these facts, except that of the maturity of the bonds, is averred to have existed. The time when Winegar received the bonds is not definitely stated. It is alleged, however, that he knew the alleged facts in regard to their issue before he received them. This alone opens the case to any defence. It is alleged again that he paid no consideration whatever on the purchase, but that his title is sham and colorable. This again opens the whole case. Upon the statements of the bill the defence to the bonds can be interposed against Winegar, as it could be against an original

* 1 Stat. at Large, p. 82.

holder; and if the allegations are true, and constitute a defence, the defence at law to the suit brought by him is perfect and complete.

A judgment against Winegar in the suit brought by him would be as conclusive upon the invalidity of the bonds, would as effectually prevent all future vexatious litigation, would expose the fraud, and prevent future deception as perfectly and thoroughly as would a judgment in the equity suit. Under such circumstances, there is no authority for bringing this suit in equity.

We are so well satisfied that the bill cannot be sustained for the reason stated, that we do not discuss the further question, whether a bill of this character can be sustained, where two of the defendants in the suit are residents of the same State with the plaintiff.

DECREE AFFIRMED.

KIMBALL *v.* WEST.

1. When a contract for sale of lands is fully executed by a conveyance with a covenant of warranty, and the payment of the purchase-money, the remedy for a defect of title is by an action on the covenant.
2. A party declining to pursue that remedy, and applying to a court of equity to rescind the entire contract, must show very clearly that such a rescission is necessary to the ends of justice.
3. If, therefore, on or before the final hearing, the vendor makes and tenders a perfect title, no rescission will be decreed unless the vendee has suffered great loss or injury by the delay, and not then if such loss or injury can be fairly compensated by damages.

APPEAL from the Circuit Court for the District of Missouri.

Kimball and Trask brought their bill in chancery against West, to rescind a contract for the sale of land of which they were purchasers from him. The contract was an executed one, West having conveyed the land—about four hundred acres in quantity—to the complainants' agent, who had

conveyed to them, and the purchase-money ($22,000) having been paid. The deed of West, the defendant, contained a clause of general warranty.

The allegation mainly relied on by the bill to set aside the contract was that the defendant represented to the agent of the complainants, that the title to the land was good; that there was no incumbrance on it, nor adverse claim to it; when in truth and in fact an action of ejectment was then pending for one hundred and eighty-four acres of it against the defendant, in which judgment was afterwards rendered against him; that the land so recovered in the suit against the defendant was the most valuable part of the tract, and without which the complainants would not have made the purchase; and that the defendant fraudulently concealed the existence of this suit, and represented the title to the whole to be perfect. On the question of concealment and fraudulent representation testimony was taken on both sides, which did not leave the matter free from doubt. This part of the matter, however, was unimportant in the view which this court took of the case.

It appeared from the record that before the cause in the court below came to a final hearing, the defendant purchased the outstanding and conflicting title to the one hundred and eighty-four acres, and tendered to the complainants such conveyances as made their title perfect. The court, therefore, dismissed the bill, but decided that the defendant should pay the costs of the suit.

From this decree of dismissal the complainants appealed.

Mr. R. T. Merrick, for the appellants:

There was confessedly misrepresentation by the vendor as to five-twelfths of the whole tract. On the ground of mere defect in quantity the purchasers have a right to be relieved of their purchase; or rather their no purchase. Can the vendor by coming in *now*, at the twelfth hour, and offering a good title, destroy this right? The purchasers may have bought for a special purpose. Presumably they did so. Suppose they bought for immediate resale on a high but

falling market, obviously they are not made whole by the tender of a good title now. Their opportunity of sale is gone, and their lost time and pains is their profit. An entire rescission of the contract should have been decreed, or at least compensation for the portion included in the ejectment suit.

Mr. J. O. Broadhead, contra.

Mr. Justice MILLER delivered the opinion of the court.

We are of opinion that the decree of the court below was clearly right. The plaintiffs had paid their money and accepted of the defendant his deed with a clause warranting the title. For any defect in that title the law gave them a remedy by an action on the covenant. But when, declining to pursue that remedy, they apply to a court of equity to rescind the whole contract, thereby compelling the defendant to repay the sum of $22,000, and receive back the title which he had conveyed to the plaintiffs, the necessity of such a decree to obtain the ends of justice must be very clear before it will be given. When, therefore, it appears that at the time of the hearing the defendant is able to remedy the supposed defect in his title, and in point of fact secures and makes good to the complainants, at his own cost, all that he conveyed to them originally, the complainants must show some loss, injury, or damage by the delay in perfecting the title before they can claim a rescission of the contract. And even if this could be shown, which is not attempted in this case, the court, as a general rule, would not be authorized to decree a rescission, if compensation could be made for the injury arising from the delay in making good the original defect in the title.*

DECREE AFFIRMED.

* Hepburn & Dundas *v.* Dunlop & Co., 1 Wheaton, 179; Buchannon *v.* Upshaw, 1 Howard, 56; Galloway *v.* Finley, 12 Peters, 264.

PENNYWIT *v.* EATON.

[ON MOTION.]

The court refused to dismiss, for want of jurisdiction, a case brought here as within the 25th section of the Judiciary Act, when they could see a Federal question raised under it, though raised somewhat obscurely; and though they had "a very clear conviction" that the decision of the State court was correct, so clear indeed that as it finally turned out (see *infra*, next case) they affirmed it with 10 per cent. damages, because any writ of error could have been prosecuted only for delay.

ON motion to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of Arkansas.

Eaton sued Pennywit in the Pulaski County Court of Arkansas upon the record of a judgment rendered by the Fourth District Court of New Orleans, that court, when the judgment was rendered, *having been held by a judge appointed by a military governor of Louisiana.* On the trial in the Pulaski County Court, the court was requested by the defendant to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment, held his office by appointment of a military governor of the State of Louisiana, and under no other authority, the judgment was void. But the Pulaski County Court did not so hold, but held to the contrary; and the Supreme Court of Arkansas affirmed its judgment. The case was now brought here under an assumption that it came within the third clause of the 25th section of the Judiciary Act (quoted *supra*, p. 3), which gives a right to bring here for review any suit "where is drawn in question the validity of any clause of the Constitution . . . 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." The title, right, privilege, or exemption here meant to be set up was one by

the defendant, and was supposed to arise under two clauses* of the Constitution, which ordain as follows:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the *Congress* shall from time to time ordain.

"The *President of the United States* . . . shall nominate, and by and with the advice and consent of the Senate shall appoint judges of the Supreme Court, and *all other officers of the United States*, whose appointments are not herein otherwise provided for, which shall be established by law."

Mr. W. M. Rose, in support of the motion; Mr. A. H. Garland, contra.

The CHIEF JUSTICE:

The Pulaski County Court was requested to hold, that if it appeared from the evidence that the judge who presided in the court at New Orleans and rendered the judgment there, held his office by appointment from a military governor of the State of Louisiana, and under no other authority, the judgment was void. This raised, though somewhat obscurely, the question whether the court so held had any jurisdiction under the Constitution of the United States, and the question was decided against the privilege claimed under the Constitution by the defendants.

We cannot, therefore, dismiss the case for want of jurisdiction, although we may have a very clear conviction that the decision of the State court was correct.

MOTION DENIED.

[See the next case.]

* Article 3, § 1, and Article 2, § 2.

Argument for the plaintiffs in error.

PENNYWIT *v.* EATON.

[ON MERITS.]

Judgment affirmed with 10 per cent. damages in a case brought here in disregard of the law as already settled by precedents of the court.

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

On the 3d day of January, 1862, during the late rebellion, the Fourth District Court of New Orleans (then held by a judge appointed by a *military* governor of Louisiana) issued a writ of attachment against the steamer "Thirty-fifth Parallel," of which one Pennywit and certain other persons were owners; each owning a part. These owners had given a promissory note at New Orleans, on the 8th day of October, 1861, for $6795.71, to Eaton & Betterton. Bond with sureties was given, and the attachment was released. Judgment was subsequently rendered against the defendants personally for the amount of the note with interest. Suit was instituted upon this judgment against Pennywit, in a court of Pulaski County, in Arkansas. The defence was that at the time of the original suit, Pennywit was not a citizen of Louisiana, and had not been served with process, but that he was a citizen of Arkansas, then domiciled there, and had ever since remained such. The judgment of the Pulaski County Court was for the defendant, and on appeal taken by the plaintiffs, the judgment was reversed in the Supreme Court of the State. In the meantime Pennywit died, and the suit was revived against his executors, and judgment was rendered against them in pursuance of the mandate of the Supreme Court. This latter judgment was affirmed in the Supreme Court, and the case was brought by writ of error to this court.

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

1. The case originated upon what purported to be a judgment, rendered in a New Orleans court, by *attaching* a steamboat. The suit in that court was not an attachment against

the interest or property of Pennywit in the steamboat, but was a proceeding *in rem* and directly against the boat itself. No such proceeding could be valid except when the process issued from an admiralty court of the United States.* The court could not by its process thus seize upon the boat.

2. The judge who presided in the court that pretended to render judgment was appointed by the military authority then holding the territory of Louisiana, and his commission was issued by that authority. Neither the military commander nor the military governor of Louisiana had any such power, and the appointment in this case was a nullity. If, as this court has decided, in *Texas* v. *White*,† the seceding States were still States of the Union, then it is as true, no military appointments of judges for Louisiana, one of those seceding States, can be upheld. If it be held, however, that Louisiana, being then in war against the General Government, and the forces of the latter having had possession of her territory, a government there by those forces was a necessity, that may be admitted, so far as the necessities of military occupation were concerned, and no further.‡ When this court said, in *The Grapeshot*,§ that a court organized by the President of the United States in Louisiana, during the occupation by the Federal troops, was a lawful court, it did not state or intimate that any military commander or governor there could organize a court and appoint judges. How does the President himself get the authority? Obviously as commander-in-chief of the army, under the Constitution of the United States. When it is given to him as such, it is given to no one else. It is not shown that Mr. Lincoln, the then President, attempted to delegate his authority to his subordinates in Louisiana; and if he had it would not help the matter. A delegated authority cannot be delegated.

Mr. W. M. Rose, contra.

* The Moses Taylor, 4 Wallace, 411; The Hine *v.* Trevor, Ib. 555; The Belfast, 7 Id. 624.

† 7 Wallace, 700. ‡ Handlin *v.* Wickliffe, 12 Id. 173. § 9 Id. 129.

Statement of the case.

The CHIEF JUSTICE delivered the opinion of the court.

Two questions are presented, both of which have been adjudicated. The first relates to the proceeding of the court of Louisiana, by which the original judgment was rendered. It is claimed that this was a proceeding in admiralty. It was, in fact, a proceeding against the persons of the defendants, instituted by attachment. Such a suit, we have held, is not a proceeding in admiralty.*

The second question relates to the validity of the appointment of the judge who presided in the court of the Fourth District of New Orleans. His commission came from the military governor, who was appointed by the President during the late war. We have already decided that such appointments were within the power of such a governor.†

There can have been no good ground for the writ of error under the former adjudications of this court, and there is no attempt to question these adjudications. We are obliged, therefore, to regard this writ of error as prosecuted for delay.

The judgment of the Supreme Court of Arkansas must be

AFFIRMED, WITH TEN PER CENT. DAMAGES.

EX PARTE ROBERTS.

The allowance of an appeal to this court by the Court of Claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking such allowance can be made.

ON petition of M. O. Roberts for a writ of mandamus to the Court of Claims to require that court to hear, entertain,

* The Genesee Chief *v.* Fitzhugh, 12 Howard, 443; Jackson *v.* Steamboat Magnolia, 20 Id. 296; Taylor *v.* Carryl, Ib. 583; The Hine *v.* Trevor, 4 Wallace, 555; The Belfast, 7 Id. 624; Leon *v.* Galceran, 11 Id. 185.

† Handlin *v.* Wickliffe, 12 Id. 173; Leitensdorfer *v.* Webb, 20 Howard, 177; The Grapeshot, 9 Wallace, 133.

Statement of the case in the opinion.

and decide a certain motion made there by him for a new trial, and also to correct the records of the court in certain particulars set forth in the petition, the main question arising on the motion being whether the allowance of an appeal to this court by the Court of Claims, absolutely and of itself removes a cause from its jurisdiction, so that no order revoking such allowance can be made.

Messrs. T. Wilson and E. N. Dickerson, in support of the motion; Mr. C. H. Hill, Assistant Attorney-General, contra.

The CHIEF JUSTICE stated the case and delivered the opinion of the court.

The act of Congress, 3d March, 1863, authorizes appeals from the Court of Claims to this court under such regulations as this court may direct, provided such appeals be taken within ninety days after such judgment or decree.

By our third rule, regulating these appeals, we directed that this limitation of ninety days should "cease to run from the time of the application for the appeal." In other words, the appeal was taken, in the sense of the act, when the defeated party in the Court of Claims signified, by his motion for the allowance of an appeal, his desire to take one. But, by the same rule, we declared that an allowance by the court or the Chief Justice in vacation was essential to the perfecting of an appeal; so that there might be, between the motion for the appeal and its allowance, an interval of time, greater or less as might be determined by the convenience of counsel, subject to the discretion of the court.

The judgment in the case before us was rendered on the 27th of February, 1871. On the 16th of May, a motion for new trial was made, and, on the 22d of the same month, there was filed a motion for the allowance of an appeal. This motion was in time, and, unless there be some rule of the Court of Claims to the contrary, we perceive no objection to hearing the motion for new trial at any time after it was made, or, if that should be refused, to the subsequent allowance of the appeal. It appears, however, that the

attorney for the petitioners, apprehending some prejudice to his motion for new trial from the motion for an appeal, entered into a stipulation with the Assistant Attorney-General, representing the United States, which was filed with the motion for an appeal, that the latter motion should not injuriously affect the former, or prevent a full hearing and decision upon the merits. Both motions were thereupon continued. Subsequently, while both were pending, one of the counsel for the plaintiffs, not the attorney of record, and without the assent or knowledge of the attorneys of record, moved the court, on the 2d day of May, 1872, for the allowance of an appeal as prayed by the motion of the 22d of May, 1871, and the appeal was allowed. As soon thereafter as the motion could be made, the same counsel moved for and obtained an order, May 8th, 1872, revoking this allowance. Afterwards, the motion for new trial coming on to be heard, on the 22d November, the court refused to entertain it, on the ground that an appeal had been allowed on the 2d May, 1872, and that, the cause having been thus removed from its jurisdiction, the subsequent order, revoking that allowance, was a nullity. The attorney for the petitioners then moved the court to strike out the allowance of appeal, on the 2d of May, 1872, but the court refused to entertain that motion.

The question whether the court erred is now before us.

We are clearly of opinion that the Court of Claims had power to hear and ought to have heard and determined both motions, and that its order of revocation, made on the 8th of May, 1872, was within its jurisdiction.

That it ought to hear and decide the motion for new trial is obvious; for, when that motion was called up on the 22d of November, 1872, the order revoking the allowance of appeal stood itself unrevoked. A new order was necessary to get rid of its effect. As long as it remained on the record, no question could be made of its operation.

But was it a nullity in fact?

It cannot be denied that the order allowing the appeal

Statement of the case.

was improvidently made. It was moved for without authority, or, if with authority, under a total misapprehension of fact and in disregard of the stipulation entered into by the attorneys in the cause. Its effect was to destroy the previous motion for a new trial, contrary to the express terms of the agreement. It had hardly been made when the counsel who had inadvertently moved for it, moved for its revocation, and the motion was granted. We do not doubt the power or the propriety of that action. The whole record was still in the possession of the Court of Claims; and the stipulation, showing that the motion for an allowance of the appeal could not properly be disposed of before the motion for new trial had been heard and determined, was a part of that record.

We shall, therefore, award a mandamus, requiring the Court of Claims to hear, entertain, and decide the motion for new trial, and also the motion to correct the records of that court, as set forth in the motion to this court, made in behalf of the petitioners.

AWARD ACCORDINGLY.

MOSES *v.* THE MAYOR.

The rule redeclared, that a decree of the highest court of a State which, merely dissolving an injunction granted in an inferior court, leaves the whole case to be disposed of on its merits, is not a "final decree," and, therefore, does not come within the 25th section of the Judiciary Act of 1789 or the 2d section of the act of 1867, giving revisory powers to this court over final decrees or judgments rendered in certain cases in such highest court.

ON motion of *Mr. P. Phillips*, to dismiss for want of jurisdiction; the case being thus:

Moses and another had filed their bill in a State court of Alabama, asserting that a law of that State authorized them, on payment of a certain sum, to establish a lottery; that they had paid the sum and established a lottery accordingly. They now complained that they had been several times ar-

rested by the mayor's police, charged with gambling, and had been thus obstructed in the pursuit of their business. The bill then prayed an injunction to restrain the mayor, &c., from interfering in their "carrying on the scheme of the roulette table and ball, or in the use of the scheme of the revolving oblong box and balls on the principle of the game called keno," &c., &c. The chancellor granted the injunction as prayed for. The answer of the mayor denied among other things that the complainants had fulfilled the conditions of the act under which they claimed the right of lottery, and asserted that under pretext of its authority they were carrying on a corrupting system of gambling, which it was admitted the mayor was determined to put down. It insisted that after a default of payment as required by the act, while it was still due and before it was paid, the legislature repealed the said act under which the complainants claimed this right to carry on the lottery or "system of gambling" described in the bill; and further, that the mode used in conducting this business was unauthorized by the act.

Upon the coming in of the answer a motion was made to dissolve the preliminary injunction, but this was denied. An appeal was taken from this order refusing to dissolve to the Supreme Court of the State, and the order of the chancery court was reversed and the said injunction dissolved. From this decree Moses and the other took an appeal to this court, under the assumption that the case came within the first paragraph of the 25th section of the Judiciary Act of 1789 (quoted *supra*, p. 3), or the similar section of the act of 1867;* for that the complainants having paid the sum required by the act authorizing the lottery had "a contract" with the State, and that the subsequent act of the State repealing the former one impaired the obligation of that contract.

Mr. Phillips, in support of the motion:

1. There is no Federal question.
2. If there be, there is no final judgment.

* See the two acts concolumned, 12 Wallace, 689.

Argument in favor of the jurisdiction.

As to the first ground. The pretensions of the complainants are under a State act, and their complaint is that certain trespassers were interfering with their rights under it. The defence is that the rights insisted on were not warranted by the true construction of that act, that its conditions had not been complied with, and that while the default existed the legislature had repealed it.

The decision of the chancellor extends only to a refusal to dissolve the preliminary injunction. He decides no question of Federal jurisdiction.

On this refusal to dissolve, the case is taken to the Supreme Court, where that refusal is overruled and the injunction dissolved. There is here no Federal question decided.

Independent of this is the second ground, that there is no final judgment. The dissolution of the injunction still left the bill pending to be disposed of on its merits.

The judgment of the court is particularly invoked on the first ground for dismissal, as it would tend to bring this litigation to a speedier end.

Messrs. J. A. Elmore, S. F. Rice, and J. T. Morgan, contra:

In *Manaway* v. *The State*,* the Supreme Court of Alabama held that the provisions of this law, when complied with by Moses and his partner, conferred on them the rights of a contract.

If this is so, the contract is protected by the Constitution of the United States, and this court cannot be ousted of its appellate jurisdiction by a decision of the highest court of the State *that there was no contract*, which was what was decided when the decree of the court of chancery giving an injunction was reversed. Such a rule would exclude this court from all appellate power in all cases of contract, if the State courts should differ with it on the fact as to whether a contract existed, and would place it in the power of the State courts to shelter their decisions against review, and enable them, by the selection of the grounds of decision, to

* 44 Alabama, 375.

deny to a person a constitutional right, and also to admeasure and restrict the appellate power of this court. In such cases the appellate power of the Supreme Court rests, in a measure, on the nature of the question in the case, arising on the pleadings and proofs, and the State court cannot shut the question out of the case, and exclude it from the cognizance of the Supreme Court of the United States by ignoring it, or pretermitting all notice of it, or even by denying its existence.

The CHIEF JUSTICE:

The motion to dismiss is rested upon two grounds: First, that none of the questions specified in the Judiciary Act of 1867 were raised in the Supreme Court of Alabama; second, that there was no final judgment.

As we are clearly of opinion that we have no jurisdiction of the case for the second reason it is unnecessary to consider the first. Obviously, there was no final decree. The only decree rendered in the Supreme Court was that the injunction of the court below be dissolved. That decree was in no sense final. It left the whole case to be disposed of upon its merits. This has been frequently decided.

WRIT DISMISSED.

DAVENPORT CITY *v.* DOWS.

The ordinances of municipal corporations laying taxes cannot be regarded as the revenue laws of the State from which they derive their power of laying taxes, within the meaning of the act of June 30th, 1870, which makes it the duty of the court to give to causes, where the execution of the *revenue laws of any State* are enjoined or suspended by judicial order, preference, or priority over all other civil causes; and gives to the State or the party claiming under the laws of the State, the execution of whose revenue laws is enjoined or suspended, the right to have such cause heard at any time after docketing in preference to any other civil cause between private parties.

ON motion to advance on the docket an appeal from the

Circuit Court for the District of Iowa, and to assign it specially for hearing. The case was thus:

Prior to June 30th, 1870, the order of hearing causes here was regulated by rule. Criminal cases were advanced, by leave of court, on motion of either party. Revenue cases and cases in which the United States are concerned, which also involve or affect some matter of general public interest, were advanced, by leave of court, on motion of the Attorney-General. All other cases were required to be heard in their regular order, unless special and peculiar circumstances were shown to the court. An act of Congress of the date just named,* made it the duty of the court to give to causes wherein a State was a party or where the execution of the "revenue laws of a State" is enjoined or suspended by judicial order, preference and priority over all other civil causes; and gave to the State, or the party claiming under the laws of the State, the execution of whose revenue laws is enjoined or suspended, the right to have such cause heard at any time after docketing in preference to any other civil cause between private parties.

The appeal, which it was now moved to advance, was from a decree on a bill in the court below, filed by one Dows, a stockholder in a railroad company, whose road passed through the city of Davenport, to enjoin the collection of a tax levied by the city on the property of the company situated within it. The bill was based on the alleged non-liability of the company to such taxation. The decree below awarded a perpetual injunction, from which the city had taken this appeal.

The charter of the city authorized it to levy and collect taxes on "all taxable property, real, personal, and mixed, within the city."

Mr. J. N. Rogers, in support of the motion:

The case is within both the letter and the spirit of the act of June 30th, 1870, as to advancing causes. The phrase,

* 16 Stat. at Large, 176.

"revenue laws of a State," includes any State law authorizing taxation; whether for the benefit of the State at large, a county or other municipal corporation. The city of Davenport in laying taxes, exercises the taxing power of the State of Iowa, delegated to it for certain purposes. And it claims in this suit under the law of the State.

It is important to the city to have a speedy determination in this case, as the decree appealed from is of course used to defeat the collection not only of the particular tax directly in controversy in the case, but of subsequent taxes on the same property.

Mr. T. F. Withrow, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The question in this case is, whether the laws for collection of taxes imposed by the city of Davenport are revenue laws of the State of Iowa.

We do not think that the ordinances of municipal corporations levying taxes can be classed as revenue laws of a State. Congress seems to have intended to give to the State the right to preference in hearing when itself a party to a cause pending in this court, and a like preference when the execution of the revenue laws of a State is enjoined or suspended, to any party claiming under such laws. This preference is given, plainly enough, because of the presumed importance of such cases to the administration and internal welfare of the States, and because of their dignity as equal members of the Union. The reasons for preference do not apply to municipal corporations, more than to railroad and many other corporations.

Nothing is shown to us which requires the advancement of the cause on account of special and peculiar circumstances.

MOTION DENIED.

HALL v. JORDAN.

On a bill to enforce a vendor's lien, where the vendee set up that the deed which the complainant had given him was insufficiently stamped (which fact if true would under an act of Congress prevent its being used in evidence), the Supreme Court of a State, disregarding the objection, enforced the lien. The vendée brought the case here as within the 25th section of the Judiciary Act. *Held*, that however frivolous the objection of the vendee, it raised a question under the section.

ON motion to dismiss for want of jurisdiction; the case being this:

Jordan, on the 1st November, 1866, sold a tract of land to Hall and Conley; they paying him $6500 in gold and giving him their obligation to pay him on the 25th December, 1867, "an amount in the legal currency of the United States sufficient to purchase $6890 of the present gold coin of the United States." Jordan made them a deed accordingly, in which, however, the consideration was stated to be "thirteen thousand dollars" to the grantor then in hand paid, and the receipt of which the deed acknowledged.

An act of Congress of June 30th, 1864,* enacts that on deeds of land there shall be a stamp of $1 for each $1000 of consideration-money, and fifty cents for every fraction of the sum last named, and that no deed not properly stamped shall be received in evidence. It makes provision for the rectification of unintentional error on the subject.

The stamp on this deed was one of $13. The amount sufficient to purchase $6890 of the then gold coin of the United States not being paid to Jordan on the 25th of December, 1867 (gold coin being then about 32 per cent. above currency), he filed a bill in one of the State courts of Tennessee setting forth the fact of his sale, and appending a copy of the deed with the $13 stamp, alleging that about $8000 in currency value was still due and unpaid, praying that his lien as vendor against the land be enforced, an ac-

* 15 Stat. at Large, 295.

count be taken, and the land sold. The defendant set up, among other defences, that Jordan was seeking to recover more than the amount of $13,000 and interest thereon, the original purchase-money, and more than the amount covered by the revenue stamps attached to the deed; and that if he was allowed to do so, the deed executed would be absolutely null and void, and convey no title to them, by reason of its being insufficiently stamped. And they prayed that if he was allowed to collect more than $13,000 in all, he should be compelled to execute a deed, sufficiently stamped to be valid and binding.

The court ordered the lien to be enforced, and that the vendor recover $8741 (an amount reported due by a master), and that sale should be in default of payment. The Supreme Court of the State affirmed this decree, and Hall and Conley appealed to this court under the assumption that they had set up a right under an act of Congress, and that it had been decided against; a state of things when a power of review by this court is given by the third paragraph of the Judiciary Act, quoted *supra*, p. 3.

Mr. F. P. Stanton, in support of the motion:

The question of stamp does not enter into the case. The suit was on the note, and not to set up and enforce the deed. The consideration expressed on the deed was $13,000, and the stamp was a proper one for that consideration. It was right *primâ facie* and sufficient to make the deed evidence.

The rule of law required vendees to pay for the stamps. They cannot hold the bond and refuse to pay the purchase-money on the pretence that an insufficient stamp was affixed. They can still, themselves, affix a proper stamp.

Moreover, *fraudulent intent* must be proved to destroy the validity of an unstamped instrument. But the vendees, plaintiffs in error, do not admit that they have been guilty of this fraud, nor do they charge it on Jordan, the vendor.

Mr. J. H. Embry and Reverdy Johnson, contra.

Statement of the case.

The CHIEF JUSTICE:

The defendant claimed that a deed offered in evidence was void, because the stamps upon it amounted only to $13 when they should have been $13.50. The court admitted the deed, although the act of Congress provided that no deed not properly stamped should be received in evidence. The decision was against the right claimed by the defendant under the act of Congress, and necessarily involved its construction.

However frivolous the objection, it undoubtedly raised a question under the 25th section of the Judiciary Act, the decision of which may be revised in this court upon a writ of error.

MOTION TO DISMISS DENIED.

MONTGOMERY *v.* UNITED STATES.

1. B., a loyal citizen of the United States, at New Orleans, had been, prior to the rebellion, agent of a planter, J., who during the rebellion was a rebel, in the rebel region and lines, within which his plantation was. B. had been in the habit before the war of making advances to J. to assist him in getting forward his crops; and by an agreement with J. was to have a lien on the crops for the advances, and a power to sell for repayment. After the war broke out, B., at New Orleans (now reduced to the possession of the Federal government), *describing himself as "agent,"* of J., agreed to sell to M., a British subject, also domiciled in New Orleans, a crop on which he had made advances above its value, belonging to J., and then on his said plantation: *describing the property as J.'s*, and not in any way referring to his own lien on or interest in it. *Held* that the sale was void, as being a trading with a public enemy.
2. Every kind of trading or commercial dealing or intercourse, whether by transmission of money or of goods, or orders for the delivery of either, between two countries at war, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, is void.

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

R. H. Montgomery, a British subject domiciled in New Orleans before and during the war of the rebellion, after

the capture of that city by the forces of the United States, in April, 1862, made a written agreement with J. W. Burbridge, a loyal person residing in that city, doing business as Burbridge & Co., and the factor and agent of one Leo Johnson, a planter, residing at that time in the parish of La Fourche, Louisiana, and *within the enemy's lines;* by which Burbridge & Co., as "*the agents* of the said Johnson, declared that they had sold, and thereby did sell unto the said R. H. Montgomery, '*the following crop belonging to said Johnson, on his plantation, in the parish of La Fourche, near La Fourche Crossings*, to wit: 605 hogsheads of sugar, 700 barrels of molasses, and 300 barrels of rum, at the following prices, to wit: For the sugar, at 4½ cents per pound; for the molasses, at 20 cents per gallon; and for the rum, at 50 cents per gallon, the weight and quantity to be determined at the time and upon the delivery thereof in New Orleans.'"

Montgomery paid to Burbridge & Co. $5000, the receipt whereof was declared in the agreement to be thereby acknowledged, "and accepted as so much on account of the first sugar, molasses, or rum delivered to him, said Montgomery, as aforestated; the balance to be paid by said Montgomery at each future delivery of said sugar, molasses, and rum." The sum of $9000 was paid afterwards.

Burbridge, on the day of the contract, signed an order directing the overseer of Johnson's plantation "to deliver to the order of the said R. H. Montgomery the entire crop of sugar, molasses, and rum contained in the sugar-house, purgeries, &c., on the said plantation, the same," said the order, "having been sold to him this day."

All the sugars and produce mentioned by the agreement having, as already said, at the time when it was made, been within the rebel lines of occupation, no actual delivery or possession was taken of any part, nor any attempt made to deliver or take possession until the sugar was brought, some time afterwards, into the Federal lines by the forces of the United States.

On the 9th of September, 1862, General Butler then commanding at New Orleans, issued a proclamation whereby,

among other things, all the property within the district known as the district of La Fourche, and including the plantation where the sugar in question then was, was sequestrated, and all sales and transfers of the same forbidden and declared to be invalid. A commission was appointed to take possession of the property and make an accurate inventory of the same, and to gather and collect all personal property covered by the proclamation and to dispose of it in the manner therein provided. Immediately after the issuing of this order the government forces took possession of Johnson's plantation and delivered to the commission about 500 hogsheads of sugar (being a portion of that embraced in the contract), which they sold; paying the net proceeds, amounting to $37,351, into the Treasury of the United States.

Burbridge & Co., for two years before May, 1862, had been the factors and agents of Johnson, and had made advances to him to enable him to secure his crops, and Johnson owed them for such advances, prior to December 9th, 1862, $131,000. Burbridge & Co., as a part of the original agreement made between them and Johnson, were to have a lien on, and were authorized to make sale of, the crop of sugars and produce on the plantation for the purpose of reimbursing themselves the amount of their advances. The sugars, &c., in question were of the crop of the year 1860 and 1861.

Montgomery now filed in the Court of Claims a claim for the proceeds of the sugar, under the Captured and Abandoned Property Act of March 12th, 1863, which enacts, among other things:

"That any person claiming to have been the owner of such abandoned and captured property, may at any time within two years bring his action. . . . And on proof, to the satisfaction of said court, of his ownership of said property, and of his right to the proceeds thereof, may recover," &c.

The Court of Claims held that the appellant was not entitled to recover. They said, among other things:

"A careful examination of the agreement between Burbridge

& Co. and the claimant (admitting the authority of Burbridge & Co. to make it), satisfies us that no ownership of the property vested in Montgomery. The transaction did not constitute a sale, but only an executory contract for a future sale and delivery. . . . Where a sale is agreed upon of goods, and anything remains to be done to ascertain the quantity or price, the property in such case does not vest in the buyer until this is done."

The court also assumed, apparently, that property situated outside of the Federal lines, and within the rebel lines, was not a lawful subject-matter of sale, between parties such as these were.* The court accordingly dismissed the petition, and Montgomery now brought the case here on appeal.

Mr. T. J. D. Fuller, for the appellant:

Had the Court of Claims in its observation about executory contracts said that "where a sale is agreed upon of goods, and anything remains to be done BY THE VENDOR to ascertain the quantity or price, the property in such case, does not vest in the buyer until this is done;" it would have stated the law truly, but it omitted the words which we put in capitals; and because of this omission—this oversight, or failure to make a proper distinction, found in the authorities,† it committed error.

Now, reading this contract in the light of authorities, and the order of delivery, there was nothing remaining to be done by the vendors.

As to the second point. The idea meant to be here presented by the Court of Claims is, of course, that the contract made a trading with the enemy in time of war. But Burbridge & Co. had a lien on the property far above all its value. They were in truth owners, though, speaking technically, we say that they had a power coupled with an interest in and over the produce of the plantation; and as factors had authority to sell the sugars to reimburse themselves for the advances previously made. But, as already

* See 5th Court of Claims Reports, 658.

† Crofoot *v.* Bennett, 2 Comstock, 258; Leonard *v.* Davis, 1 Black, 483.

said, being far in advance above the value of the crop, they were in truth owners of it; acting for themselves. They could be acting for nobody else. Johnson had no real interest in the crop. *Their* interest was supreme, for from it only were they likely to get their advances at all. Now, *they* were not enemies; contrariwise, they were subjects and friends. Reading the contract in the light of then existing facts, the expressions "*agent of Johnson*," "*the property of Johnson*," are merely words descriptive of the property sold, to identify it. Johnson was no party to the sale; his assent or dissent would not in anywise affect the interest of the parties to it.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice STRONG, delivered the opinion of the court.

Whether the contract under which the appellant claims to have become the owner of the sugar, molasses, and rum was so far executed that, without more, it would have passed the property, had it been legal, it is unnecessary to consider; for we are of opinion that, whether executed or executory, it was illegal and void. It was a clear case of trading with a public enemy. The subject of the contract was personal property within the Confederate lines. It was a crop at the time on the plantation of Leo Johnson, in the parish of La Fourche, near La Fourche Crossings. It belonged also to Johnson, who was then domiciled in the enemy's territory, and who was himself an enemy. This is expressly stated in the contract itself. The appellant's right, therefore, is founded upon an attempted purchase, during the war, from an enemy, of enemy's property, in direct violation not only of the laws which always prevail in a state of war, but also in violation of the acts of Congress. It is vain to contend that any right can be acquired under such a contract.

It is true the sale was negotiated by agents of Johnson, living outside of the enemy's territory, but it was not the less his act because it was done by those acting under his

authority. Nothing is clearer, says President Woolsey,* than that all commercial transactions of whatever kind (except ransom contracts), with the subjects, or in the territory of the enemy, whether direct or indirect, as through an agent or partner who is neutral, are illegal and void. This is not inconsistent with the doctrine that a resident in the territory of one belligerent may have in times of war an agent residing in the territory of the other belligerent, to whom his debtor may pay the debt, or deliver property in discharge of it. Such payments or deliveries involve no intercourse between enemies. The present case exhibits a transaction not wholly within enemy's territory, but a sale from an enemy to a friend. If that can be made through an agent, then the rule which prohibits commercial intercourse is a mere regulation of the mode of trade. It may be evaded by simply maintaining an agency in the enemy's territory. In this way every pound of cotton or of sugar might have been purchased by Northern traders from those engaged in the rebellion. Perhaps the rule is stated too broadly in Woolsey's Commentaries, and in many elementary books, but it is certain that "every kind of trading or commercial dealing or intercourse, whether by transmission of money or of goods, or orders for the delivery of either between two countries (at war), directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission," are prohibited.† The contract in this case contemplated the delivery of the sugar, molasses, and rum at New Orleans, then within the Federal lines. There, on its being weighed and measured, payment was to be made to Johnson's agents. If this be allowed, the enemy is benefited and his property is protected from seizure or confiscation.

It has been argued that because Burbridge & Co., the agents, had a lien upon the property for advances made by them, and had also a power to sell for the repayment of their advances, the sale which was made ought not to be re-

* International Law, § 117.

† Kershaw v. Kelsey, 100 Massachusetts, 561.

garded as a sale by Johnson. Yet the only authority they had to sell at all, resulted either from express power given to them by the owner, or from the relation to him in which they then stood. They might have sold their lien, or the debt secured by it; and had they done so, the sale would have involved no trading with the enemy. But they undertook to sell Johnson's property, describing it as such in the instrument of sale, and describing themselves as Johnson's agents. Very clearly, in effect, the parties to the transaction were the appellant and a public enemy. For this reason the judgment is

AFFIRMED.

RAILROAD COMPANY *v.* GLADMON.

1. While in a suit by an *adult* against a street railway company for injuries done to him while he was crossing the track of the company, it is true that the absence of reasonable care and caution on his part will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of it, or, as it is termed, "contributory negligence," is a defence to be proved by the other side.
2. The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years, is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child, a matter to be determined in each case by the circumstances of that case.
3. A prayer for instructions which assumes as existing, matters of which no proof is found in the record, and which are simply inferred to be facts by counsel making the prayer, ought not to be granted.
4. In this case the respective obligations of street railway companies on the one hand, and of persons (including children) crossing the tracks on which the rail-cars run on the other, are stated in the charge of the court below, and declared by this court in a general approval of it.

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

One of the drivers of the Washington and Georgetown Railway Company—a company chartered by Congress to

run cars through streets of the cities of Washington and Georgetown,—was, on a morning of April, 1868, driving a car through a populous portion of the latter place. Some person was standing beside him on the front platform of the car. Instead of looking at his horses and before him, he turned his face round and began to talk to this person; thus turning himself so as to look at a right angle to the course in which he was driving. Just as he turned his head, Oliver Gladmon, a child seven years old, attempted to run across the track, in front of the horses. Before he got across he turned to come back again. In some way which was not more particularly explained, before he got back he was severely injured by the horses or car. Hereupon his father, as next friend of the child, sued the company. The record showed no testimony but that of one witness, who mentioned the chief facts above stated, and testified "that if the driver had not been looking at his companion he could have checked the horses in time to have prevented the accident." At the close of this testimony, tending to show the negligence of the driver, the counsel of the railroad company asked the court to give the following instructions:

1. If the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an agent of defendant's, the burden of proof is on the plaintiff to show affirmatively not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his own part; and if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff caused the accident, or even contributed to it, or that it could have been avoided by the exercise of due care on his part, then the plaintiff is not entitled to recover whether the driver of the car was guilty of negligence or not, but the jury must find for defendant.

2. If the jury find that the plaintiff negligently or rashly attempted to cross the street in front of the car, but his injuries resulted from his having accidentally slipped and fallen on or near the track when endeavoring to turn back when it was too late to stop the car, it is to be regarded as an inevitable acci-

dent, for the consequences of which the defendant is not responsible.

3. If the plaintiff's injuries resulted from his attempting to cross the street so suddenly that the driver could not stop the car in time to avoid a collision with him, he is not entitled to recover.

4. That the driver of the car had a right to suppose that the plaintiff, when duly warned, would desist from the attempt to cross the street immediately in front of the car, and if such due warning was given, and it not being heeded, it was then too late to avert the accident, though the driver made every effort to do so, the plaintiff is not entitled to recover.

The court (CARTER, C. J.) refused to give these instructions, and charged as follows:

[The care of the defendant is to be tested by the exercise of adult judgment in treating undeveloped judgment in childhood. The defendant, in his duty under the law, is to be held to the exercise of adult judgment and caution when brought to bear upon the security of childhood and undeveloped judgment, and as a convertible proposition the child is to be held to the measure of childhood judgment; and I will give you some of the reasons for this determination:]

This corporation, under the operation of its charter, the authority of the law of its existence, is permitted to occupy the common thoroughfares of this city. It is created to move in those thoroughfares with the machinery that it has adopted as a carrier.

[It is not contemplated by law, under the authority of their creation, that they occupy the thoroughfares of Washington and Georgetown, to the exclusion of an occupation, the right of the citizens of the cities to do so—an easement that belongs to all men, women, and children of all grades of intelligence and circumspection, from the lowest grade of description to the highest. The rule that I have laid down covers the whole compass of description—from childhood to manhood, from infant judgment to ripe judgment—and was determined by the court for the reason that the occupation of these streets is the common property of all in common and the regulation of the intercourse each with the other must have reference to and be qualified by that common right.]

I do not wish to be understood in advancing this rule, as saying that this corporation are compelled to work this road through the thoroughfares of the streets of the District, as amid a population of blind or deaf men. They are not obliged to furnish eyes that others may see, or ears that others may hear. The responsibility of the highway is not theirs alone. Every person who enters upon it, enters upon it under the obligation to exercise a certain judgment in the preservation of his or her own life.

[The degree of that accountability varies with the age and capacity of the individual, until you get to a point where the occupant of the highway is utterly disqualified from protecting him or herself for the want of discretion.]

At that point the liability to exercise discretion for him is to be found in another quarter than with the stranger. At that point the liability of the guardian attaches and not the liability of the defendant.

There is another suggestion in explanation of this text of the law, as the court has given it, which it may not be improper to give at this time.

While the railroad, in working its cars through this city, is charged with caution, and strict caution, as far as their movement may affect adversely the rights of others, they are chargeable with no higher caution than can be exercised with the machinery which the law permits them to employ in performing the service of a common carrier in the District. This remark is made with reference to the character of a car, and the difficulty in bringing it to an instant pause. The car, to be of any service to the public, must be in motion, must move at intervals at least; and when in motion, its momentum requires time to bring it to a pause. There is nothing in the obligation of a circumspection resting upon this company that compels them to do what cannot be done. They have a right to the measure of time necessary to bring their car to a state of rest. There is no other rule by which these different interests of different citizens, and under different circumstances, can be regulated in the enjoyment of a common easement. They have the right to pass across, and the right to pass over the streets of the cities; and in estimating the proof for the plaintiff and the defendant in this case, it is your duty to look upon the relations of each to the other, and the rights of one citizen with another in a com-

mon enjoyment and a common right, and answer, yourselves, the question, Have these relative rights been offended in this case, as made manifest by the proof? If they have, trace the violation to the offender, and hold him accountable in the consequence of his violating the right.

[I am requested to say to you that if the defendant in this case was in the wrong, if the car of the defendant was moving with greater speed than good precaution and judgment would dictate, yet if you find from the testimony that the plaintiff, by his own act and in his own fault, superinduced the injury of which he now complains, that he may not recover.

That *is* the law, gentlemen. But in estimating that you will go back again to the foundation principle laid down in the government of the law of this case, and estimate the fault, the indiscretion, by the measure of the years of the plaintiff. You have got to adopt one of two rules here, and I have concluded it to be my duty to adopt the rule I have laid down; either to judge this child's conduct under the measure of his years, and the measure of his discretion, or pronounce that no action lies in behalf of a child, or demand of the child a measure of judgment that nature has not given to him, which would be a greater outrage upon good logic than to pronounce he had no remedy.

Now, if you find from the facts that this child interposed himself in the way of this car at a time when it could not be arrested, and under circumstances where he could not be seen under watchful, reasonably watchful, strictly watchful care on the part of the driver, where the car could not be brought to a pause early enough to save his body from injury, the defendant is not liable. If you find, on the contrary, that this child came upon the theatre of observation there at a time when the driver, attending to his duty, may have observed him, and observed him as an infant, with power to arrest his car to save him, you will hold this corporation responsible for the injury done to him; and it appears to me that the whole case lies pretty much there, too.]

However, I do not wish to comment on the facts. That is your province. Take the case and dispose of it.

The defendant excepted to the parts of the charge above in [ ]. The jury found for the plaintiff $9000 and costs, and judgment being entered accordingly the case was

brought here on exception to the refusal to charge as requested, and to the charge as given.

Messrs. J. P. Bradley and J. P. Bradley, Jr., for the plaintiff in error; Messrs. R. T. Merrick and W. F. Mattingly, contra.

Mr. Justice HUNT delivered the opinion of the court.

Sufficient proof was given to establish the negligence of the driver of the car, and no point is raised on that branch of the case.

The alleged errors arise from refusals to give certain instructions upon the effect of the conduct of the child, and of the charge as actually made on that subject. The first prayer for instructions is stated in the record in the words following:

"If the jury find from the evidence that the plaintiff's injuries resulted from his attempting to cross a street in front of an approaching car, driven by an agent of defendants, the burden of proof is on the plaintiff to show affirmatively, not only the want of ordinary care and caution on the part of the driver, but the exercise of due care and caution on his own part; and if the jury find from the evidence that the negligence or want of due care or caution of the plaintiff caused the accident, or even contributed to it, or that it could have been avoided by the exercise of due care on his own part, then the plaintiff is not entitled to recover, whether the driver of the car was guilty of negligence or not, but the jury must find for defendant."

As applied to *adult* parties, the first branch of this proposition is not correct. While it is true that the absence of reasonable care and caution, on the part of one seeking to recover for an injury so received, will prevent a recovery, it is not correct to say that it is incumbent upon him to prove such care and caution. The want of such care or contributory negligence, as it is termed, is a defence to be proved by the other side.

The plaintiff may establish the negligence of the defend-

ant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof on that point does not rest upon the plaintiff.* In the case of *Oldfield* v. *The New York and Harlem Railroad Company*,† Denio, J., says:

"I am of opinion that it is not a rule of law of universal application that the plaintiff must prove affirmatively that his own conduct, on the occasion of the injury, was cautious and prudent. The *onus probandi*, in this as in most other cases, depends upon the position of the affair as it stands upon the undisputed facts. Thus, if a carriage be driven furiously through a crowded thoroughfare, and a person is run over, he would not be obliged to prove that he was cautious and attentive, and he might recover, though there were no witnesses of his actual conduct. The natural instinct of self-preservation would stand in the place of positive evidence, and the dangerous tendency of the defendant's conduct would create so strong a probability that the injury happened through his fault that no other evidence would be required. . . . The culpability of the defendant must be affirmatively proved before the case can go to the jury, but the absence of any fault on the part of the plaintiff may be inferred from circumstances; and the disposition of men to take care of themselves and keep out of difficulty may properly be taken into consideration."

The later cases in the New York Court of Appeals I think will show that the trials have almost uniformly proceeded upon the theory that the plaintiff is not bound to prove affirmatively that he was himself free from negligence, and this theory has been accepted as the true one. Generally, as here, the proof which shows the defendant's negligence, shows also the negligence or the caution of the plaintiff.

* Oldfield *v.* New York and Harlem Railroad Co., 3 E. D. Smith, 103; affirmed 14 New York, 310; Johnson *v.* Hudson River Railroad Co., 20 New York, 65; Button *v.* Same, 18 Id. 248; Wilds *v.* Same, 24 New York, 430.

† 3 E. D. Smith, 103.

The question of the burden of proof is, therefore, not usually presented with prominence. In some of the States it has been held that the plaintiff was bound to make affirmative proof of his freedom from negligence. In many cases it is so held by virtue of local statutes.*

There is, however, another and very satisfactory reason for the refusal to comply with the prayer. The rule of law in regard to the negligence of an adult, and the rule in regard to that of an infant of tender years is quite different. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. If he fails to give it, his injury is the result of his own folly, and cannot be visited upon another. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. Of a child of three years of age less caution would be required than of one of seven, and of a child of seven less than of one of twelve or fifteen. The caution required is according to the maturity and capacity of the child, and this is to be determined in each case by the circumstances of that case.†

The rule laid down in the request under consideration entirely ignores this difference. Assuming that it would have been a sound rule if the plaintiff had been an adult, it is evident that the jury would not have been justified in applying it in this case. That "due care and caution" required of plaintiffs generally, was not required of the plaintiff here. If it had been given as requested, the instruction would have been quite certain to mislead the jury to the prejudice of the plaintiff. It was properly refused.

The instruction asked for in the second prayer, and which the judge refused to give, was as follows:

* Sherman & Redfield on Negligence, §§ 43 and 44, and note where the cases are collected.

† Sherman & Redfield on Negligence, § 49; Mangam *v.* Brooklyn City Railroad, 38 New York, 455; O'Mara *v.* Hudson River Railroad Co., 38 New York, 445; Smith *v.* O'Connor, 48 Pennsylvania State, 218; Pennsylvania Railroad *v.* McTighe, 16 Id. 316.

"2. If the jury find that the plaintiff negligently or rashly attempted to cross the street in front of the car, but his injuries resulted from his having accidentally slipped and fallen on or near the track when endeavoring to turn back when it was too late to stop the car, it is to be regarded as an inevitable accident, for the consequences of which the defendant is not responsible."

The suggestions already made are applicable to this request. The circumstance that the plaintiff was an infant of tender years, and that a different rule was required in that case from the rule in the case of an adult, was excluded from the proposition. A charge in accordance with the prayer could not, therefore, have been properly made. The prayer also assumed as existing, facts of which no proof is found in the record. I do not find any evidence of the fact here assumed, that when the plaintiff slipped or fell, it was too late to stop the car. The evidence on that subject comes from the witness who testified in substance that if the driver had been attending to his duty he could have checked his horses in time. This witness gave the only evidence on the point. It is not allowable to assume as existing, facts not proved, and to ask a direction to the jury upon such assumption. This practice would tend to embarrass and mislead the jury.

The third and fourth prayers are of the same general character and do not require more particular consideration.

Exception is also taken to certain portions of the charge. The general scope and tendency of the charge is correct. The rule in regard to the liability of the defendant under the circumstances submitted to the jury is correctly given. The language is less simple, perhaps, than might have been desired, and detached sentences might be open to criticism, but upon the whole it is right, and the jury could not have failed to understand it correctly.

Some discussion was had upon the argument on the point of the degree of care and attention to be required of those having the charge and custody of an infant of tender years.

This presents an interesting question, which, when it is properly before us, will receive the careful attention of the court. In the present case it does not appear to have been presented to the court below, and there is nothing in the evidence to justify this court in now considering it. Upon the case, as it comes before us, the judgment must be

AFFIRMED.

TIFFANY *v.* LUCAS.

1. A sale by a person in fact insolvent and made within six months of a bankruptcy subsequently decreed, is not necessarily and without regard to its character, void under the 35th section of the Bankrupt Act.
2. If it was made in good faith, for the honest purpose of discharging debt, and in the confident expectation that by so doing the person could continue his business, it will be upheld. On the contrary, if he made it to evade the provisions of the Bankrupt Act, and to withdraw his property from its control, and the vendee either knew or had reasonable cause to believe that the vendor's intention was of this character, it will be avoided.
3. Thus two things must concur to avoid the sale: the fraudulent design of the bankrupt and the knowledge of it on the part of the vendee, or reasonable cause to believe it existed.

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

Lucas purchased in April, 1869, from Darby (then in debt) a piece of real estate in St. Louis: the deed being made on the 24th of that month. At a meeting of Darby's creditors, held on the 17th of June following, he was told by them that he must file his petition to be adjudged a bankrupt, or that he would be forced into bankruptcy. On that day he discontinued business, and on the 1st of July presented his petition praying to be adjudged a bankrupt, and on the 12th following was adjudged a bankrupt accordingly; one Tiffany being appointed his assignee. Tiffany soon afterwards filed a bill in the District Court for the District of Missouri,

to avoid the sale to Lucas as made in contravention of the 35th section of the Bankrupt Act. That section is thus:

"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 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 coming to his assignee in bankruptcy, or to prevent the same from being distributed under this act, or to defeat the object of, or in any way impair, hinder, or delay the operation and effect of, or evade any provision of this act, the sale, assignment, transfer, or conveyance shall be void. . . . 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 question, of course, was whether the sale had been made under any of the circumstances mentioned in this section. The facts seemed to be these:

The property was confessedly valuable. It was a large lot, at the southwest corner of Olive and Fifth Streets, St. Louis, 75 feet front on Fifth Street by 127 deep, with three marble stores, five stories high, upon it; that it had cost near or quite $100,000 to build; the position being by some thought, from their judgment as to the course trade in St. Louis was likely to take, and of prospective values, to be the best in that growing city; and by a few regarded even as such for its present advantages, though the general judgment was that a neighboring corner—the corner of Olive and Fourth—was at that time a better situation than this. Whatever was its relative advantage, its positive value was attested to in many ways. Among them, by the fact that in the summer of 1868, Darby wanting to borrow $150,000 on mortgage of an insurance company in Philadelphia on this property, Lucas, who had long lived in St. Louis, was possessed of great wealth and was particularly conversant with

the values of real estate, along with a certain Britton, president of the National Bank of the State of Missouri, also very conversant with values, gave him a certificate thus:

"Having been called upon by Mr. Darby to estimate and state the value of his property in the city of St. Louis, on the southwest corner of Olive and Fifth Streets [description], we state that we are well acquainted with it, and that we consider it *well* worth the sum of $300,000. We value the same accordingly at that sum.

"J. H. LUCAS.
"J. H. BRITTON.

"ST. LOUIS, September, 1868."

Lucas in buying the property paid $50,000 in cash, and assumed to pay the mortgage of $150,000, which had five years from November, 1868, to run, and bore interest at 8 per cent. a year. The mortgage required the owner of the property so long as it remained unpaid to keep the stores insured to the extent of $100,000. *After* the sale to Lucas was completed, there were different persons who said to Darby that they could have found a man who would have given more; "fellows," said Darby, "who came around and talked." One of them made mention particularly of a certain Robert Campbell, a man of property, who he said would have given more. But Campbell had never offered more. Darby had in fact, in a private way, been trying unsuccessfully for some time to sell the property. Certain persons testified, on the other hand, that in their opinion Lucas had given as much as the property was worth, in the then state of prices for real estate at St. Louis, where anticipations prevailed, among several persons, of a prompt return to specie payments, an event which, if it should occur, the dealers in real estate supposed would cause a great fall in the values there of that kind of property. Assuming, as the fact seemed to be, that productive real estate in the best parts of St. Louis commonly yielded 6 p. c. on its cost, and that money was worth 8 p. c. (the rate paid on the mortgage of $150,000), the rental of this particular property during a year that Lucas held it, indicated that the price, so far as

Statement of the case.

present income, and estimates divested of anticipations of future value were concerned, was not unfair. Thus—

The gross rental was, ...		$17,500
Deduct interest on $200,000 at 8 p. c., . .	$16,000	
Insurance, $100,000 at say ¾ of 1 p. c., . .	750	
Taxes (in 1869), ...	2,900	
Repairs, agency, care of the buildings, &c. (say),	350	
		20,000
Loss of annual income, compared with income from $200,000 personally, at interest at 8 p. c.,		$2,500

In fact the buildings, though very costly, had been injudiciously arranged. Adverting to the small income from the rents, witnesses who estimated the property at $300,000, and even $330,000, conceived that a 6 p. c. rental on that sum could soon be had, if about $10,000 were laid out in "gutting" part of the buildings and changing the plan.

When Lucas purchased the property of Darby there was just coming due to the insurance company six months' interest ($6000) on the mortgage given by Darby. This, and also the State and county taxes for the current year, Darby promised to pay. The former, he did pay; the latter, inasmuch as the collector did not come round until after he was bankrupt, when he was unable to pay, Lucas had to discharge.

The first movement in regard to the sale came from Darby, through one Hogeman. This Hogeman was cashier of the Boatman's Saving Bank, of which Lucas was a director—an "ornamental director," as he styled himself,—who "did not by any means consider himself responsible for what was done, and who went there more for the sake of getting the news than anything else." This same bank had been for a long time in the habit of discounting (when it was well indorsed) Darby's paper, and its cashier thus knew that Darby was always pressed for ready money. In this way, Hogeman stood in a sort of friendly relation to both the parties, and to both had apparently good feelings. Darby talked with Hogeman confidentially. "I told him," said he, "that I wanted to sell my property and settle my debts and quit-off everything; and I asked him to sell it for

me if he could, and do all that he could to sell it for me; and he promised to do it." Hogeman then offered the property to Lucas, and urged him to make a proposition. Lucas after a certain time offered $50,000. Darby wanted him to assume the payment of the taxes, $2900, for the current year. This he refused to do. He would give $50,000 and assume nothing but payment of the mortgage of $150,000. Things remained a few days, when Hogeman advised Darby to accept the offer. He said he thought that more could not be got; that the sum offered would enable Darby "to get out of debt, pay all up, square out, and relieve himself, and go on and sell out the residue of his real estate." Darby accordingly accepted the offer. A few days after that the parties met. Darby prepared and executed a deed for the property; Lucas filled up and signed a check for $50,000; not retaining any part of this purchase-money to pay either the $6000 interest now payable on the mortgage or the $2900 taxes for the current year then partially due. Hogeman received $500 from Darby for his services.

Thus, in the transaction itself, there seemed nothing that condemned it. The matters which involved it in question were certain facts indicative of Darby's condition and intent, which it was supposed by his assignee and general creditors *must* have been known to Lucas, and, if known, showed that he purchased knowing that Darby contemplated bankruptcy.

The case, in regard to these, seemed thus:

On the one hand, Darby, who had settled himself in St. Louis many years ago as an exchange broker, doing banking business also, was testified to be "a man of wonderful energy and capacity for business." He had failed in the fiscal crisis of 1841–2, but "worked through that dismal season, lost some of his property, but saved part and got soon on his feet again." In the next fiscal crisis, which was A.D. 1857, "he encountered enormous losses, went under for a while, but in the end came up and paid his debts with 10 p. c. interest;" so that in 1864 he was again afloat, and in

1867-8-9, a hopeful, active, and popular man of business—a broker and banker—on the full tide of money-making experiments, in various sorts of ways. He had some of the most valuable real estate in that large and growing city, including the property now in controversy and other valuable property in Main Street. He owned a lead mine also, in Missouri, from which in one year the yield was $33,000, and which would have been a source of income to him had it not been managed by fraudulent agents. His rents from his city property in inflated times, as *ex. gr.*, prior to 1857, and in that year, amounted to between $40,000 and $50,000. His probity and honor were conceded. He had warm friends; among them Dr. Brotherton and Mr. Knox, the latter of whom had once been his partner, and knew him well; men of character and property both, and who had apparently such confidence in his capacity and resources that they indorsed his paper continually and for large sums, believing, as would seem, that though embarrassed he would bear himself up and in the end come out sound, so far at least as entire solvency was concerned. At the very time of his suspension he had depositors on his books to the extent of $170,000; among them Mr. Polk, a leading member of the bar at St. Louis, for $40,000, and Mr. Inge for $10,000. When Mr. Knox, who was a lawyer and gentleman of standing, was asked by the president of the Boatman's Savings Bank, which, as already and hereafter mentioned, was constantly discounting Darby's paper at rates of from 10 to 18 p. c., whether Darby was good, Mr. Knox replied that he was perfectly good, "as good as anybody." None of his paper ever got to protest, and he paid all his obligations as they came due. He appeared to have kept his efforts to raise money and all facts which might destroy his credit in a remarkable degree from the public generally; so that even persons in the walks of business seemed not much informed of the shifts to which he was driven. Mr. Britton, already named, president of a bank and an intimate acquaintance for years of Darby's, "could not say" that he regarded him for two or three years before his failure in imminent danger

of failing, and "was a good deal surprised when he heard that he had failed." He had, however, not gone now *voluntarily* into bankruptcy. On the contrary, though he had stopped payment and called his creditors together, he sought an extension; stating that with time he could pay all. It was one of his creditors, Mr. Polk, his largest depositor, who considered that he could not go on, and that the only safety of the creditors was an immediate winding up under the eye of a court of bankruptcy.

On the other hand, he seemed to be one of that class of persons—more or less known in all of the large cities of our country—who beginning with little or no capital, are yet doing from the outset a large business; always borrowing, or trying to borrow money; periodically failing, but never, as they consider, broken; or if broken in the end, broken only by other people, and by some *vis major* of commercial vicissitudes, for which, in their judgment, even the most prudent man is not responsible in the eye of discretion.

Thus the whole cash capital of Darby when after his failure in 1857 he set up the business of a banker in 1864, was $5000. For the rest he "did business on deposits." Though thus banking, and banking therefore in a way where credit was of supreme importance to him, his notes, continually prior to 1869, were in the hands of different street brokers—three or four at least—and often sold at from 1 to 1½ per cent. a month. All his real estate was incumbered to the fullest extent to which he could incumber it; the mortgages on it generally overdue. He had been paying as high as 10 per cent. interest on deposits. All the money he had on deposits, both in St. Louis and New York, was $800. He had no stocks or bills receivable. For six months before his suspension he had been discounting his rents. For three or four years before he suspended he had lost about $25,000 a year in his business; for two or three years prior to 1869 he had paid about $40,000 a year in usury. At the time of his suspension he had $50,000 of accommodation paper out.

His cashier and bookkeeper from 1866 up to the time of

his suspension was examined as a witness. His testimony gave a view of the interior conduct of the bank. The witness said in substance:

"I thought Mr. Darby was much embarrassed for two years before his failure. I judged so from the appearance of his cash and the trouble he had in getting money. From the time I went into his employment, he was in the constant habit of raising money through street brokers. Some of the checks drawn by his depositors were honored only after hesitancy; he sometimes had to get the money to pay them. Mr. Darby had a very small amount of cash on hand at any one time. I do not suppose that he ever had over $5000 on an average. Some five or six months before he failed I had to go to pay a check after banking hours at the Second National Bank. The check was for $150 or $175. During the last year he was in business, ten or twelve checks were presented when we had not money to meet them. I know it plagued me very often a great deal. It vexed me to think we had to put them off. I was often asked for a year or two before his failure if he was not much embarrassed. Of course, I always denied it, in order to save his credit. I do not know that anybody outside of his office knew of the shifts to which he was forced to resort for ready money. Five or six months before his failure he was uneasy about one of his depositors, Mr. Polk (who had a deposit of $40,000), calling for his money. It was payable on demand. He said that it would break him if Polk called on him as he expected that he would; that he would have to hurry round to see if he could make a raise of the money, and he did not know how he would raise it. He always remarked that he was trying to sell his lead mines; that if he could only sell them for $100,000 he could meet these things. His money on hand would not average over $5000; possibly he might have $5000 to-night, and $100 the next night; the next day he might have $10,000, and it would be drawn out before twelve o'clock next day. He had no great deal of money at the East—very little—for a year before his failure. He sold exchange on the East when he had no funds there, and then raised money to meet it. This he did a year before his failure; it became more common as early as the February before his failure. There was no entry on the books of the notes sold by street brokers. Very few active business men

had deposits there. His capital was $5000. Besides Mr. Polk's deposit of $40,000, Mr. Inge had a certificate for $10,000 also payable on demand. Polk called for $10,000; Mr. Inge never called for his."

On the other hand again, it was stated by this same witness, that when Darby without money there was thus drawing time-drafts on New York—"kiting"—to raise money for present urgent demands at St. Louis, he sold those drafts—in one instance two, amounting to $7500—"at the usual rates, . . . the regular rate of exchange at the time;" and this to banks; the Third National and the Traders'. Whether they were indorsed, and if so by whom, did not appear in the testimony.

Both Darby and Lucas were examined as witnesses, the former by the assignee; the latter for himself.

In regard to Darby the following questions and answers were made:

"Q. Were you in contemplation of bankruptcy at any time exceeding two months before you actually were compelled to take the benefit of the bankrupt law?

"A. I never thought of going into bankruptcy at all.

"Q. You always expected to settle up your debts and pay your creditors?

"A. That was my object, and I called my creditors together here, and asked them to let me settle up my debts; that I could do it, and that I had no expectation of going into bankruptcy.

"Q. Then you had no contemplation of going into bankruptcy when you stopped?

"A. Not when I stopped; but when I called my creditors together, I asked them to let me do this. Mr. Polk made a speech and said it could not be done, and they passed a resolution that I should go into bankruptcy, and that is the reason I went.

"Q. At the time you made this conveyance to Mr. Lucas, you had no expectation of going into bankruptcy?

"A. No, sir."

So Lucas. The bill filed by the assignee to set aside the sale, had charged that Lucas retained $6000 (the amount due for interest on the mortgage at the time of the sale) out

of the $50,000, the consideration of the sale, lest Darby should not pay it. The following questions and answers were now made.

"Q. Is this true?

"A. No, it is not; I never had the least idea of Mr. Darby's not paying it. The proof is that I paid him a $50,000 check without reservation of any kind. I have always thought Mr. Darby an honorable man—a man in business that could be relied upon. That was my opinion all the time, and I acted with him as I would with any other gentleman that I thought would be a punctilious business man.

"Q. State if you had confidence in his solvency also?

"A. I had, I assure you; it never occurred to me to think otherwise; I knew he had been embarrassed and borrowing money, but some of the best men in town indorsed for him, who were said to be perfectly good; stood by him, and I suppose knew more of his business, and would not have done it if they had not known that they were justified in so doing.

"Q. Had you any intimation that Mr. Darby was in bankrupt circumstances?

"A. No, sir; none whatever. I had no intimation from any quarter, except if it should be that a man's paper is selling on the street, and some person might think that is an evidence; but I know from my own experience that a man may sell his paper on the street at a great sacrifice and still not be broke, by any means.

"Q. When did you first receive any intimation or knowledge that Mr. Darby was a bankrupt?

"A. I do not recollect how long it was; but some time after the transaction I had with him."

The answer to the bill which had charged the insolvency of Darby at the time of the sale, and Lucas's knowledge of it then, ran thus:

"The respondent further answering says that disclosures and information subsequent to the date of the deed, have led the respondent to the conclusion that the said Darby was, at the time of making said deed, in insolvent circumstances, but at the time when the said deed was made and delivered, and the said con-

sideration paid, he, the said Lucas, had no suspicion or belief that the said Darby was in failing or insolvent circumstances, or in contemplation of bankruptcy or insolvency; nor had the said Lucas any reason to believe the said Darby to be insolvent, or to be acting in contemplation of insolvency at the time when the said sale and conveyance were effected, nor until a long time thereafter. On the contrary thereof, the said Lucas had been for many years acquainted with the said Darby as a banker, and the owner of valuable real estate in and about the city of St. Louis, and considered him a wealthy man. He knew that the said Darby had incumbered some of his real estate in furtherance of his business as a banker, but regarded such action on the part of the said Darby as indicating merely his, the said Darby's, belief that the profits he could make as banker out of the money borrowed, would exceed the interest he would pay therefor."

Speaking of the value of the property, Lucas said "that at one time Fifth Street looked as if business was going to run off of Fourth; but that this had been changed. Still that Fifth Street would come out in the long run, and that this would be one of the best pieces of property on it; that it was so now; but that the house was not well-planned, not planned as such a house ought to be; that it should be planned in a way greatly different, when it would be worth much more; but that he did not notice that till after he had bought it." Lucas had heard "that *somebody* had offered $300,000 for the property, but he never knew who that was." Darby, however, testified that he had never been offered $300,000 for the property, and that what Lucas heard was a mistake.

Britton, who with Lucas had given the certificate (*supra*, p. 412), when Lucas wanted to borrow money on the property, that it was well worth $300,000, was also examined. He said:

"I have this to say in regard to this certificate: I have been frequently called on to value property that way where parties made a loan, and where it was understood distinctly that they gave 50 per cent. only of the value of the property, and there-

fore I have been liberal in these valuations, and so stated to the parties where they have been made."

The District Court, where the bill was filed, dismissed it, and the Circuit Court affirmed the decree. The question here on appeal, where the matter was fully argued, was whether such action was right.

Mr. S. Knox, for the appellant; Mr. T. Gantt, contra.

Mr. Justice DAVIS delivered the opinion of the court.

There would seem to be no difficulty in ascertaining the meaning of Congress on the subject embraced in the 35th section of the Bankrupt Act (in contravention of which this sale is alleged to have been made), in its application to this case. Clearly *all* sales are not forbidden. It would be absurd to suppose that Congress intended to set the seal of condemnation on every transaction of the bankrupt which occurred within six months of bankruptcy, without regard to its character. A policy leading to such a result would be an excellent contrivance for paralyzing business, and cannot be imputed to Congress without an express declaration to that effect. The interdiction applies to sales for a fraudulent object, not to those with an honest purpose. The law does not recognize that every sale of property by an embarrassed person is necessarily in fraud of the Bankrupt Act. If it were so, no one would know with whom he could safely deal, and besides, a person in this condition would have no encouragement to make proper efforts to extricate himself from difficulty.

It is for the interest of the community that every one should continue his business, and avoid, if possible, going into bankruptcy, and yet how could this result be obtained if the privilege were denied a person who was unable to command ready money to meet his debts as they fell due, of making a fair disposition of his property in order to accomplish this object.

It is true he may fail, notwithstanding all his efforts, in keeping out of bankruptcy, and in that case any sale he has

made within six months of that event is subject to examination. If it shall turn out on that examination that it was made in good faith, for the honest purpose of discharging his indebtedness, and in the confident expectation that by so doing he could continue his business, it will be upheld. On the contrary, if he made it to evade the provisions of the Bankrupt Act, and to withdraw his property from its control, and his vendee either knew, or had reasonable cause to believe, that his intention was of this character, it will be avoided. Two things must concur to bring the sale within the prohibition of the law: the fraudulent design of the bankrupt and the knowledge of it on the part of the vendee, or reasonable cause to believe that it existed.

The evidence in this case, fairly weighed, negatives both these conditions. If Darby's conduct was unwise, it was prompted by correct motives. There could have been no intention, on his part, of violating any of the provisions of the bankrupt law, for he did not contemplate the necessity of going into bankruptcy. His action was not based on the idea, even, that he was in a bankrupt condition. On the contrary he believed his property, if converted into money, would pay his debts, and this belief induced him to set to work to accomplish that object. There was no thought of preferring one creditor over another, because he was convinced of his ability to pay all. In the execution of his purpose to sell his property and pay his debts, the sale was made to Lucas, and it cannot be impeached because it turns out that Darby was mistaken in his calculations. There is no arbitrary rule by which the good faith of a transaction can be tested. It may be that ordinary men in similar circumstances would have acted differently, but this is no reason to condemn the conduct of men like Darby. Possessed of uncommon energy and great business capacity; having in previous crises of his fortune surmounted difficulties of equal, if not greater, magnitude, he was not appalled by a state of affairs which, to a man not above the common level would have been a hopeless undertaking. That he failed proves nothing, for other men, whose integrity was

above suspicion, have also failed. It would have undoubtedly been better for some of his creditors if he had taken a less hopeful view of his situation, but they cannot on this account attack the sale in controversy. It was made in good faith for an honest purpose, and is not within the condemnation of the law.

If Darby did not intend to defraud his creditors by withdrawing his property from the operation of the Bankrupt Act, it is not easy to see how Lucas can be charged with aiding him to do it, even if at the time he suspected his insolvency. But it is unnecessary to consider this point, for, in our opinion, the evidence fails to establish that, at the time Lucas purchased the property, he had reasonable cause to believe Darby to be insolvent, or to be acting in contemplation of insolvency. If he believed him insolvent, why trust him to pay six thousand dollars due for interest in a few days after the sale, instead of retaining in his own hands enough money to pay it. His conduct on that occasion cannot be explained on the theory of his belief in Darby's insolvency; but we are not concerned with his actual belief on the subject. The real inquiry is, had he good grounds for believing that insolvency existed. It appears that Darby's banking paper had been met up to the date of the sale, and it is a fair inference that the real estate paper secured by deed of trust, which was overdue, remained in that condition by consent of parties. Britton, the president of the National Bank of the State of Missouri, located in St. Louis, considered Darby to be wealthy, and was a good deal surprised when he heard of his failure. This reputation for wealth was not confined to Britton, but was shared by others on account of a supposed ownership of a large amount of real estate. The Third National Bank and the Traders' Bank, a short time preceding the sale, took his exchange on New York at the usual rates, and others dealt with him as if he were entirely solvent. Polk, a leading lawyer of the city, held his certificate of deposit for forty thousand dollars, and Knox and Brotherton, prominent citizens, were in the habit of indorsing his paper. These parties, from their

course of dealing, of necessity regarded him as a solvent man. If so, why should Lucas suspect his condition to be otherwise?

All of them had equal opportunities with Lucas of knowing his real condition, and some far better, for Knox and Brotherton were on terms of intimacy with him, while Lucas was not. If they were ignorant of the exact state of his affairs, how can Lucas, with less familiarity with them, be supposed to be in a different condition. It is claimed, however, that Lucas is chargeable with notice that Darby's paper was in the hands of street brokers, because the Boatman's Institution, of which he was a director, purchased it from them, and that paper put on the street in this manner is evidence that the maker is insolvent. This conclusion by no means follows, for a man may sell his paper on the street at a great sacrifice to effect a purpose deemed beneficial by him, and still not be insolvent. This proceeding undoubtedly tended to show that Darby was embarrassed, but, if his paper bore the indorsement of good men of reputable standing and recognized wealth, it is reasonable to suppose they were satisfied with his pecuniary status. This supposition is verified in the case of Knox, one of the indorsers, who, when asked by the president of the institution "how good is Darby?" replied, "as good as anybody." It is fair to infer that this information quieted any misgivings which this officer had about purchasing the paper, and that Lucas, with the other directors, was told what Knox said. If so, it is idle to say that the confidence of Lucas in Darby's solvency had nothing to rest on. If it be conceded that the mode of raising money adopted by Darby had a tendency to create distrust in the mind of Lucas, it is nevertheless apparent that the fact of two men of substance indorsing his paper, coupled with the broad declaration of one of them on the subject of his pecuniary condition, was well calculated to remove this distrust and establish his credit.

It is contended, however, by way of impeachment of the good faith of the transaction in controversy, that the property was sold for less than its value, but we are by no means

satisfied that this is so. The evidence on this subject consists chiefly of the opinions of witnesses upon the relative and prospective values of corner lots upon rival streets. This mode of ascertaining the worth of property is necessarily uncertain and speculative. It is undoubtedly true that every person who buys property in a growing city like St. Louis expects it to rise in value, and that this consideration is more or less an element in every purchase. This expectation, however, is more particularly applicable to unproductive and unimproved property. It rarely occurs that valuable ground in the heart of a city, on which costly buildings are erected, is purchased on any other theory than that it will pay, from the time of its purchase, a fair return on the investment. Of course the purchaser looks forward to a gradual rise in the value of the ground which will compensate for the deterioration of the buildings, but the basis of the purchase, as a general thing, is the present rental value. He takes the risk of a change of business from the particular locality, which, as is well known, oftentimes works a serious injury. There is nothing to show that the property in question was not rented to as good an advantage as it could be, and, clearly, the net income received from it demonstrates that it was not sacrificed. Besides, Darby had been trying to sell it, but was unable to get more for it. There are plenty of witnesses who say it was sacrificed, but no one is produced, having the ability to buy, who testifies he would have given more for it than Lucas did. If, as is contended, Robert Campbell, a gentleman of large means, who had the purchase of the property under consideration when the negotiations with Lucas were concluded, would have paid a higher price for it, why is he not called to testify to that fact? In the nature of things, in a city like St. Louis, if this property could have been sold for more money than Lucas gave for it, direct proof was obtainable to show it. In the absence of this proof it is a reasonable presumption that the sale cannot be impeached because of inadequate consideration.

It is insisted, however, that Lucas was precluded from

purchasing at a sum less than $300,000, because he certified with Britton, in 1868, on the occasion of the negotiation of the loan of $150,000 by Darby, that the property was worth that sum. It is undeniable that this certificate was carelessly and loosely signed, because the parties making it had no good reason for saying the property was worth twice the money proposed to be lent on it. Britton says he makes a practice of regarding values with extreme liberality, when he knows the inquiry is made for the purpose of a loan and the property offered is abundant security for it. This is all wrong, and cannot be justified by any of the supposed exigencies of business. Lucas, in vindication of his action, tells us he was unaware at the time of the faulty construction of the building and the small amount of rents received, and, besides, that he had heard that some one had offered the sum named in the certificate for the property, though it turns out no such offer was made.

These things relieve him from the charge of making a certificate with intent to procure for Darby a credit to which he knew him not to be entitled, but they do not furnish a case of justification, as, manifestly, certificates to character or value should not be given unless they are known to be true. It cannot be doubted, from the evidence, that neither Lucas nor Britton meant to do anything wrong, and, if so, we know of no principle of law which would estop Lucas from disputing the correctness of the valuation named in the certificate in order to show his good faith and fair dealing in his transaction with Darby.

It is hardly necessary to say, in concluding this case, that the sale of real estate by Darby was not out of the usual course of business within the meaning of the Bankrupt Act.

DECREE AFFIRMED.

GRAHAM *v.* NORTON.

Mandamus from the District Courts will not lie by an assignee in bankruptcy, representing sundry bankrupts, against the auditor of a State, to recover from the State, taxes long before paid into the State treasury, upon the ground that the legislature had by law directed them to be refunded to the parties who had paid the same, or to their representatives. Such a mandamus is not ancillary to a jurisdiction already acquired, but is in effect an original proceeding.

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

The 13th section of the Judiciary Act enacts* that—

"The Supreme Court shall have power to issue writs of mandamus in cases warranted by the processes and usages of law to any courts appointed or persons holding office under the authority of the United States."

The 14th section, referring to certain courts of the United States, including the Circuit and District Courts, enacts that they

"Shall have power to issue writs of *scire facias*, *habeas corpus*, and ALL OTHER writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law."

With these statutory enactments in force, one Norton, the assignee in bankruptcy of certain bankrupts, presented, in May, 1871, his petition to the District Court of the United States, setting forth that before the persons now represented by him had been declared bankrupts, they had each paid to the State of Louisiana certain amounts respectively, "as taxes imposed by it under an act of the legislature; that the legislature had then recently, by a more recent act, declared the illegality of the said taxes, and enacted that they should be refunded to the parties who paid them, or to their proper representatives, and that the auditor of public accounts of

* 1 Stat. at Large, 81.

the State should issue to the said parties, or to their proper representatives, certificates of the amount paid by them; that by operation of law, and the assignments of all the assets, rights, and interests, to the petitioner of the said bankrupts, he, the said Norton, was entitled to the several amounts illegally collected by the State and to receive from the auditor the certificates; which, however, the auditor refused to issue to him; he accordingly prayed for a mandamus ordering the auditor of public accounts, one Graham, to deliver to him, as assignee in bankruptcy of the persons mentioned, certificates for the amount of taxes illegally collected," &c.

The District Court granted the mandamus and the Circuit Court affirmed its action; whether rightly was now the question here on appeal by the auditor.

Mr. P. Phillips (*a brief of Mr. T. Hunton being filed on the same side*), *for the appellant; Mr. T. J. Durant, contra.*

The CHIEF JUSTICE delivered the opinion of the court.

We are of opinion that neither the District nor the Circuit Court had jurisdiction to issue a writ of mandamus in this case.* This court has held that the writ may be used for the purpose of enforcing a judgment rendered by the Circuit Court, where its use by the State court for that purpose is sanctioned by State laws, but in such cases it is used as a process for the enforcement of judgments and not as an original proceeding.

In the thirteenth section of the Judiciary Act this court is clothed with power to issue "writs of mandamus in cases warranted by the processes and usages of law to any courts appointed or persons holding office under the authority of the United States."† This express authority to issue writs of mandamus to National courts and officers has always been held to exclude authority to issue these writs to State courts and officers.‡ The only exception is that just adverted to,

* Riggs *v.* Johnson County, 6 Wallace, 186. † 1 Stat. at Large, 81.

‡ Riggs *v.* Johnson County, 6 Wallace, 189.

where they have been issued as process to enforce judgments.

The fourteenth section clothes all the courts of the United States with power to issue certain specific writs, and all other writs which may be necessary for the exercise of their respective jurisdictions. Of course Circuit Courts may issue writs of mandamus when necessary to the exercise of their jurisdiction, but they have no authority to issue it as an original writ in any case. The absence of the power in the Circuit Courts to issue writs of mandamus, except as ancillary to a jurisdiction already acquired, is so well explained in *Bath County* v. *Amy*,* that it is unnecessary to pursue the subject further.

JUDGMENT REVERSED, and the case remanded with directions to

DISMISS THE SUIT FOR WANT OF JURISDICTION.

Mr. Justice BRADLEY:

I concur in the judgment of the court, on the ground that the case was not on its merits a proper one for a mandamus. I think it unnecessary to pass upon the question whether the bankrupt court may or may not in any case issue a mandamus to an officer of a State.

CITY OF RICHMOND *v.* SMITH.

The council of the city of Richmond, towards the close of the rebellion, and in anticipation of the entry into the city of the forces of the United States, which were then beleaguering it, passed a resolution that the stock of liquors in the city should be destroyed by committees to be appointed to do this, who should give receipts to the holders; the council pledging the faith of the city to the holders for the value. The stock of S was destroyed accordingly. Almost immediately afterwards, the Confederate government, against the protest and remonstrance of the city council, set fire to certain tobacco warehouses and other buildings

* 13 Wallace, 247.

Statement of the case.

near the premises where S had his liquors, whereby the premises of S. and his liquors were destroyed. S. sued the city, counting specially on the resolutions, the destruction of his liquor, and stating that he had no receipts. The city demurred. The court overruled the demurrer.

The defendant then pleaded specially the fact of the firing of the tobacco warehouse, &c., *near* to S 's premises, and that at the instant of destruction the premises were about to take fire from the tobacco warehouses, and did in a short time thereafter actually take fire; that the city had no means to extinguish that fire, and that the liquors were consumed; and would have been consumed by the fire if the committee had not destroyed them, and that so they were of no value to the plaintiff. The plaintiff demurred. The court sustained the demurrer.

The parties now went to trial, when they agreed to waive a jury and to submit all questions of fact to the court, "with authority to draw all inferences and conclusions that a jury is authorized to draw from the evidence, and with liberty to either party to except to the judgment in the same manner and to the same extent that he might except to the verdict of a jury, and to object to the same for the same reasons and with the right to appeal from the same." The court found for the plaintiff generally.

Held (the highest State court of Virginia having in a similar case held the city liable):

1st. That the declaration was good; in other words, that the action lay against the city.

2d. That the special plea was bad; in other words, that the fact that the plaintiff would have lost his liquors in any event, was no defence.

3d. That the defendant could not under the agreement raise any questions as to the effect of evidence, &c., in this court, with a view of making this court find as true the facts set forth in the special plea; which plea, as above mentioned, if true, was declared to be no defence.

ERROR to the Circuit Court for Virginia; the case being thus:

On the 2d of April, 1865—the rebellion then in throes, and the city of Richmond lying open to the entry of the government troops that had beleaguered it—its council, in order to prevent drunkenness, and some of the horrors incident to the occupation of a town by an invading army, passed certain resolutions, hereinafter set forth, for the destruction of all liquor in the city; and pledging the faith of the city to the owner for payment of its value. A stock of liquor owned by one Smith was thus destroyed, and on the suppression of the rebellion and the return of peace, Smith sued the city accordingly.

Statement of the case.

The declaration contained two counts; one special and the other general. The special count alleged that,

"Whereas, on the 2d of April, 1865, in the then condition of the government and army of what were then called the Confederate States of America, and in contemplation of the said army giving way to the army of the United States of America, there was held in the said city a meeting of the council of the said city for what was then considered a work of necessity, and at the said meeting the council of said city adopted certain resolutions as follows:

"1. *Resolved*, That it is the imperative duty of this council, in case of the evacuation of this city by the government and army, to provide, as far as it can, for the immediate destruction of the stock of liquor in the city.

"2. *Resolved*, That a committee of twenty-five citizens in each ward be appointed by the president, to act on behalf of the city, and proceed at once to accomplish this object, that said committee destroy, on the premises, all the liquor they can find, *giving receipts for the same to the holders.*

"3. *Resolved*, That the faith of the city be, and is hereby, pledged for the payment of the value of all liquor so destroyed to the holders of said receipts.

"And the plaintiff avers that, during the evening of the same 2d day of April, 1865, and the morning of the next day, there did occur such evacuation of the said city by the government and army, as was contemplated by the first of said resolutions; and that a committee was appointed, according to the second of said resolutions; and that, on the 3d day of April, 1865, said committee did, in pursuance of said second resolution, destroy on the premises a large quantity of liquor found by them, and in most of the cases did give receipts for the same to the holders; and among the liquor so destroyed, *and for which no receipts were so given*, was a large quantity of whisky, brandy, rum, and alcohol, to wit—particulars given—the total value of all which liquors amounts to the sum of $2832, whereof the plaintiff was before, and at the time of such destruction, lawfully possessed as of his own property, by means whereof the faith of the said city was, and is, pledged for the value of all the said liquor of the plaintiff so destroyed, to the plaintiff, which value amounts to a large sum of money, to wit, to the sum of $2832, of all which the defendant heretofore, to wit, on the 3d day of April, 1865, had due notice; by reason whereof the defendant became liable to pay to the plaintiff the said value, amounting,

as aforesaid, to a large sum of money, to wit, the sum last specified; and, being so liable, the said defendant, in consideration thereof, afterwards, to wit, on the day and in the year last mentioned, undertook and promised to pay him the same when the said defendant should be thereto afterwards requested."

To this special count the defendant demurred, but the court overruled the demurrer; the city excepting. A defendant, by the practice of Virginia, not losing the benefit of his demurrer by pleading over, the city then pleaded specially,

"That, at the time of the destruction of the liquor of the plaintiff, and long prior thereto, it had been determined by the *Confederate government* to set fire to the *tobacco warehouses* and other buildings in said city, upon the evacuation of the city, *against the protest and remonstrance of the said council*, and that one of the said warehouses was situated *near* the premises of the said *plaintiff;* that, in pursuance of the said determination the Confederate government did on the day aforesaid, set fire to the said *warehouses* and other buildings, whereby the premises of the plaintiff and all the property on them were destroyed by fire; and that said city had no means by which it could arrest and extinguish the fire; and that at the instant when the said committee were destroying the said liquor, the house of the plaintiff, in which the liquor was stored, was about to take fire, and did in a short time thereafter actually take fire and was consumed, and that the said liquors would have been consumed therein, as the said plaintiff was wholly unable to remove the same; and the defendant avers that the liquor of the plaintiff so destroyed *by the committee* as aforesaid would, if the same had not been so destroyed by the committee, have been consumed by the said fire; and that by reason thereof the liquor was of no value to the plaintiff, and by its destruction as aforesaid the said plaintiff has sustained no loss."

The plaintiff demurred generally. The demurrer was sustained.

The parties went to trial; agreeing to waive a trial by jury, and to submit all questions of law and fact to the decision of the court, "with authority to draw all the inferences and conclusions that a jury is authorized to draw from

the evidence, and with liberty to either party to except to the judgment of the court in the same manner and to the same extent that he might except to the *verdict of a jury*, and to object to the same *for the same reasons, and with the right to appeal from the same.*"

On the hearing the plaintiff gave evidence to show the destruction and value of his liquor; and in showing this, they showed that he got no receipts from the committee; that they had no time to give them, and here rested.

The record now proceeded in these words:

"And this being all the evidence he offered here closed his case.

"And then the defendant offered no evidence except evidence to prove the facts alleged and set forth in said special plea, but the court refused to receive said evidence and excluded the same; to which opinion of the court refusing to receive said evidence and excluding the same, the defendant excepted, and tendered this his bill of exceptions, and prayed that the same might be signed, sealed, and reserved to him, which is done accordingly.

"HUGH L. BOND,

[SEAL.] "Judge of the Circuit Court of the United States for the 4th Circuit and District of E. Virginia."

The court found the facts generally for the plaintiff, and gave judgment accordingly for $2832, with interest from the 3d of April, 1865.

To this judgment the defendant excepted, and the case was now here on error.

In this court the case was submitted on printed briefs, the only error assigned in that of the plaintiff in error being that—

"The Circuit Court erred in *overruling the demurrer to the special count in the plaintiff's declaration.*"

It is proper to mention that in the case of *Jones & Co.* v. *City of Richmond*,* on a suit against the city arising on the

* 18 Grattan, 517.

same resolutions, the Court of Appeals of Virginia had decided that the city was liable to the holders of receipts given under the resolutions of the city council.

Mr. L. R. Page, for the city, plaintiff in error:

There was error in overruling the demurrer to the special count in the declaration.

The liability of the city, if any there be, for the destruction of the plaintiff's liquors, can only be upheld upon the ground that the city made a valid contract to pay for their value. The destruction of this property was not a taking of private property for public uses, for which compensation is required to be made. The resolves of the city council were made and executed for the public weal, at a time of imminent peril. The rights of private property, sacred as they are, must yield to the higher demands of the public safety. In such cases *salus populi, suprema est lex.* The proceedings upon which the plaintiff below rested his claim, are like those where an individual or a municipality *raze* houses to prevent the spread of an existing conflagration; and it is well settled that this may be done without responsibility to the owner for the damages he sustains.

In *Mouse's Case*,* Lord Coke says:

"For the commonwealth, a man shall suffer damage, as for the saving of a city or town, a house shall be plucked down if the next be on fire. This every man may do, without being liable to an action."

There was, therefore, no consideration for the undertaking of the city to pay the value of the liquors destroyed. The judge who delivered the opinion derives the power of the city to make the order and pledge, from the *general welfare* clause in the charter. Similar provisions are to be found in the charter of nearly every municipality in the land, and yet it is believed no case can be found where the exercise of such powers has been maintained, unless there was express authority therefor, either in the charter or some

* 12 Reports, 63, Ib. 13.

general statute. It is manifest that the language of this general provision must be construed with reference to the other powers granted the city, otherwise the specific grant of powers would have been useless, and it is further manifest that the power to be exercised under these general words, must be exercised by fixed by-laws, rules, or ordinances, and not by some isolated and instantaneous act.

The decision is questioned by Dillon in his able treatise on Municipal Corporations,* and it is there intimated that the order for the destruction of liquors was not within the scope of the corporate powers of the city.

But if the decision in *Jones & Co.* v. *The City of Richmond*, as to the validity of this contract, be binding in this forum because it may be regarded as a local question, then it is insisted that the defendant in error has not brought himself within the terms of the resolutions of the council so as to entitle him to maintain this suit. He holds no receipt from the commissioners authorized to destroy the property, and the faith of the city is pledged only to those who hold such receipts.

Mr. W. F. Mattingly, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Prior to the surrender of the city of Richmond to the Federal forces, and in contemplation of that event, which took place on the same day, the city council adopted the following resolutions: (1.) That it is the imperative duty of this council, in case of the evacuation of this city by the government and army, to provide as far as it can for the immediate destruction of the stock of liquor in the city. (2.) That a committee of twenty-five citizens in each ward be appointed by the president to act in behalf of the city and proceed at once to accomplish this object; that said committee destroy on the premises all the liquor they can find, giving receipts for the same to the holders. (3.) That the faith of the city

* Page 366, note 1.

be, and is hereby, pledged for the payment of the value of all liquors so destroyed to the holders of said receipts.

Such evacuation of the said city by the government and army as that contemplated by the first resolution did occur during the evening of that day and the morning of the next day, and it appears that the committee contemplated by the second resolution was appointed, and that they, on the following day, in pursuance of said second resolution, destroyed on the premises of the plaintiff the liquors mentioned in the declaration, of the value specified in the bill of particulars filed in the case and annexed to the declaration.

Payment having been refused the plaintiff brought an action of assumpsit against the corporation defendants to recover the value of the liquors destroyed, as promised in the third resolution. Service was made, and the defendants having entered their appearance demurred to the special count, but the court overruled the demurrer and the parties having waived a jury submitted the cause under the pleadings to the decision of the court.

Two pleas were pleaded by the defendants, as follows: (1.) That they never undertook and promised as alleged in the declaration. (2.) That prior to the destruction of the liquors as alleged, the Confederate government determined, in case the city should be evacuated as supposed, to set fire to the warehouses and other buildings in the city, and that they did on that day set fire to such warehouses and buildings, including the premises of the plaintiff, and that the same were destroyed by fire; that the building in which the liquors were stored took fire shortly after the liquors were destroyed, and was consumed, and that the liquors, if they had not been destroyed, would have been consumed.

Issue was joined upon the first plea and the plaintiff demurred to the second, and the court sustained the demurrer and held the plea to be insufficient. Evidence was introduced by the plaintiff and the court rendered judgment in his favor for the sum of two thousand eight hundred and thirty-two dollars, and the defendants excepted and removed the cause into this court.

Opinion of the court.

Before proceeding to examine the questions which have been discussed at the bar, it becomes necessary to refer to certain other portions of the record, and more particularly to the agreement signed by the counsel waiving a trial by jury and submitting all questions of law and fact arising on the trial of the cause to the decision of the court. By that agreement it is also stipulated that the court may "draw all the inferences and conclusions that a jury is authorized to draw from the evidence, and with liberty to either party to except to the judgment of the court in the same manner and to the same extent that he might except to the verdict of a jury, and to object to the same for the same reasons."

Parties have a right to waive a trial by jury and submit the issues of fact to the determination of the Circuit Court, but they cannot by any such agreement make it the duty of this court to draw inferences and conclusions of fact from the evidence, nor to examine such inferences and conclusions of fact as may be drawn from the evidence by the Circuit Court.*

Pursuant to that agreement the court made a general finding as follows: "The court finds the facts for the plaintiff," and rendered judgment that the plaintiff recover of the defendants the sum of two thousand eight hundred and thirty-two dollars, with interest. Exceptions were taken at the time to the opinions of the court given against the defendants, but there is no exception to any ruling of the court in admitting or rejecting evidence, and no prayers for instructions of any kind were presented to the court.

Issues of fact in civil causes pending in the Circuit Courts may, if the parties so agree, be tried and determined by the court without the intervention of a jury, but such a submission necessarily implies that the facts shall be found by the court, and the act provides that the finding may be either general or special, and that it shall have the same effect as

* Shankland *v.* Washington, 5 Peters, 397; Suydam *v.* Williamson, 20 Howard, 434.

many years, a resident of the city of New Orleans. On the 9th of that month—being "a registered enemy" of the United States—a military order was issued that he should "leave that parish for the so-called Confederacy before the 15th instant." The order was obeyed. He proceeded to Mobile, and remained there until the capture of that place by the National forces in April, 1865. He thereupon returned immediately to New Orleans, and was not further molested there by the military authorities. The subjugation of the city of New Orleans by the forces of the United States became complete on the 6th of May, 1863. It remained thenceforward in their possession until the close of the insurrection. The absence of Lasere from New Orleans, like his departure, was enforced and involuntary. He intended to return, and, as soon as permitted to do so, did return and resume his residence. In the fall of 1863, after his expulsion, proceedings by executory process were instituted against him upon two mortgages for the seizure and sale of the mortgaged premises, consisting of a house and lot in New Orleans. The first order bears date on the 23d of November. On the 27th of that month the sheriff returned on the notice of demand of payment, that, "after diligent search and inquiry," he "was informed" that Lasere had "left the city and State without leaving an agent to represent him." A curator *ad hoc* was thereupon appointed, but it does not appear that he took any action. "After the legal delay had expired" the sheriff proceeded to advertise and sell the premises, and conveyed them to the purchaser. Lasere, after his return from Mobile, instituted the original cases to vacate those proceedings. They terminated in the adverse judgment which is before us for review.

It is contrary to the plainest principles of reason and justice that any one should be condemned as to person or property without an opportunity to be heard.* Scant time was allowed the plaintiff in error to prepare for his removal

* McVeigh *v.* United States, 11 Wallace, 267.

Statement of the case.

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

JUDGMENT AFFIRMED.

Mr. Justice BRADLEY, dissenting:

I dissent from the judgment of the court in this case. A resolution adopted by the common council of an insurgent city just before its occupation by our armies, for the purpose of keeping any class of property out of its hands by destroying the same, is a sheer act of war, and no contract or stipulation for indemnity to persons whose property was thus destroyed had any validity after the collapse of the Confederacy. The owners of tobacco, cotton, or machinery destroyed on similar occasions are just as much entitled to set up stipulations for indemnity. The wounded soldier has just as good a right to claim damages from the Confederate soldier who wounded him.

HANAUER *v.* WOODRUFF.

1. Bonds issued by authority of the convention of Arkansas, which attempted to carry that State out of the Union, for the purpose of supporting the war levied by the insurrectionary bodies then controlling that State against the Federal government, do not constitute a valid consideration for a promissory note, although bonds of that character were used as a circulating medium in Arkansas and about Memphis in the common and ordinary business transactions of the people.
2. The case of *Thorington* v. *Smith* (8 Wallace, 1) approved, but distinguished from the present case.

ON certificate of division in opinion between the judges of the Circuit Court for the Eastern District of Arkansas; the case being thus:

Hanauer sued Woodruff in the court below upon a promissory note executed by the latter, at Memphis, Tennessee, on the 22d of December, 1861, for $3099, payable twelve

months after date, if not before, with interest after maturity at the rate of 8 per cent. per annum. The case was tried in the District of Arkansas, by the Circuit Court, without the intervention of a jury, by stipulation of the parties. And the court found, specifically, that the only consideration of the note was certain bonds, issued by authority of the convention which attempted to carry the State of Arkansas out of the Federal Union, by an ordinance of secession; that these bonds were issued for the purpose of supporting the war levied by the insurrectionary bodies then controlling that State against the Federal government, and were styled "war-bonds" on their face, and that the purpose of their issue was well known to both the plaintiff and defendant. The court further found that at the time of the transaction between the parties, that is, at the time the note was given, these war-bonds had at Memphis and in Arkansas a value 25 per cent. below their par value; that those received by the defendant were not used nor intended to be used by him in direct support of the war, but were received by him to be used in the ordinary course of his business; and that bonds of this character were at that time used as a circulating medium in Arkansas and about Memphis, in the common and ordinary business transactions of the people.

Upon the facts thus found, the following questions of law arose, upon which the judges of the Circuit Court were divided in opinion:

1st. Was the consideration of the note void on the ground of public policy, so that no action could be sustained upon it in the Federal courts?

2d. Was the consideration of the note illegal under the principles of public law, the Constitution of the United States, and the laws of Congress, and the proclamations of the President relating to the rebellion, which existed and was pending when the note was made?

3d. If the bonds were a sufficient consideration to sustain the action, what was the measure of damages?

These three questions were now sent up to this court for answers.

Argument in support of the note.

Mr. A. H. Garland, for the plaintiff, Hanauer:

1. While it is true the *bonds* for which the note in suit was given were issued to be used in carrying on the war against the United States, yet as the particular bonds obtained by the defendant of the plaintiff were not used or intended to be used in support of that war, the contract is not void, but stands upon a good and valid consideration. The issuing of the bonds by the State of Arkansas can have no bearing on the matter now in question, unless both the parties to the note participated, in making their contract, in the intention with which the bonds were issued. The contract must grow out of, immediately, or be connected with, the immoral or illegal act to vitiate it; and if the promise be entirely disconnected from the illegal consideration or act, and is founded on a new consideration, it is good; and this though the party to whom the promise is made is the contriver and the conductor of the illegal act. This is the view taken by this court in *Armstrong* v. *Toler*,* *Kennett* v. *Chambers*,† and by other courts in numberless cases.

The defendant got the bonds and used them legitimately, and they were worth to him not much less than the sum expressed on their face. He did not use them for the war, nor did he intend to do so. To him they were as money. He should not be heard to say they were not money.‡

Recovery was denied in *Hanauer* v. *Doane*,§ because the notes sued on were given for goods sold in aid of the rebellion, both buyer and seller having knowledge of the use intended to be made of the goods.

2. But the finding by the court, that the bonds were used as a circulating medium among the people within the Confederate lines at and about Memphis, and had there much value, brings the case directly within *Thorington* v. *Smith*.‖ The doctrine of that case leaves nothing to discuss here. Indeed, without *Thorington* v. *Smith*, upon general principles,

* 11 Wheaton, 258.
† 14 Howard, 38.
‡ Pickard v. Bankes, 13 East, 20; Mason v. Waite, 17 Massachusetts, 563.
§ 12 Wallace, 342.
‖ 8 Id. 1.

this court has fully recognized as law all that is asked for Hanauer, and places that recognition upon the very cases already cited in this argument.*

3. *What is the measure of damages?*

This question is almost solved in determining the other. The note was given for so many dollars; and nothing less than dollars, as contracted for, will discharge the contract. The parties made their own contract and used plain words to express their meaning.

Mr. Justice FIELD delivered the opinion of the court, as follows:

The first question presented is embraced within the second, for if the consideration of the note was illegal under the Constitution of the United States and the laws of Congress, there can be no inquiry whether it was void for reasons of public policy. There can be no public policy in this country which contravenes the law of the land. And that the consideration was illegal and void under the Constitution and laws of the United States, does not admit of a doubt. If the Constitution be, as it declares on its face it is, the supreme law of the land, a contract or undertaking of any kind to destroy or impair its supremacy, or to aid or encourage any attempt to that end, must necessarily be unlawful, and can never be treated in a court sitting under that Constitution and exercising authority by virtue of its provisions, as a meritorious consideration for the promise of any one. The obligations of a traitorous combination, issued expressly to make war against and overthrow the government of the United States, can never give validity to any transaction which must seek the courts of that government for enforcement.

The issuing of the bonds in question was an act of open hostility to the United States; it was an act by which the convention declared its adherence to their enemies, and it gave aid and comfort to them. The purpose of their issue

* Thomas *v.* City of Richmond, 12 Wallace, 349.

being inscribed upon their face, notice of their character was imparted to every one. Wherever they were carried, they showed the taint of their origin, and no one could take them, or give currency to them, or part with value for them, without knowingly adding to the strength of the insurgents, and thus in some degree furthering their cause.

An ingenious argument is presented on the part of the able and learned counsel of the plaintiff, by which it is attempted to sustain the validity of the note in suit on the ground that it is a contract collateral to that upon which the bonds were issued, and therefore not tainted by it; and on the further ground that it is a contract based upon a valid consideration within the authority of the decision in the case of *Thorington* v. *Smith*.*

Neither ground can be maintained. The contract expressed by the note is indeed collateral to that upon which the bonds were issued; that is to say, it is not the same, but a different contract. Yet it is connected with that contract by the fact that the bonds constitute its consideration; it therefore gives value and currency to those bonds, and to that extent advances the purposes for which the bonds were issued. It thus draws to itself the illegality of the original transaction.

When a contract is thus connected by its consideration with an illegal transaction a court of justice will not aid its enforcement. It is sometimes said that the test whether a demand connected with an illegal transaction is capable of being enforced at law, is, whether the plaintiff requires any aid from the illegal transaction to establish his case. This test was given in *Simpson* v. *Bloss*,† by the court of Common Pleas, in England. But it is too narrow in its terms and excludes many cases where the plaintiff might establish his case independently of the illegal transaction, and yet would find his demand tainted by that transaction. He might, in some instances, establish his case by showing a simple loan of money, or a simple sale of goods, yet the court would

* 8 Wallace, 1.

† 7 Taunton, 246.

hold the contract of loan or sale to be invalid if at the time the money was loaned or the goods were sold he knew they were to be used for an illegal and criminal transaction, and the contract was made to further its execution.* Such was the decision of this court in the recent case of this same plaintiff against Doane, reported in 12th Wallace. There goods were sold to the defendant, the vendor knowing at the time that they were to be used in aid of the rebellion, and it was held that the sale was, from this knowledge, an illegal transaction on the part of the vendor and did not constitute a valid consideration for the note of the purchaser; and it was further held that due-bills given by the purchaser when taken up and paid by third parties with knowledge of the purpose for which they were issued, were equally invalid as a consideration for his note in their hands.

But notwithstanding the narrow terms of the test mentioned in the English decision, the present case falls directly within them. No inquiry can be made into the consideration of the note in suit without disclosing that it consists of bonds issued by one of the insurgent States to support the war levied by them against the United States. The plaintiff, therefore, cannot establish his case, his demand being contested, without aid from that illegal and treasonable transaction.

The decision in *Thorington* v. *Smith*,† does not control the present case. There it appeared that the plaintiff, Thorington, had sold a parcel of land situated in Montgomery, Alabama, to the defendant for $45,000. At that time, Alabama was in the occupation of the civil and military authorities of the Confederate States. There was no gold or silver coin, nor were there any notes of the United States in circulation in that State. The only currency in ordinary use, in which the daily business of the people was carried on, were treasury notes of the Confederate States, which in form and general appearance resembled bank bills. In these notes

* Cannan *v.* Bryce, 3 Barnewall & Alderson, 179; Pearce *v.* Brooks, 1 Law Reports, Exchequer, 214.

† 8 Wallace, 1.

$35,000 of the purchase-money of the land were paid, and a note was given for the balance, payable by its terms in dollars. It was by that term that Confederate notes were designated.

Upon the suppression of the rebellion these notes became of course valueless. Thorington then filed a bill to enforce a vendor's lien upon the land sold, claiming the balance of the stipulated purchase-money in lawful money of the United States. The defendant set up as a defence that the purchase of the land was made at Montgomery, Alabama, where the parties at the time resided; that the only currency then in vogue there consisted of treasury notes of the Confederate government; that the contract price for the land, $45,000, was to be paid in those notes; that $35,000 were thus paid; that the note in suit given for the balance was to be paid in the same manner, and that the actual value of the land in lawful money of the United States was only $3000. The court below held that as the payment was to be made in Confederate notes the contract was illegal, and dismissed the suit, and the case was brought to this court for review. One of the questions presented, and the most important one was, whether the contract thus made for the payment of Confederate notes during the rebellion, between parties residing in the Confederate States, could be enforced in the courts of the United States.

In examining this question, the court referred to the establishment of the Confederate government in 1861, and to the power it exercised over the territory of the States confederated in insurrection, observing that it was the actual government of all the territory of the insurgent States, except those portions protected from its control by the presence of the armed forces of the United States. It then considered the character of this government, and classed it in that description of *de facto* governments, which were aptly termed governments of paramount force. The distinguishing features of this kind of government, the court said, were, "(1) that its existence is maintained by active military power within the territories and against the rightful authority of

an established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens, who by acts of 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."

Illustrations of this sort of government were found in the case of Castine, in Maine, reduced to British possession during the war of 1812, and in the case of Tampico, in Mexico, occupied by the troops of the United States during the war with that country in 1846 and 1847.

As to Castine, that place was captured in September, 1814, by the British forces, and remained in their possession until the ratification of the treaty of peace in February, 1815. "By the conquest and military occupation of Castine," this court said, by Mr. Justice Story, in *United States* v. *Rice*,* "the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender, the inhabitants passed under a temporary allegiance to the British government and were bound by such laws, and such only as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection or allegiance, or sovereignty, there can be no claim to obedience."

As to Tampico, that place was taken possession of in November, 1846, by the military forces of the United States, and in December following the entire State of Tamaulipas, in which Tampico is situated, was reduced to military subjection by our forces, and both Tampico and the State remained in our occupation until the treaty of peace in 1848. While thus captured and held in subjection other nations

* 4 Wheaton, 254.

were bound, as this court said, speaking through Chief Justice Taney, in *Fleming* v. *Page*,* "to regard the country, while our possession continued, as the territory of the United States, and to respect it as such. For by the laws and usages of nations, conquest is a valid title while the victor maintains the exclusive possession of the conquered country. The citizens of no other nation, therefore, had a right to enter it without the permission of the American authorities, nor to hold intercourse with its inhabitants, nor to trade with them. As regarded all other nations, it was a part of the United States, and belonged to them as exclusively as the territory included in our established boundaries."

After referring to these cases of Castine and Tampico the court said that it was among the governments, of which these are examples, that the Confederate government established for the insurgent States must be classed, though it differed from them in the circumstance that its authority did not originate in lawful acts of regular war; that it was not, however, on that account less actual or less supreme; that to the extent of its actual supremacy, however gained, in all matters of government within its military lines, the power of the insurgent government could not be questioned; that though that supremacy did not justify acts of hostility to the United States, it made obedience to its authority in civil and in local matters not only a necessity, but a duty; and that without such obedience civil order was impossible. It was by this government, said the court, exercising its power through an immense territory, that the Confederate notes were issued early in the war; that they became in a short time almost exclusively the currency of the insurgent States; that while the war lasted they were used as money in nearly all the business transactions of many millions of people; and that they must, therefore, be regarded *as a currency imposed on the community by irresistible force.*

From these considerations the court held that it followed

* 9 Howard, 614.

"as a necessary consequence from this actual supremacy of the insurgent government as a belligerent within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded for that reason only as made in aid of the foreign invasion in the one case or of the domestic insurrection in the other. They have no necessary relation to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection." And so the court held that such contracts could be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation.

There is nothing in the case at bar which has any analogy to the case cited. In the latter case the transaction was in a currency imposed by irresistible force upon the community, in which currency the commonest transactions in the daily life of millions of people, even in the minutest particulars, were carried on, and without the use of which there would have been no medium of exchange among them. The simplest purchase in the market of daily food would, without its use, have been attended with inconveniences which it is difficult to estimate. It would have been a cruel and oppressive judgment, if all the transactions of the many millions of people, composing the inhabitants of the insurrectionary States, for the several years of the war, had been held tainted with illegality, because of the use of this forced currency, when those transactions were not made with any reference to the insurrectionary government.

In the case at bar the war-bonds issued by the secession ordinance of Arkansas, though used as a circulating medium

in that State and about Memphis, did not constitute any forced currency which the people in that State and city were obliged to use. They were only a circulating medium in the sense that any negotiable money instruments, in the payment of which the community has confidence, constitute a circulating medium. The difference between the two cases is the difference between submitting to a force which could not be controlled, and voluntarily aiding to create that force.*

The first two questions certified to us must, therefore, be answered in the affirmative. The third question does not show any matter upon which the judges of the Circuit Court were divided in opinion, but, in any event, it requires no answer.

Mr. Justice MILLER:

I assented with much reluctance to the opinion in the case of *Thorington* v. *Smith*.

But I did assent to it on the ground that, while it was unsupported by and in some degree at variance with the general doctrine of the turpitude of consideration as affecting the validity of contracts, it was necessary to be established as a principle to prevent the grossest injustice in reference to transactions of millions of people for several years in duration.

I think the present case comes within that principle.

But I am content that the case of *Thorington* v. *Smith* shall be so limited, modified, and explained as to make it inapplicable to any further class of cases at all probable in the history of this country.

The necessity in which it was founded has passed or is rapidly passing away, and I acquiesce.

* See Head *v.* Talley, decided by the Chief Justice in the Circuit Court in Virginia, 3 American Law Times, 155.

FLANDERS *v.* TWEED.

1. Where objection is made in this court that a court below allowed a clerk and marshal there excessive fees, but the record, while showing what fees were allowed, furnishes no means of ascertaining what services were rendered by the clerk or marshal, nor any means of determining whether the fees were or were not in excess of what is authorized by law, the objection cannot be sustained.
2. The plaintiff's fees to counsel on a suit for damages against a treasury agent for illegally seizing and retaining his property, disallowed; though the seizure was adjudged to have been illegal, and damages were given accordingly.

ERROR to the Circuit Court for the District of Louisiana, in which court Tweed sued Flanders, deputy general agent of the Treasury Department of the United States, to recover damages caused by an alleged unlawful seizure and detention of certain cotton of his, Tweed's. Judgment being given for the plaintiff the treasury agent appealed.

Mr. S. F. Phillips, Solicitor-General, for the plaintiff in error; Mr. T. D. Lincoln, contra.

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

Tweed claims that he was the owner of four hundred and ninety-five bales of cotton; that the defendant, on the sixth of March, 1866, unlawfully seized and took the same into his possession, and that he unlawfully detained the cotton until the fifteenth of May in the same year, when he, the plaintiff, obtained possession of the cotton by virtue of two writs of sequestration which he instituted in the same court for that purpose, and that he expressly reserved the right to recover damages for the seizure and detention of the cotton in his petition in each of the sequestration suits; that the cotton declined in value to the amount of thirty thousand dollars during the period the possession of the same was unlawfully withheld from the possession of the plaintiff by the

Statement of the case in the opinion.

defendant; that in consequence of said unlawful detention of the cotton, the plaintiff was compelled to pay and did pay interest to the amount of one hundred and sixty dollars, and insurance to the amount of two hundred dollars, and storage to the amount of one thousand dollars; that he was compelled to institute the two suits of sequestration to recover the possession of the cotton, and that he was compelled to pay and did pay counsel fees, clerk's fees, and marshal's fees to the further amount of seven thousand dollars. He also charges that the defendant, during the period he wrongfully withheld the possession of the cotton from the plaintiff, sent fifty bales of the same to be rebaled, whereby the cotton in those bales was diminished in value to the amount of one thousand dollars, for all which he claims damages in the sum of thirty-nine thousand three hundred and sixty dollars.

Service was made and the defendant appeared and filed an answer in which, among other things, he alleged that he was a deputy general agent of the Treasury Department; that the cotton, before and at the time the writs of sequestration were issued, was in his custody and control as such officer, and that it was held by him as an official act in administering the laws of Congress in relation to the States in insurrection and rebellion; that the cotton, when the plaintiff caused the same to be seized, sequestered, and taken into the custody of the officer of the court, was, by virtue of his possession under color of those laws, in the due and actual custody, control, and possession of the United States, and that the issuing and executing the writs of sequestration and taking the cotton into possession by the officer under the same were in all respects acts of lawless and unjustifiable trespass and violence.

Evidence was introduced to the jury, and the jury, under the instructions of the court, returned their verdict in favor of the plaintiff, and the defendant excepted and removed the cause into this court.

Exceptions were taken by the defendant to the instructions given by the court to the jury, but the counsel for the United States who appear for the defendant submit the ex-

ceptions without argument. None of the questions presented in the exceptions are assigned for error, and in view of the circumstances the court does not deem it necessary to re-examine those questions.

Nothing remains for the consideration of the court except the error assigned founded upon the verdict of the jury, from which it appears that they found damages in favor of the plaintiff, as follows:

For decline in cotton,	$6,994 35
" insurance premiums,	160 00
" lawyer's fees,	6,000 00
" storage,	1,000 00
" clerk's and marshal's fee,	1,126 13
	$15,280 48

Objection is made by the defendant to the allowance for fees of counsel and to the allowance for the fees of the clerk and marshal, but the record furnishes no means of ascertaining what services were rendered by the clerk or marshal, nor any means of determining whether the charges allowed were or were not in excess of what is authorized by law. Viewed in the light of those suggestions it is quite evident that the objection to the allowance for fees to the clerk and marshal cannot be sustained.

Cases also may be found in which it is held that counsel fees, under certain circumstances, are a proper matter for allowance in cases not different in principle from the one before the court, but the rule is now well settled the other way. Fees and costs allowed to officers therein named are now regulated by the act of Congress passed for that purpose, which provides in its first section, that, in lieu of the compensation previously allowed by law to attorneys, solicitors, proctors, district attorneys, clerks, marshals, witnesses, jurors, commissioners, and printers, the following and no other compensation shall be allowed.* Attorneys, solicitors,

* 10 Stat. at Large, 161.

and proctors may charge their clients reasonably for their services, in addition to the taxable costs, but nothing can be taxed or recovered as cost against the opposite party, as an incident to the judgment, for their services, except the costs and fees therein described and enumerated. They may tax a docket fee of twenty dollars in a trial before a jury, but they are restricted to a charge of ten dollars in cases at law, where judgment is rendered without a jury.* Perhaps the leading case upon the subject is that of *Day* v. *Woodworth*,† which was an action of trespass *quare clausum fregit* for pulling down a mill-dam. In the course of the trial the plaintiff requested the presiding justice to instruct the jury that they might allow counsel fees as damages, but the justice refused so to instruct the jury, and the plaintiff excepted and the cause was removed into this court, where it was held that neither the common law nor the statute law had invested the jury with any such power or privilege. It has sometimes been exercised by the courts, said Mr. Justice Grier, but its results have not been such as to recommend it for general adoption either by courts or legislatures.‡

Suggestion may be made that the matter is not open to re-examination, as the verdict is not a special one in form, but further discussion of that topic at this time is unnecessary, as it was fully considered in a prior case decided at this term.

JUDGMENT REVERSED AND MODIFIED by disallowing the sum of six thousand dollars included in the verdict for counsel fees, and the cause remanded with directions to render judgment in favor of the plaintiff for the residue of the verdict.

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* The Baltimore, 8 Wallace, 392.

† 13 Howard, 363.

‡ Teese *v.* Huntingdon, 23 Howard, 2.

Statement of the case.

TOMLINSON *v.* JESSUP.

1. The Northeastern Railroad Company was incorporated by the legislature of the State of South Carolina in 1851 for fifty years, and the usual powers of railroad companies were granted to it. At that time a general law of the State was in existence, passed in 1841, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, unless the act granting the charter or the renewal, amendment, or modification, in express terms excepted it from the operation of that law. In 1855 the legislature passed an amendment to the charter of the company, providing that its stock, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempt from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. In 1868 the constitution of the State was adopted, which requires that the property of corporations then existing or thereafter created, shall be subject to taxation, except in certain cases, not affecting this case. The subsequent legislation of this State carried out this requirement and provided for the taxation of the property of railroad companies, and under it the property of the Northeastern Railroad Company was taxed; *Held*, that the taxation was legal and constitutional; that the power reserved to the State by the law of 1841 authorized any change in the contract created by the charter between the corporators and the State, as it originally existed, or as subsequently modified, or its entire revocation.
2. The object of the reservation was to prevent a grant of corporate rights and privileges in a form which would preclude legislative interference with their exercise, if the public interests should at any time require such interference, and to preserve to the State control over its contract with the corporators, which would otherwise be irrepealable and protected from any measures affecting its obligation.
3. Immunity from taxation, constituting a part of the contract between the government and the corporators or stockholders, was, by the reservation of power contained in the law of 1841, subject to be revoked equally with any other provision of the charter, whenever the legislature might deem it expedient for the public interest that the revocation should be made. The reservation affected the entire relation between the State and the corporation, and placed under legislative control all rights, privileges, and immunities derived by its charter directly from the State.

APPEAL from the Circuit Court for the District of South Carolina; the case being this:

Jessup, of New York, and owner of a number of shares

in the Northeastern Railroad Company, a corporation created in 1851 by the State of South Carolina, filed a bill in the court below against Tomlinson and others, officers of the State of South Carolina, to enjoin them from levying a tax on the property of the road.

The question was whether the property was liable to taxation under the legislation of the State.

The act incorporating the company contained a grant of the usual powers of railroad companies, and the charter was for the term of fifty years. At the time of its passage the 41st section of an act of the General Assembly, passed in December, 1841, was in force, as follows:

"It shall become part of the charter of every corporation, which shall, at the present, or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal, by the legislative authority."*

The act of incorporation did not except the charter of the company from the operation of this section. The company received extensions of their powers and privileges at various times subsequently, but in no case did the amendatory acts except the company from the operation of that section.†

By an act, passed December 19th, 1855, entitled "An Act to amend the charter of the Northeastern Railroad Company, and for other purposes," it was enacted as follows:

"That the stock of the said company, and the real estate that it now owns or may hereafter acquire, which is connected with or subservient to the works authorized in the charter of the said company, shall be, and the same is hereby exempted from all taxation during the continuance of the present charter of the said company."‡

* Stat. at Large, vol. 11, p. 168.

† Id., vol. 12, pp. 176, 208–9 and 370.

‡ Ib., p. 407.

This latter act did not except in terms the charter of the company from the provisions of the 41st section of the act of 1841, above recited.

The present constitution of South Carolina was adopted in 1868, and article 9, section 1, is as follows:

"The General Assembly shall provide, by law, for a uniform and equal rate of assessment and taxation, and shall prescribe such regulations as shall secure a just valuation for taxation of all property, real, personal, and possessory, except mines and mining claims, the proceeds of which alone shall be taxed; and also exempting such property as may be exempted by law for municipal, educational, literary, scientific, religious, or charitable purposes."

Article 12, section 2, is as follows:

"The property of corporations now existing or hereafter created, shall be subject to taxation, except in cases otherwise provided for in this constitution."

On the 15th of September, 1868, the General Assembly passed an act entitled "An Act providing for the assessment and taxation of property," the first section of which declares

"That all real and personal property in this State, and personal property of residents of the State, which may be kept or used temporarily out of this State, with the intention of bringing the same into the State, or which has been sent out of the State for sale and not yet sold; all moneys, credits, investments, in bonds, stocks, joint stock companies or otherwise, of parties resident in this State, shall be subject to taxation."*

Subsequent acts provided specially for the taxation of the property of railroad companies, under which the officers of the State were proceeding to assess and tax the property of the Northeastern Railroad Company, when the present bill was filed.

The court below granted an injunction; at first temporary, and then final; and from the final injunction the officers of the State appealed.

* Stat. at Large, vol. 14, p. 27.

Messrs. D. T. Corbin and D. H. Chamberlain, for the appellants; T. G. Barker, contra.

Mr. Justice FIELD delivered the opinion of the court.

The constitution of South Carolina, adopted in 1868, declares that the property of corporations then existing or thereafter created, shall be subject to taxation, except in certain cases, not material to the present inquiry. The subsequent legislation of the State carried out this requirement and provided for the taxation of the property of railroad companies; and the question presented is, whether the act of December, 1855, to amend the charter of the Northeastern Railroad Company, exempted the property of that company from such taxation. The company was incorporated in 1851, and at that time a general law of the State was in existence, passed in 1841, which enacted that the charter of every corporation subsequently granted, and any renewal, amendment, or modification thereof, should be subject to amendment, alteration, or repeal by legislative authority, unless the act granting the charter or the renewal, amendment, or modification, in express terms excepted it from the operation of that law. The provisions of that law, therefore, constituted the condition upon which every charter of a corporation subsequently granted was held, and upon which every amendment or modification was made. They were as operative and as much a part of the charter and amendment, as if incorporated into them.

The act amending the charter of the Northeastern Railroad Company, passed in December, 1855, provided that the stock of the company, and the real estate it then owned, or might thereafter acquire, connected with or subservient to the works authorized by its charter, should be exempted from taxation during the continuance of the charter. This act contained no clause excepting the amendment from the provisions of the general law of 1841. It was, therefore, itself subject to repeal by force of that law.

It is true that the charter of the company when accepted by the corporators constituted a contract between them and

the State, and that the amendment, when accepted, formed a part of the contract from that date and was of the same obligatory character. And it may be equally true, as stated by counsel, that the exemption from taxation added greatly to the value of the stock of the company, and induced the plaintiff to purchase the shares held by him. But these considerations cannot be allowed any weight in determining the validity of the subsequent taxation. The power reserved to the State by the law of 1841 authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation. The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the legislature. The object of the reservation, and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation.

There is no subject over which it is of greater moment for the State to preserve its power than that of taxation. It has nevertheless been held by this court, not, however, without occasional earnest dissent from a minority, that the power of taxation over particular parcels of property, or over property of particular persons or corporations, may be surrendered by one legislative body, so as to bind its successors and the State. It was so adjudged at an early day in *New Jersey* v. *Wilson*;* the adjudication was affirmed in *Jefferson Bank* v. *Skelly*,† and has been repeated in several cases within the past few years, and notably so in the cases of *The Home of the Friendless* v. *Rouse*‡ and *Wilmington Railroad* v. *Reed*.§ In these cases, and in others of a similar character, the exemption is upheld as being made upon considerations mov-

* 7 Cranch, 164. † 1 Black, 436. ‡ 8 Wallace, 430. § 13 Id. 264.

ing to the State which give to the transaction the character of a contract. It is thus that it is brought within the protection of the Federal Constitution. In the case of a corporation the exemption, if originally made in the act of incorporation, is supported upon the consideration of the duties and liabilities which the corporators assume by accepting the charter. When made, as in the present case, by an amendment of the charter, it is supported upon the consideration of the greater efficiency with which the corporation will thus be enabled to discharge the duties originally assumed by the corporators to the public, or of the greater facility with which it will support its liabilities and carry out the purposes of its creation. Immunity from taxation, constituting in these cases a part of the contract with the government, is, by the reservation of power such as is contained in the law of 1841, subject to be revoked equally with any other provision of the charter whenever the legislature may deem it expedient for the public interests that the revocation shall be made. The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its charter directly from the State. Rights acquired by third parties, and which have become vested under the charter, in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case the power under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired.

DECREE REVERSED, and the cause remanded with directions to

DISMISS THE SUIT.

General statement of the case.

TOMLINSON *v.* BRANCH.

1. The doctrine that a State legislature, unrestricted by constitutional prohibition, has power to exempt certain property from taxation, reiterated.
2. Where a railroad company, by its charter, was granted such an exemption for a limited period, and was afterwards merged in another railroad company, which became invested with all its property, rights, and privileges, the exemption and its limitation accompanied the property, and a perpetual exemption from taxation in the charter of the latter company would not be extended to the property so acquired, without express words, or necessary intendment to that effect.
3. Where two railroad companies are consolidated the presumption is, that each of the two united lines of road will be respectively held with the privileges and burdens originally attaching thereto, unless the contrary is expressed.

APPEAL from the Circuit Court for the District of South Carolina.

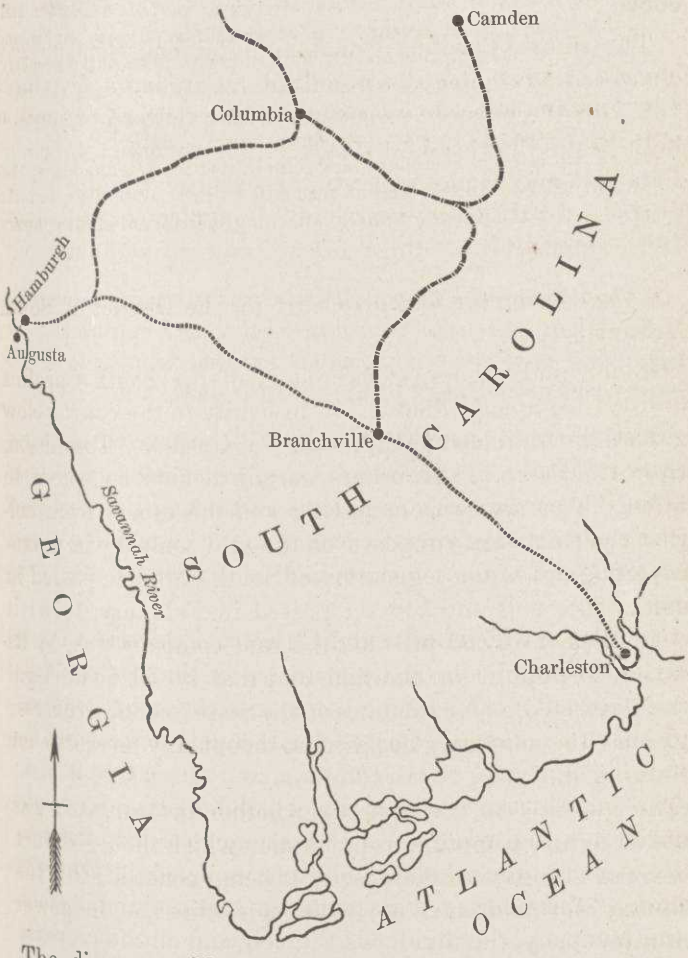
Branch and others, stockholders of the South Carolina Railroad Company, filed a bill in equity in the court below against the said company, as also against one Tomlinson, the State Auditor, and others, certain county collectors, to enjoin the company from paying and the others from collecting certain taxes imposed on the said company in pursuance of an act of the legislature of South Carolina, passed in April, 1868, and another act passed in February, 1870; it being alleged in the bill that the said company was, by its charter, exempt from taxation, and that no adequate legal remedy existed under the laws of the State to obtain redress; and that the company declined to adopt any measures for obtaining it.

The question in the case was whether the company was entitled to an exemption from taxation which the legislature could not abrogate or disregard; it being conceded that the company was made taxable, if the legislature had the power to tax it.

The property of the company was derived from two sources, one portion being a railroad from Charleston to Hamburg, opposite the town of Augusta, Georgia, which

General statement of the case.

was constructed by and formerly belonged to the South Carolina *Canal* and Railroad Company, and the other being roads extending from Branchville on the line of the first road, to Columbia and Camden, which were constructed by the South Carolina Railroad Company under its *own* charter. This court distinguished between the two parts.



The diagram will exhibit the roads, as well as another one from Columbia towards Augusta, incidentally mentioned in the case.

Statement, in the opinion, of the first part of the case.

Messrs. D. H. Chamberlain, D. T. Corbin, and P. Phillips, for the appellants; Messrs. J. Conner and A. G. McGrath, contra.

Mr. Justice BRADLEY stated the cases as respected both parts of the road, and delivered as to each the opinion of the court.

The South Carolina Canal and Railroad Company was chartered by the legislature of South Carolina in December, 1827, for the purpose of constructing a railroad or canal, or both, from Charleston to each of the towns of Columbia, Camden, and Hamburg, with the exclusive right for that purpose for thirty-six years. In a supplement of January, 1828, amongst other things, it was enacted as follows, viz.:

"That during the first period of thirty-six years the stock of the company, and the real estate that may be purchased by them and connected with, and be subservient to the works herein authorized, shall be exempted from taxation."

Under this charter the company constructed a railroad from Charleston to Hamburg only, a distance of nearly 140 miles. This road was completed in 1833, and it is admitted that the thirty-six years of exemption from taxation expired in 1869, and cannot be invoked in support of the present suit.

In 1835 the Cincinnati and Charleston Railroad Company was incorporated by the legislature of South Carolina, for the purpose of establishing a communication by railroad between Cincinnati and Charleston, through the States of Kentucky, Tennessee, North Carolina, and South Carolina, with power to construct branches not conflicting with any chartered rights, and with power to use any section of the said railroad before the whole should be completed. By the 43d section of this charter it was enacted that the capital stock of this company, the dividends thereon, and all the property and estate, real and personal, belonging to said company, should be forever exempt from taxation, unless the dividends should exceed lawful interest. Subsequently the project of

Statement, in the opinion, of the first part of the case.

extending the road into other States was abandoned, and the name of the company was changed, first to that of the Louisville, Cincinnati, and Charleston Railroad Company, and afterwards to that of the South Carolina Railroad Company. The company never built any portion of the railroad authorized by its charter, except from Branchville to Columbia, and a branch to Camden. The exclusive privileges conceded to the South Carolina Canal and Railroad Company rendered it difficult, if not impracticable, to effect a communication with Charleston without the consent of that company. Hence negotiations for an amalgamation of interests between the two companies took place as early as 1837, and it was practically effected in that and the ensuing years. The mode in which it was done was that the stockholders of the South Carolina Canal and Railroad Company exchanged their stock in that company for an equal number of shares in the Louisville, Cincinnati, and Charleston Railroad Company (afterwards called the South Carolina Railroad Company), and received in addition a bonus of twenty-five per cent. By this means the latter company acquired the entire control of the former, and used the road of the former company between Branchville and Charleston, instead of building a separate road of their own.

In 1843, by an act of the legislature passed the 19th of December, this amalgamation was formally legalized. The section relating to this subject was expressed in the following terms:

"That whenever the written consent of all the stockholders of the South Carolina Canal and Railroad Company shall have been obtained, the said South Carolina Canal and Railroad Company shall be *merged* in the said South Carolina Railroad Company, and thereupon and thereafter all the rights, privileges, and property belonging to the said South Carolina Canal and Railroad Company shall be vested in the said South Carolina Railroad Company, and the said South Carolina Railroad Company shall be liable for all the debts and contracts of the said South Carolina Canal and Railroad Company; and the stock and property of the said South Carolina Railroad Company

shall be subject to the same liens and charges to which the stock and property of the said South Carolina Canal and Railroad Company may be liable, and in the same relative order in which the said liens and charges now stand."

It is conceded that the terms of this law were complied with. And now the defendants in error contend that by the "merger" of the South Carolina Canal and Railroad Company in the South Carolina Railroad Company, the property of the former is held by the latter, with all the rights and privileges of its own charter attaching thereto, including the right of perpetual exemption from taxation.

If this is so, the State, by giving the latter company the power to acquire the property of the former, has lost a valuable prerogative in reference to that property, which it possessed up to the time when the act of 1843 was passed—namely, the right to tax the property after the expiration of the thirty-six years. Such a conclusion of the rights of the State ought not to be admitted without a clear expression of the legislative assent. It does not seem to us that the section in question contains such clear assent. In declaring that the one company shall be merged in the other, and that the rights, privileges, and property of the one shall be vested in the other, the legislature cannot be understood to mean that the restrictions, limitations, and burdens affecting that property, and imposed for the benefit of the public or of individuals, shall not go with it. The rights and privileges go with it, and those rights and privileges can with difficulty be separated from the restrictions and duties by which they are measured and qualified. For example, the right to charge toll and freight can hardly be separated from the limitation of the rates of toll and freight which the charter of the merged company imposed. If the rates of freight were limited in that charter to five cents per ton per mile, can it be claimed that the new company is discharged from that limitation altogether? Or if its own charter allows a charge of ten cents per ton per mile, can it claim the right to charge ten cents for freight transported on the old road?

If the hypothesis were reversed, and the old charter allowed ten cents, whilst the new allowed but five, the company would not hesitate, under the grant of the rights and privileges of the old, to continue to charge ten cents, as the former company had done. And they would have reason on their side. Had it been intended that the road and property of the old company should be owned and controlled by the new company under its own charter, in the same manner as its other property, it would have been easy to have so declared. Not having so declared, we cannot presume that such was the intent. The keeping alive of the rights and privileges of the old company, and transferring them to the new company in connection with the property, indicates the legislative intent, that such property was to be holden in the same manner and subject to the same rights as before. The owners of the property were to lose no rights by the transfer, nor was the public to lose any rights thereby. Of course, these remarks do not apply to those corporate rights and franchises of the old company, which appertain to its existence and functions as a corporation. These became merged and extinct. But all its rights and duties, its privileges and obligations, as related to the public, or to third persons, remain, and devolve upon the new company. This seems to us the most obvious and natural construction of the act, and leads to the conclusion that, as to the road, property, and works appertaining to the main line from Charleston to Hamburg, the South Carolina Railroad Company has no claim to exemption from taxation.

This view of the subject is corroborated by the decision of this court in the case of *The Philadelphia, Wilmington, and Baltimore Railroad Company* v. *Maryland*.* It there appeared that the railroad line between Baltimore and Philadelphia had originally belonged to several distinct organizations chartered by the States of Maryland, Delaware, and Pennsylvania. One of these companies was exempt from certain taxation, and it was claimed by the consolidated company

* 10 Howard, 376.

that this exemption was transferred to it and affected all parts of the line. The act authorizing the union of the several companies provided that the "said body corporate so formed should be entitled . . . to all the powers and privileges and advantages then belonging to the former corporations." And the new company claimed the exemption from taxes as one of the privileges and exemptions acquired. But the court held that the exemption did not extend to a portion of the line to which it had not extended before the union. It considered the evident meaning of the law to be, that whatever privileges and advantages either of the former companies possessed should in like manner be held and possessed by the new company, to the extent of the road which the said former companies had respectively occupied before the union; that it should stand in their place, and possess the power, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them.

It seems to us that this decision is directly in point, and governs that branch of the case now under consideration.

Reference is made, however, to certain decisions of the courts of South Carolina, which, it is contended, settle the question the other way.

The first case referred to is *South Carolina Railroad Company* v. *Blake*,* which arose out of an attempt of the South Carolina Railroad Company to condemn certain land for its purposes in Charleston. The owner disputed the right of condemnation on the ground that the road and works had long before been located, and that, therefore, the power was gone. But the court held that the power existed under both charters, and might be exercised under either—first, showing by affidavit the necessity of the use. The observations on the subject of taxation were *obiter dicta;* but, as far as the judgment goes it does not seem to us to militate against the views we have taken, but rather to confirm them by recognizing the continued vitality of the powers con-

* 9 Richardson, 233.

tained in the old charter. These cannot fairly be claimed without accepting also its duties and burdens.

Another case was that of *The State ex rel. South Carolina Railroad Company* v. *Hood, State Treasurer*,* in which the company claimed exemption from a State income tax imposed in 1867, under a law passed the year preceding, taxing the gross incomes of all railroads *not exempt by law*. The Court of Appeals held that the company was exempt by law, both under the thirty-six years' exemption in the old charter (which had not then expired), and under the exemption in the charter of 1835; and expressly waived the consideration of the effect of the act of union passed in 1843. This case, therefore, furnishes no authority on the subject.

The remaining case is that of *The South Carolina Railroad Company* v. *The Columbia and Augusta Railroad Company*,† decided in 1867. The defendant company, in that case, was chartered in 1858 with authority to construct a railroad from Columbia to Augusta. The South Carolina Railroad Company claimed that this would be an invasion of its exclusive privileges, as guaranteed in the charter of the South Carolina Canal and Railroad Company and in that of the Cincinnati and Charleston Railroad Company. The learned chancellor, by whom the case was decided, assumed that the South Carolina Railroad Company was entitled to both guarantees; but he held that the projected road would not be an infringement of either. The guarantee given to the old company was that of an exclusive right (for thirty-six years from the completion of its road) of having a railroad between Charleston as one terminus, and the towns of Columbia, Camden, and Hamburg, respectively; and the guarantee given to the Cincinnati and Charleston Railroad Company was, that for thirty-six years from January first, 1836, the State should not authorize any other road within twenty miles of its road, which should connect any points thereon, or should run in the general direction thereof; which exclusive privilege was not to extend to branches, but only to the

* 15 Richardson, 177.

† 13 Richardson's Equity, 339.

main road. The chancellor held that the first guarantee secured the company only against other roads leading to Charleston, which the projected road did not do; and that the second guarantee secured the company only against roads interfering with the main line of the Cincinnati and Charleston company, which the projected road did not do, because this main line, as originally contemplated, was to extend from Charleston, *via* Branchville and Columbia, to Cincinnati; and the only part of it ever constructed was the road from Charleston *via* Branchville to Columbia; with which the projected road did not interfere. This was all that the chancellor decided. It is true that, in the course of his opinion, he does say that after the acquisition of the old road, extending from Charleston to Hamburg, the charter of the South Carolina Railroad Company extended over it, the same as if that company had built it. But that proposition was not material to the conclusion to which he came. And when he assumed that the guarantee of the old charter still subsisted with regard to the old road, and based his judgment upon that assumption as one of its grounds, his opinion is virtually an authority for the other proposition, that the company must be regarded as holding the old road, so far as the rights of the public are concerned, subject to the conditions and limitations of that charter, as well as with its privileges and immunities.

Be this, however, as it may, we find nothing in this case or the other cases referred to, which, in our view, affects the authority of the case of *The Philadelphia, Wilmington, and Baltimore Railroad Company* v. *Maryland*, or the soundness of the conclusion to which we have come, as before expressed.

The next inquiry relates to the line of railroad constructed by the South Carolina Railroad Company, under its own charter; being that portion between Branchville and Columbia and Camden. We have seen that the company, by its original charter granted in 1835, had the grant of a perpetual exemption from taxation. We have already decided that it is competent for the legislative power to grant such

Statement, in the opinion, of the second part of the case.

an exemption. But it is contended on the part of the State, that this exemption, and all other chartered privileges of the company, are subject to alteration and repeal, by virtue of the 41st section of an act, passed in December, 1841, by which it is declared—

"That it shall become part of the charter of every corporation, which shall, at the present, or any succeeding session of the General Assembly, receive a grant of a charter, or any renewal, amendment, or modification thereof (unless the act granting such charter, renewal, amendment, or modification shall, in express terms, except it), that every charter or incorporation granted, renewed, or modified as aforesaid, shall at all times remain subject to amendment, alteration, or repeal, by the legislative authority."

Now, there can be no doubt but that the act of 1843, authorizing the consolidation of the two companies, or the merger of the one into the other, was an act modifying the charter of the South Carolina Railroad Company; but the third section of that act withdrew the charter from the operation of the act of 1841. It was in these words:

"SECTION 3. The said South Carolina Railroad Company is hereby excepted from the provisions of the forty-first section of an act entitled, An act to incorporate certain villages, &c. [referring to the act in question], but nothing herein contained shall be construed as exempting the said company from the provisions of the said forty-first section, upon any future grant, renewal, or modification of their charter."

The allegation on the part of the State is, that subsequent legislation was obtained by the company, which modified its charter, and thus rendered the whole charter liable to subsequent alteration and repeal. The legislation referred to consists of two several acts, namely: "An act to lend the credit of the State to secure certain bonds, *to be issued* by the South Carolina Railroad Company, and for other purposes, passed December 21st, 1865;" and "An act to amend the act last aforesaid, passed the 19th day of September, 1866." It is very doubtful whether these acts can be re-

garded as amending or modifying the charter of the company. They merely authorize the extension of certain bonds made by the company (which the State had guaranteed), by the issue of new bonds of like character, and the continuation of the mortgage for securing the payment of said bonds. But whatever may be thought on this point, the third section of the act of 1843 clearly withdraws from the operation of the act of 1841 (by which power to amend and repeal is reserved) the entire charter of the company except as to future grants, renewals, and modifications. Such future grants only were to be subject to alteration and repeal. This seems to us conclusive of the point raised, and no further argument is necessary.

It is our opinion, therefore, that the part of the line now under consideration is exempt from taxation; and that so much of the decree as relates thereto is correct.

DECREE REVERSED, with directions to enter a decree making the injunction perpetual as to all that part of the line and railroad of said South Carolina Railroad Company, which extends from Branchville to Columbia and Camden, and as to all property and stock of said company, properly apportionable and applicable to the said portion of line and railroad, and dismissing the bill as to all the residue of the railroad property and stock of said company, and that such further proceedings be had as may be necessary to perfect and carry out said decree.

NOTE.

AT the same time with the preceding case was argued and adjudged another appeal, from the same court, the case, namely, of the

CITY OF CHARLESTON *v.* BRANCH,

in which case Branch had filed a bill against the councils of the said city and against the same South Carolina Railroad Company, to prevent the former from collecting and the latter from

paying a tax, levied by the city on the station-house of the railroad, and the property appurtenant to it in the said city. The principles involved were the same as in the last case, and the court below granted the injunction, thus holding the property free from taxation. The city appealed.

After argument by the same counsel as in the former case, the opinion of the court was delivered by

Mr. Justice BRADLEY:

The principles laid down in the preceding case must be applied to this. All parts of the road and property formerly belonging to the South Carolina Canal and Railroad Company, and all appendages and appurtenances thereof, are liable to taxation; whilst all property acquired by the South Carolina Railroad Company directly under its own charter, and for purposes connected with its original road, is exempt from taxation. *Primâ facie* the railroad terminus and depot in Charleston, and the property accessory thereto, belong to the South Carolina Canal and Railroad Company portion of the joint property. But if it can be fairly shown that any of the company's property in Charleston, claimed to be taxable, was acquired by the South Carolina Railroad Company for the accommodation of the business belonging to its original roads, or for the joint accommodation of the entire system of roads under its control, such property will, *pro tanto*, and in fair proportion, be exempt from taxation.

DECREE REVERSED, and the record remitted to the Circuit Court with directions to proceed

IN CONFORMITY WITH THIS OPINION.

PROUT *v.* ROBY.

1. No particular phraseology is necessary to create a separate estate for a *feme covert*. In whatever language expressed, if there is a clear intent of the parties to create the estate, it is created.
2. A lease of land for a term of years on a ground-rent, fixed, to P. "in trust for J. M. (a married woman), her heirs and assigns," with a covenant on the part of the lessor that on payment of a principal sum named, he will, at any time, convey the land in fee to "the said J. M.,

her heirs and assigns," cuts off all the rights of the husband in the fee. The covenant to convey passes to the heir of the woman.

3. In such a case, where the woman dies intestate, leaving no personal representative, and the lessor during the continuance of the lease, without any proper re-entry or right, takes possession and receives the rents of the land, the heir of the woman on a bill filed by her heir for an account and a payment of the ground-rents out of the other rents and an application of the surplus to the payment of the principal on payment of which a conveyance in fee was to be had, and for a conveyance accordingly, may proceed against the lessor or his heir alone. A representative of the woman as a defendant is, in such a case, no necessary party.
4. Where on a bill by one asserting himself to be the heir-at-law of another, the answer denies the heirship, and on an issue directed, the heirship is found, and the court decrees for the complainant accordingly, no objection being made to anything that occurred at the trial and no application to set aside the verdict, this court will not, in the absence of the evidence given before the jury, go behind the decree of the court.
5. At the common law, where a right of re-entry is claimed on the ground of forfeiture for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset upon the day when the rent is due, upon the land, at the most notorious place of it, though there be no person on the land to pay.

APPEAL from the Supreme Court of the District of Columbia; in which court John Roby, asserting himself to be grandson and heir-at-law of a certain Jane Mallion, filed, A.D. 1865, a bill against Robert Prout (the now appellant), in order to have an account taken of rents received by him, the said Robert, from a lot on Capitol Hill, Washington, D. C., leased A.D. 1820, on a small ground-rent, by William Prout, ancestor of him, the said Robert, to one Porter "in trust for the said Jane Mallion, her heirs and assigns," with a right on the part of her and them to have, *at any time*, a conveyance in fee simple on payment of the principal of the rent; and on which lot (the said Jane dying A.D. 1852 intestate and leaving no personal representative) the said Robert Prout, without any such demand on the premises, of arrears of rent, as gave him a right of re-entry, had assumed to re-enter as for a common-law forfeiture; and the bill praying, moreover, in the event of certain findings, a conveyance in fee simple to him, the said John Roby, complainant.

Mr. Bradley, for the appellant; Mr. Totten, contra.

Statement of the case in the opinion.

Mr. Justice SWAYNE stated the facts and delivered the opinion of the court.

On the 14th of April, A.D. 1820, William Prout, the ancestor of the appellant, leased to Jonathan Porter, as trustee for Jane Mallion, the premises described in the bill. The lease was for the term of ninety-nine years, and was renewable for successive terms of that duration forever. Rent amounting to $25.80 was to be paid at the end of each succeeding year, while the lease should subsist. It was stipulated that if the rent should at any time be due and unpaid for the period of sixty days, and there should not be sufficient property upon the premises wherefrom to make the amount due by levy, the lessor, his heirs or assigns, might re-enter and hold the premises as if the lease had not been executed. It was further stipulated that if Porter, as such trustee, or Jane Mallion, her heirs or assigns, should *at any time* thereafter pay to the lessor, his heirs or assigns, the sum of $430 over and above the rents then due, the lessor, his heirs or assigns, should thereupon execute to Jane Mallion, her heirs or assigns, a deed of release for the leasehold premises. There was a further provision that Jane Mallion might dispose of her interest in the premises by will, and that the will should pass the title which she held, subject to the conditions and requirements of the lease, in favor of the lessor, his heirs and assigns. The bill alleges that Jane Mallion left but one child, Mary Ann Roby, her only heir-at-law, who was the original complainant in this litigation. Porter died many years before this bill was filed. It does not appear that he left any heir, or that there has ever been any legal representative. Prout, the lessor, also died many years ago. The appellant holds title to the leasehold premises by descent and partition. Upon the death of Jane Mallion, Vandora Mallion, her husband, who survived her, assumed the possession and control of the property and received the accruing rents down to his death, which occurred in February, 1853. He devised all his property, real, personal, and mixed, to the Reverend Edward Knight, now also deceased. Knight claimed and possessed the leasehold estate under

the will, and received the rents until a subsequent period, when he abandoned the possession thus acquired. At a later period the appellant entered into possession and has since received the rents and appropriated them to his own use. The bill prays for an account, that the appellant be credited with the stipulated rent and the stipulated purchase-money, and if the rents and profits which he has received exceed the amount of these items that he be decreed to pay the surplus and convey the premises; and if the rents and profits received fall short of his credits, that then upon payment of the amount of the difference, he be decreed to convey. The defendant answered, and testimony was taken by both parties. The complainant died *pendente lite*, and her son and only heir-at-law, John T. Roby, was made complainant in her place by a bill of revivor. The defendant denied that Mary Ann Roby was the child of Jane Mallion. The court below ordered this question to be submitted to a jury in the proper court of law, and that both parties should be at liberty to read upon the trial all the depositions taken in the case pertinent to the issue. The jury found for the complainant and the verdict was certified back to the Equity court. It does not appear that any motion was made by the appellant in either court for a new trial, nor does it appear whether any evidence in addition to that specified in the order of the court was or was not given to the jury. The Equity court decreed for the complainant, and the defendant thereupon removed the case to this court by appeal.

No particular phraseology is necessary to create the provision for *a feme covert* technically designated in the law as her *separate estate*. As in all other cases of instruments to be construed, the controlling test is the intent of the parties. That, in whatever language it may be clothed, constitutes the contract. Here the meaning is so clear that no room is left for doubt. The intervention of the trustee and the power of disposition by will, could have had no purpose but to give to the *cestui que trust* the same power over the lease as if she had been *a feme sole*, and to place it beyond the

reach and control of her husband both during her life and after her death. These facts are irreconcilable with any other view of the subject. No interest in the lease could vest in the husband without some act on her part in his favor. No such act was done. His assumption of control over the premises after her death was simply usurpation, and no right or title passed under his will to his devisee. What he did and what Knight did may therefore be laid out of view, as of no legal consequence in the case. It is not shown that there is, or ever was, any personal representative of Jane Mallion. The maxim applies that what does not appear is to be presumed not to exist.

It is insisted by the counsel for the complainant that the proofs are insufficient to establish the heirship of Mary Ann Roby. It was competent for the court which tried the issue, and for the court which ordered it to be tried, to set aside the verdict and award a new trial, or the latter court might at the hearing have disregarded the verdict if it were proper to do so, and it is within the power of this court to do the same thing.* But it does not appear that the appellant objected to anything that occurred during the progress of the trial, nor that he took any action in either court touching the verdict after it was found, nor does it appear what evidence oral or otherwise was before the jury. The court having decreed according to the finding, we think the appellant should be held concluded, and that under the circumstances we ought not to go behind it in our examination of the case. The testimony in the record fails to satisfy us that the verdict ought to be disregarded. The objection comes from the party called upon to convey, under the covenant of one with whom he is in privity of blood and estate. If Mary Ann Roby were not the heir-at-law, the true heirs, whenever they appear, not being parties, will not be affected by this litigation.

The re-entry of the appellant cannot avail him. If there had been a personal representative of Jane Mallion after

* 2 Daniel's Chancery Practice, Metcalf's edition, 1147, notes 8 and 10.

her death, the title to the leasehold term being personalty, would have passed to and vested in him. There being no such representative, it fell into abeyance, and has since so continued. The covenant to convey, passed by descent to the heir-at-law as if it had been contained in a separate instrument. If there had been a personal representative with sufficient assets, the heir could have called upon him to pay the purchase-money.* In that event, the personal representative would have been a necessary party. But the heir asks no such relief. He proposes to make payment *aliunde*. Hence there is no necessity for the presence of an administrator. If the covenant had been to convey, upon the payment of the purchase-money during the life of the lease, putting an end to the lease would have destroyed the covenant. But the covenant is to convey whenever the purchase-money should be paid. In such cases the conveyance may be demanded at any time, and the existence or non-existence of the lease when the demand is made is immaterial to the rights of the parties.† But if the covenant were different in this particular from what it is, and belonged to the class first mentioned, the result would be the same. The re-entry was without effect. *Connor* v. *Bradley and wife*‡ was a case arising in the city of Washington, under a lease of the same lessor, and identical as regards the right of re-entry with the one here under consideration. It was there said that the statute of 4 George II, ch. 28, was in force in the county of Washington. Upon examination, that statute is found to contain nothing applicable to this case. This leaves the rights of the parties to be determined by the common law. In that case this court said: "It is a settled rule at the common law, that where a right of re-entry is claimed on the ground of forfeiture for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset upon the day when the rent is due, upon

* Chitty on Descents, 10, 13, 250; Platt on Covenants, 514; Fry on Special Performance, 103; Seton *v.* Slade, 7 Vesey, Jr., 279, note; Daniels *v.* Davison, 16 Id. 253, note.

† 1 Shepherd's Touchstone, 169.

‡ 1 Howard, 217.

the land, at the most notorious place of it, though there be no person on the land to pay." The legal propositions thus stated, are fully sustained by the authorities.*

In this case it is not shown that any demand was ever made upon the premises. It is in proof that an officer went there twice to distrain for rent in arrear, and that he did not find sufficient property to satisfy the costs, but when this occurred, and what amount of rent was then claimed to be in arrear, is not disclosed. This testimony is wholly immaterial. If the requirements of the law had been complied with, or if the appellant had enforced the forfeiture by a recovery in ejectment, upon tender of the amount due with interest and costs at the proper time, relief would have been given; in the former case in equity by injunction, and in the latter by motion and stay of execution.† Where it is necessary to take an account between the parties, no tender need be made before bringing the bill.‡ This subject was fully examined in *Sheets* v. *Selden*.§

The appellant is entitled to be paid the rent in arrear, and the amount of his expenditures for taxes, both with interest, and the purchase-money, before he can be required to convey. All this we understand to be carefully provided for in the decree of the court below. The directions for taking the account are clear and explicit. The appellant is entitled to nothing more.

DECREE AFFIRMED.

* Coke Lit. 201; B. 1 Saunders, 287, n. 16; Doe ex dem. Wheeldon *v.* Paul, 3 Carrington & Payne, 613; Smith *v.* Whitbeck, 13 Ohio State, 471; Taylor's Landlord and Tenant, § 493, note 6.

† 2 Story's Equity, §§ 1315, 1316; Wadman *v.* Calcraft, 10 Vesey, Jr., 68; Hill *v.* Barclay, 18 Id. 63.

‡ O'Mahony *v.* Dickson, 2 Schoales & Lefroy, 400; O'Connor *v.* Spaight, 1 Id. 305.

§ 7 Wallace, 420.

MILLER *v.* THE STATE.

A constitution of New York, made in 1826, ordains that "corporations may be formed under general laws, but shall not be created by special act except in certain cases;" and also "that all general laws and special acts, passed pursuant to this section, may be altered from time to time or repealed." And a statute of New York, passed A.D. 1828, enacts that "the charter of every corporation that shall be thereafter granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature."

In this state of things, a general railroad law was passed in 1850, authorizing the formation of railroad corporations with *thirteen* directors. The formation of a company under this general law being subsequently contemplated, with a capital of $800,000, to build a road fifty miles long, the legislature authorized the city of Rochester to subscribe $300,000 to it; and enacted that if the company accepted the subscription, the city should appoint one director for every $75,000 subscribed by it, that is to say, should appoint four directors out of the thirteen contemplated; the other stockholders, of course, appointing the remaining *nine*. The company did accept the subscription, and the stockholders other than the city subscribed $677,500; but paid up only $255,000. Then the enterprise for all but eighteen miles of the road was abandoned. The city had paid its $300,000 subscribed. In 1867 the legislature passed another act giving the city power to appoint one director for every $42,855.57 of stock owned by the city; in other words establishing the same ratio that existed among the subscribers for the stock at the time the original subscription was made. The effect was to give the city *seven* directors and to leave the other stockholders but six. These last stockholders, regarding the act of 1851 as making a contract that they should have nine directors and the city but four, and that the act of 1867 violated that contract, elected their old nine. *Held*, on a *quo warranto*, that the act of 1867 did not, in view of the State constitution and the act of 1828 making charters subject to alteration, suspension, and repeal, make such a contract, and that the act of 1867 was constitutional.

ERROR to the Supreme Court of New York; the case being thus:

Section 1 of article 8 of the constitution of the State, just named, adopted by it A.D. 1826, ordains as follows:

"Corporations may be formed under general laws, but shall not be created by special act except in certain cases. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

Statement of the case.

And title 3 of chapter 18 of the first part of the Revised Statutes of 1828, enacts thus:

"The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension, and repeal, in the discretion of the legislature."

With this provision of the constitution and this enactment of the Revised Statutes of the State in force, the legislature of New York passed in 1850 a general act for the formation of railroad companies and the regulation of the same. This act authorized any number of persons, not less than twenty-five, to form a company for the purpose of constructing, maintaining, and operating railroads for public use, . . . and for this purpose to make and sign articles of association in which the name of the company should be stated, the places from which and to which the road was to be constructed, the amount of the capital stock, which should not be less than $10,000 for every mile of road constructed, the number of shares of which the capital stock should consist, and the names and places of residence of *thirteen* directors of the company who should manage its affairs for the first year, and until others were chosen in their place. Each subscriber was to state what number of shares he would take; and the articles were to be filed in the office of the Secretary of State, and after certain formalities gone through with them, the persons who had subscribed the articles of association, and all who should become stockholders in the company, "shall," says the act "be a corporation by the name specified in such articles of association, and shall possess the powers and privileges granted to corporations, *and be subject to the provisions contained in title* 3 *of chapter* 18 *of the first part of the Revised Statutes.*"*

The formation of a railroad company to be styled the Rochester and Genesee Valley Railroad Company, and to run between the city of Rochester and the town of Portage, fifty miles south of it, being contemplated by a course which

* The provisions last above quoted; at the top of the page.

should run through the town of Avon, about eighteen miles south of Rochester, an act of the State just named amending the charter of that city was passed July 3d, 1851, by which its common council were authorized to borrow upon its credit $300,000, to be invested in the stock of the new company, and by virtue of the subscription thus authorized, the city was declared to acquire all the rights and privileges and be liable to the same responsibilities as other stockholders of the company, except as otherwise provided in the act. In case the railroad company elected to receive the subscription, the common council were authorized to nominate and appoint one director for every $75,000 of capital stock held by the city at the time of each election of directors, but the city could have no voice in the election of the remaining directors. On the 10th of July, 1851, the articles of association of the new company were filed in the office of the Secretary of State, organizing the corporation under the general railroad act of 1850, already in part quoted. The corporation was declared in the article to be created for the purpose of constructing, owning, and maintaining a railroad from the city of Rochester to the town of Portage, a distance, as already said, of fifty miles, with a capital stock of $800,000, divided into 8000 shares of $100 each. On the 15th of June, 1852, the mayor of Rochester subscribed for 3000 shares of the stock of the company, and, on the same day, at a meeting of the directors of the railroad, such subscription was unanimously accepted. Other parties subscribed for stock to the amount of $677,500, so that the whole amount subscribed, including the stock taken by the city, was $977,500. The whole amount of capital stock fully paid up was:

By the city of Rochester, ...	$300,000
By all other parties, ...	255,200
Total amount, ...	$555,200

The balance of the stock subscribed was extinguished or forfeited before March 9th, 1867. Before this time also the Rochester and Genesee Valley Railroad Company had aban-

doned the construction of their road south of Avon, and assigned all their rights and franchises beyond that point to another corporation.

On the 9th of May, 1867, an act was passed, amending the act of 1851 by giving the common council authority to appoint one director for every $42,855.57 of stock owned by the city; in other words, establishing the same ratio that existed among the subscribers for stock at the time the original subscription was made. The effect of this act was to give the city of Rochester power to appoint seven of the thirteen directors, and the other stockholders six. At the next annual election, however, the stockholders, other than the city, alleging that the act of July 3d, 1851, made a contract between the city and the other stockholders, that the city should elect but four directors out of the thirteen, and that the act of 1867, authorizing the election of seven, violated the obligation of that contract, proceeded to elect one Miller and eight others directors as the directors eligible by them; and on the same day the common council, in pursuance of the act of 1867, appointed seven other persons as directors eligible by *them*. Thereupon, the attorney-general of New York, on the relation of Powers and the six other directors appointed by the city, issued a *quo warranto* against Miller and his eight co-directors; and the case coming to the Court of Appeals that court held that the appointment by the city was valid, and the election of the nine directors by the other side irregular. Miller and his co-directors now brought the case here.

The only question involved was the constitutionality of the act of 1867. If that act was constitutional the decision of the State court was correct, and was to be affirmed. If the act was a violation of the Constitution of the United States, the decision was erroneous and was to be reversed.

Messrs. Theodore Bacon and H. R. Selden, for the plaintiff in error, argued the case orally, and submitted also the opinions of certain of the judges in the court below who dissented from the judgment there. A part of one follows:

Argument for the nine directors.

The act of July 3d, 1851, made it lawful for two corporations to enter into an arrangement by which one of them might become a stockholder in the other if both should consent, and declared what the rights of the parties to the arrangement should be as between each other if they availed themselves of this permission. There was no exercise of legislative will further than to confer this power; all beyond that depended upon the mutual consent of the parties.

The making and the acceptance of the subscription to the stock were acts of the parties, and they thereby adopted the conditions contained in the act of the legislature and mutually consented to be governed by them. The consent of each party must be deemed to have been given in consideration of the obligation thus assumed by the other, and a valid contract was thus made between the subscriber to the stock and the other stockholders of the railroad company, or the company representing the rights of such stockholders, unless it can be shown that the subject-matter of the arrangement was one concerning which a contract could not be made or authorized by the legislature to be made.

The city of Rochester, by this arrangement, secured to itself the right of appointing four out of the thirteen directors. This was a valuable right, for in its absence, if the stock of the company should all be paid up, the city holding but a minority of the stock might not have been able to obtain the election of any director of its selection. In consideration of this privilege the city surrendered to the other stockholders the right to elect the remaining nine directors. The railroad company, in consideration of that surrender, bound itself to admit the four city directors. Neither party can be presumed to have acted on the assumption that this arrangement could be changed without its consent. It may well be supposed that those interested in the company and who had embarked, or were about to embark, their capital in it, would not have consented to place so large an amount of stock in the hands of the city, had they not been secured against the possibility of the control of the affairs of the company becoming invested in so changing and uncertain a

body as a municipal corporation, whose officers would have no personal interest in the road and no special inducement to manage it in the interest of its stockholders.

It will be argued, however, that the power reserved in the constitution and statutes of the State of New York, to alter, suspend or repeal the charters of all corporations, gives power to the legislature to change the terms upon which the subscription was received, and to enlarge the number of directors to be appointed by the city, and that the act of 1867, which purports to authorize the city to appoint seven directors instead of four, thus giving to the city the majority instead of a minority representation in the board, is valid as an amendment of the charter of the railroad company.

The purpose and object of this reservation of power is generally conceded to have been to prevent the alienation by the State of corporate franchises, in such form that they could be held as against the State free from that legislative control which the public interests might from time to time require. When it was settled by the Supreme Court of the United States that an unconditional charter to a private corporation was a contract between the State and the corporation, which could not be impaired by State laws, and that franchises thus granted could never be withdrawn, several of the States resolved to make no more such irrevocable contracts, and either by general laws or provisions in the charters themselves inserted the condition that such charters might be altered or repealed.

In New York the constitution has deprived the legislature of the power of granting irrepealable charters, and there is now no power to make a grant of this description which shall operate as an irrevocable contract on the part of the State. But this reservation is for the benefit of the State alone, and affects only the relations between it and the corporation. The exercise of this reserved power may, undoubtedly, indirectly affect private rights and interests which are dependent upon the powers and franchises of the corporation itself, but no others. The individual rights and interests of the members of the corporation, or of persons

Argument for the nine directors.

dealing with it, cannot be acted upon directly by the legislature even under the form of an amendment of the charter. A contract between individuals or between a corporation and individuals is not subjected to the action of the legislature by the mere fact that it is embraced in a charter or an amendment to a charter, or results from a dealing had with reference to such an enactment. The State has power to revoke its own contracts where it has in making them reserved such right. But it has no power to impair the lawful contracts of its citizens, or even of corporations created by it. When such contracts relate to the rights of individuals and not to the powers of the corporation, any attempt to reserve such a power would be ineffectual. And a State constitution is no more effectual for such purpose than a statute.*

In *Zabriskie* v. *Hackensack and New York Railroad Co.*,† the doctrine is stated, that the reservation in a charter that the State may at any time alter, amend, or repeal it, is a reservation of the State for its own benefit and is not intended to affect the rights of corporators as between each other; that it does not empower the State to authorize one part of the stockholders for their own benefit and at their mere option to change their contract with the other part, but is confined to the powers and franchises granted to the corporation by the charter. And although in the case cited the doctrine was applied in a manner inconsistent with some of our own adjudications, none of the latter will be found to conflict with the doctrine itself.

In *Oldtown and Lincoln Railroad Co.* v. *Veazie*‡ the charter required that not less than 11,000 shares should be subscribed before the subscriptions could be enforced by calls. The defendant subscribed for 1000 shares. Only 9500 shares were subscribed in all. A supplemental act was then passed, reducing the limit to 8000 shares. It was held that the reserved power to amend the charter did not authorize a

* Dodge *v.* Woolsey, 18 Howard, 331. † 3 C. E. Greene, 178.
‡ 39 Maine, 571.

change in the liability of the stockholders as between themselves.*

The cases of *Sherman* v. *Smith*† and *The Reciprocity Bank*,‡ which will probably be relied upon by the other side, are in strict accordance with these views. The alterations in charters there, related to the franchises. One of the chief privileges which may be granted by an act of incorporation is that of doing business as an aggregate body without that individual liability of the members which, but for the incorporation, would necessarily attach. By the amendatory acts the prospective enjoyment of that privilege was taken away from corporations there. No attempt was made to impose on the members liability for existing contracts of the corporation. The amendment affected the whole body alike, and declared that for all contracts the corporation should make after January, 1850, the members should be liable. This was clearly within the scope of the power reserved, and essentially different from the present case. In all the adjudications to be found in which the exercise of this power has been maintained the amendment has related to the corporate franchises and only incidentally affected the rights of the stockholders, through the interest which they had in the franchises of the corporation itself, and affected the interests of all the stockholders alike. The cases which have gone the greatest length in support of this power§ are within this limit. They are those in which the corporate powers have been enlarged after subscriptions to the stock, and the subscribers held not to be discharged by this enlargement of the corporate enterprise. In these and kindred cases the alteration affected purely the powers and duties of the corporation in its relations to the State and to the public, and the subscriber to stock as well as the purchaser of stock

* And see Hawthorn *v.* Calef, 2 Wallace, 10; Woodruff *v.* Trapnall, 10 Howard, 190; Curran *v.* The State, 15 Id. 304.

† 21 New York, 9, and 1 Black, 587.

‡ 22 New York, 9.

§ Schenectady and Saratoga Plankroad Co. *v.* Thatcher, 11 New York, 102; Buffalo and New York City Railroad Co. *v.* Dudley, 14 Id. 336.

must be deemed to have contracted with reference to the conceded power of the legislature over those subjects.

There are other acknowledged limits to the exercise of the reserved power of amendment where it trenches upon vested rights or rights of property of the corporation. In *Commonwealth* v. *Essex Company** the doctrine is maintained that, "when under power in a charter rights have been acquired and become vested, no amendment of the charter can take away the property or rights which have become vested under the legitimate exercise of the powers granted." See also *Durfee* v. *Old Colony Railroad*† and *Roxbury* v. *Boston and Providence Railroad*.‡

It will be argued, however, that, conceding the principle that contracts between the corporation and its stockholders, though resulting from provisions of the charter, may be protected by the Constitution of the United States when they do not relate to the franchises of the corporation, yet the right of stockholders to vote on their stock or to appoint the directors or managers of the company is a chartered right and subject to the reservation in the State constitution.

This position necessarily leads to the result that the right of stockholders in private business corporations to vote upon their stock is wholly under the control of the legislature; that it cannot be secured by any contract; and that whether claimed under the provisions of the charter or under a contract made in pursuance of legislative authority, it may at any time be taken away *in toto* from the stockholders by a mere exercise of the will of the legislature; or it may be taken from a portion and vested in the residue.

This result is inevitable, for if the right of voting and the extent of the voice which each stockholder shall have in the management of the property and the affairs of the corporation are mere charter rights or franchises created by the act of incorporation, and within the scope of the power to suspend, alter, and repeal reserved in the constitution, they cannot, even by authority of the legislature, be withdrawn

* 13 Gray, 239. † 5 Allen, 230, 240, 247. ‡ 6 Cushing, 424.

from the exercise of that power, and they can at any time be taken away entirely from the stockholders without their consent.

The most essential element of a right of property is the right to manage or control the management of the object which is in common parlance designated as property.

Is it argued that by investing property in a corporate enterprise, the owner consents to subject its management to the control of the legislature?

This is true to a certain extent; but the fallacy of this argument as applicable to the point now in question consists in the omission to qualify the extent to which the owner has, by thus investing his property, parted with his own power over it.

He has doubtless restricted himself to the use of the property while so invested, in such business as the State may sanction, and through such agencies as the State may permit him to appoint; but he has not consented to part with his control over its management within those limits.

The legislature which creates the artificial body must necessarily have power to prescribe the organs through which it shall act. But this is a different thing from arbitrarily taking possession of the corporation itself, and through it of the property of the parties for whose benefit the corporation was created. They cannot be presumed to have anticipated that a charter giving them the privilege of managing their property for their own benefit, in a certain way, could be transformed by this reserved power of amendment into a vehicle which should transfer from them to the State, or its appointees, all control over the property which they have invested in the corporate enterprise. To hold such a doctrine would be to place all property invested in corporate enterprises beyond the pale of the protection of the Federal Constitution. Such an act would approach nearer to one of confiscation than of legislation.

It is no answer to say that the act of 1867 works so as to secure an equitable result. If the arrangement which it assumes to change was a contract, it makes no difference

whether it was unduly beneficial to one party or another. The legislature has no power over it.

It is a misnomer to call the act of 1867 an amendment of the charter of the railroad company. It affects no corporate right or franchise of the company. Its more appropriate description would be "An act to enlarge the rights of one of the stockholders of the company."

Mr. J. C. Cochrane, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Corporate franchises, granted to private corporations, if duly accepted by the corporators, partake of the nature of legal estates, and the grant, under such circumstances, if it be absolute in its terms, and without any condition or reservation, importing a different intent, becomes a contract within the protection of that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of contracts. Charters of private corporations are regarded as executed contracts between the State and the corporators, and the rule is well settled that the legislature, if the charter does not contain any reservation or other provision modifying or limiting the nature of the contract, cannot repeal, impair, or alter such a charter against the consent or without the default of the corporation, judicially ascertained and declared. Subsequent legislation, altering or modifying such a charter, where there is no such reservation, is plainly unauthorized, if it is prejudicial to the rights of the corporators, and was passed without their assent. Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution.* Such power also, that is the power to alter, modify, or repeal an act of incorporation, is frequently reserved to the State by a general law applicable to all acts of incorporation, or to certain

* Pennsylvania College Cases, 13 Wallace, 213.

Restatement of the case in the opinion.

classes of the same, as the case may be; in which case it is equally clear that the power may be exercised whenever it appears that the act of incorporation is one which falls within the reservation, and that the charter was granted subsequent to the passage of the general law, even though the charter contains no such condition, nor any allusion to such a reservation.*

Matters of fact, though not in dispute, must be first ascertained, in order that the questions involved in the case may be properly presented for decision. Briefly stated the material facts are as follows, as appears by the finding of the court of original jurisdiction, and from the concessions of the parties:

That the railroad company is a corporation duly organized under the general railroad act of the State, passed on the 2d of April, 1850, and that the articles of association were, on the 10th of July, of the succeeding year, filed in the office of the secretary of state; that the articles of association provided for the construction of a railroad from Rochester to Portage, a distance of fifty miles, with a capital of eight hundred thousand dollars, to be divided into shares each for one hundred dollars, as therein specified; that the stock subscribed for the corporation, paid and unpaid, amounted to nine thousand seven hundred and seventy-five shares, of which only five thousand five hundred and fifty-two shares were ever fully paid, and for which certificates have been issued. Authority was conferred upon the city of Rochester, by an act to amend the charter of the city, to subscribe for or purchase stock of that railroad company to the amount of three hundred thousand dollars, and the provision was that by virtue of that subscription or purchase the city should acquire all the rights and privileges, and be liable to the same responsibilities as other stockholders of said company, except in certain particulars not necessary to be mentioned.† Pursuant to that authority the proper officers of

* Fletcher *v.* Peck, 6 Cranch, 136; Terret *v.* Taylor, 9 Id. 51.

† Session Acts 1851, p. 768.

the city subscribed for that amount of the stock of the railroad company, and it appears that the proper officers of the railroad company elected to receive the subscription, and that the full amount of the subscription was paid, and that the certificates of the shares were duly issued to the city, and that the city has ever since been the holder and owner of the whole number of said shares. Power was also conferred upon the city, in case the company "elected to receive their subscription," to nominate and appoint one director for every seventy-five thousand dollars of capital stock held by the municipality, at the time of each election of directors, but the further provision was that the city should have no voice in the election of the remaining directors; consequently the common council of the city, at the time of each annual election of directors, elected four—the number being limited by law to thirteen—and the other stockholders elected nine, without any interference from the city authorities. Complaints arose from the fact that four hundred and fifty-two thousand and three hundred dollars of the stock, subscribed by parties other than the city, had never been paid in, nor had certificates ever been issued for any part of that unpaid subscription. On the contrary, the same was not in existence as stock, having long before been extinguished and forfeited for non-payment, in consequence of which the railroad company had abandoned the construction of their road south of Avon, and assigned all their right of way, property, and franchises beyond that point to another corporation, so that their railroad as constructed and operated terminates at Avon, and is only eighteen and three-fourth miles in length. Control of the railroad, by a change of circumstances not contemplated when the plan was organized, being in the hands of stockholders owning a minority of the stock, the legislature of the State, on the 9th of March, 1861, enacted that the common council of the city should "have the power to nominate and appoint one director of the company for every forty-two thousand eight hundred and fifty-five dollars and five-sevenths of a dollar of capital stock of the said railroad company held by

the said city, at the time of each election of directors of said company."* Thereafter the common council of the city, as the plaintiffs claim, became entitled at each annual election of directors to elect seven of the number allowed by law, and that the other stockholders were entitled to elect the remaining six only, as authorized by the apportionment prescribed by the amendatory act of the legislature. Accordingly the common council of the city, at the annual election held in June of the succeeding year, elected seven directors, but the other stockholders, denying the validity of the amendatory act, elected nine directors under the old law, and the persons so chosen immediately entered upon, used, and exercised the said offices as directors of said corporation, and without any warrant or authority, as insisted by the plaintiffs. Deprived of their rights as defined by the amendatory act the plaintiffs brought the present action, in the nature of a writ of *quo warranto*, in the Supreme Court of the State, alleging that the nine directors elected by the other stockholders have usurped the offices of directors of the railroad company. Service was made and the defendants appeared and filed an answer. Hearing was had, and the Supreme Court rendered judgment for the plaintiffs, and the defendants transferred the cause to the Court of Appeals, where the judgment was affirmed; thereupon the losing party sued out a writ of error and removed the record into this court. They seek to reverse the judgment of the State courts upon the ground that the act of the State legislature, authorizing the common council of the city to elect seven of the thirteen directors in the railroad company, is unconstitutional and void as repugnant to their act of incorporation, and in support of that theory they submit the following propositions: (1.) That the signers of the beforementioned articles of association, when the articles were filed in the office of the secretary of state, became a corporation by the name specified in those articles, with all the powers and privileges granted by the general law of the

* Sessions Acts 1867, p. 92.

State upon that subject.* (2.) That the powers and privileges thus conferred were granted by the State, and that the grant, as an act of incorporation, became and was an executed contract. (3.) That the powers and privileges of the charter are prescribed and defined in the general railroad law of the State. (4.) That the persons named as corporators in a charter cannot be compelled to accept the act of incorporation, nor any modification or extension of the powers and privileges granted, whether conferred or modified or extended, by a special act or by virtue of a general law. (5.) That a contract created by an act of incorporation, when once complete, is unalterable by either party without the consent of the other.

Undoubtedly the powers and privileges of the railroad company in this case are the same as they would have been if the company had been incorporated by a special act, and it may also be conceded that the charter, when the articles of association were filed in the office of the secretary of state, became an executed contract, subject to the restrictions ordained by the constitution of the State, and to the reservations contained in the general law of the State relating to corporations, and also in the general railroad act, which it is admitted prescribes and defines the powers and privileges of the railroad company.

Section one of article eight of the constitution of the State ordains as follows: Corporations may be formed under general laws, but shall not be created by special act except in certain cases. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.†

Provision is also made by the eighth section of the act defining the powers, privileges, and liabilities of corporations, that the charter of every corporation that shall hereafter be granted by the legislature shall be subject to altera-

* 3 Edm Stats., 618, §§ 1-4.

† Constitution of 1846, Article 8, § 1.

tion, suspension, and repeal, in the discretion of the legislature.*

Articles of association for the incorporation of railroad companies cannot be filed and recorded in the office of the secretary of state until at least one thousand dollars of stock for every mile of railroad proposed to be made is subscribed thereto, nor without complying with the other conditions specified in the second section of the general railroad act; and the first section of the act provides that such corporation shall be subject to the provisions (except those enacted in the seventh section) contained in title three of chapter eighteen of the first part of the revised statutes, which includes section eight, containing the reservation that the charter of every corporation that shall hereafter be granted shall be subject to alteration, suspension, and repeal, in the discretion of the legislature.† Such a reservation, therefore, is not only ordained by the constitution of the State but it has been twice enacted by the legislature, and it is conceded that both of those statutes are in full force. Superadded to those reservations is the further one, contained in the forty-eighth section of the general railroad act, which provides that the legislature may at any time annul or dissolve any corporation formed under this act, the effect of which, it is admitted by the defendants, is to incorporate into the grant a power of revocation, which seems to supersede all necessity for any further remark upon the subject.‡

Much consideration was given to the question under consideration in the case of *Dartmouth College* v. *Woodward*,§ in which the right of the State was denied to amend the charter granted to the college by the Crown before the Revolution, and to modify and restrict the same without the consent of the trustees under the charter. Four propositions were decided by the court in that case, the opinion being given by the Chief Justice: (1.) That the charter was a contract within the meaning of that clause of the Constitution which ordains that no State shall pass any law impairing the obligation of

* 1 Revised Statutes, 600.

† Session Acts 1850, 212, § 1.

‡ Ib. p. 234.

§ 4 Wheaton, 675.

contracts. (2.) That the charter was not dissolved by the Revolution. (3.) That the acts of the State legislature altering the charter, in a material respect, without the consent of the corporation, was an act impairing the obligation of the charter, and was unconstitutional and void. (4.) That the college, under its charter, was a private and not a public corporation.

Concurring opinions were also given by two of the associate justices, and Judge Story, in enforcing his views, remarked that where a private corporation is thus created by the charter of the Crown, it is subject to no other control on the part of the Crown than what is expressly or implicitly reserved by the charter itself. Unless a power be reserved for this purpose the Crown cannot, in virtue of its prerogative, alter or amend the charter or divest the corporation of any of its franchises, or add to them, or augment or diminish the number of trustees, or remove any of the members, or change or control the administration of the funds, or compel the corporators to receive a new charter.

Prior to that adjudication the Supreme Court of Massachusetts had decided that rights legally vested in a corporation cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation; and the learned judge having referred to that case remarked that the principles there laid down are so consonant with justice, sound policy, and legal reasoning, that it is difficult to resist the impression of their perfect correctness, showing very plainly that such legislation would be valid if the power for that purpose is reserved in the act incorporating the company.* Conclusive evidence that such was the opinion of that learned judge is also derived from his subsequent remarks in that same case, in which he says that any act of a legislature which takes away any powers or franchises vested by its charter in a private corporation or its corporate officers, or which restrains or controls the legitimate exercise of them,

* Dartmouth College *v.* Woodward Case, 4 Wheaton, 708; Wales *v.* Stetson, 2 Massachusetts, 146.

or transfers them to other persons, *without its assent*, is a violation of the obligations of the charter, adding: "If the legislature mean to claim such an authority it must be reserved in the grant."*

Where such a provision is incorporated in the charter, it is clear that it qualifies the grant, and that the subsequent exercise of that reserved power cannot be regarded as an act within the prohibition of the Constitution.†

Members of banking associations, it was enacted by the general banking law of New York, should not be individually liable for the debts of the association, unless it was so provided in the articles of organization, but this court held, in the case of *Sherman* v. *Smith*,‡ that a subsequent statute imposing such a liability upon the shareholders of the association was a valid law, as the charter reserved to the legislature the power to alter or repeal the act of incorporation. Such a conclusion was earnestly resisted at the bar, as the conditional exemption from such liability was embodied in the articles of association, but the court overruled the defence upon the ground that the reservation in the charter of the right to alter or repeal the act was paramount and controlling.

Decisions of the State courts, in repeated instances, both before and since that time, have been made to the same effect. When that case was before the Court of Appeals, before the record was removed here for revision, the Court of Appeals decided that the provision reserving to the legislature the power to alter or repeal the general banking law became a part of the contract with every association formed under it, and that the State might modify it prospectively or retrospectively without infringing the article of the Federal Constitution, which ordains that no State shall pass any law impairing the obligation of contracts, and this court affirmed the judgment in that case.§

* Dartmouth College *v.* Woodward, 4 Wheaton, 712; Cooley's Constitutional Limitations, 279.

† Pennsylvania College Cases, 13 Wallace, 213.

‡ 1 Black, 587.

§ Oliver Lee & Co.'s Bank, 19 New York, 146.

Laws could not be enacted under the constitution in force when the general banking law was passed, to create, alter, continue, or renew any body politic or corporate, without the assent of two-thirds of the members in each branch of the legislature. Consequently it was contended that the members of such associations, subsequently created, could not be affected by the statute declaring that shareholders should be liable individually for the debts of the association, but the Court of Appeals reaffirmed the decision in the preceding case, and determined that the statute imposing that liability was a valid exercise of the power reserved in that act, and that its effect was that the franchises and privileges granted were at all times subject to abrogation or change by the legislative power of the State; that the power reserved was one to be exercised at any time by the existing legislative authority, however constituted, and in any mode conforming to the organic law of the State for the time being.*

Exactly the same principle was adopted in the case of *Railroad* v. *Dudley*,† where it was held that an alteration of the charter of the company, made by the legislature, in pursuance of the power reserved to alter or repeal the act, by changing its name, increasing its capital, *and extending its road*, did not discharge a subscriber to the stock from liability for his subscription, whether such alteration was or was not beneficial to him, the alteration having been duly made and without fraud on the part of the company.‡

Under such a reservation it is also held by the same court, that a member of the corporation holds his stock subject to such liability as may attach to him in consequence of an extension or renewal of the charter, made without his application or consent, and that the estate of an intestate succeeds to the individual liability imposed on the owner in his lifetime as a stockholder, in a corporation whose charter would

* The Reciprocity Bank, 22 New York, 14; White *v.* Railroad Co., 14 Barbour, 559.

† 14 New York, 348.

‡ See also Plankroad *v.* Thatcher, 11 New York, 110.

have expired if it had not been renewed, but was extended after his death; and that his administrator was liable for debts of the corporation contracted after the death of the intestate.*

Even the defendants admit that the exact question presented for decision in this case was decided by the Supreme Court of the State in the case between these same parties, or some of them, and which was subsequently transferred to the Court of Appeals, and was there reversed upon an exception involving a question of local law.†

Nearly forty years earlier the same question substantially was decided in the same way by the chancellor of that State, in which he held that where a State legislature reserves to itself, in the very charter it grants to a private corporation, the right of altering, amending, or repealing the act of incorporation, a subsequent repeal of the charter is valid and constitutional; that such a reservation in the charter of a corporation, upon common law principles, is not repugnant to the grant, but a constitutional limitation of the powers granted.‡ Few or none, it is presumed, will question the correctness of that rule, but the court here is of the opinion that the reservation is equally valid and effectual if it exists in the constitution of the State, or in a prior general law.§ So where the legislature in granting a charter to an insurance company reserved the right to alter it, and they subsequently exercised that right by declaring that if the assets of such corporation should pass into the hands of a receiver he might make assessments upon the premium notes, it was held that this was a legitimate exercise of the reserved power, and that it fully authorized the receiver to make assessments whenever it became necessary to carry the in-

* Bailey *v.* Hollister, 26 New York, 116; Clarke *v.* City of Rochester, 28 Id. 631; People *v.* Hills, 35 Id. 449.

† People *v.* Hills, 46 Barbour, 344.

‡ McLaren *v.* Pennington, 1 Paige Ch., 102.

§ Pennsylvania College Cases, 13 Wallace, 213; General Hospital *v.* Insurance Co., 4 Gray, 227; Roxbury *v.* Railroad Co., 6 Cushing, 424; Suydam *v.* Moore, 8 Barbour, 363; Angel & Ames on Corporations, 9th ed., § 767.

tention of the legislature into effect.* Power to legislate, founded upon such a reservation in a charter to a private corporation, is certainly not without limit, and it may well be admitted that it cannot be exercised to take away or destroy rights acquired by virtue of such a charter, and which by a legitimate use of the powers granted have become vested in the corporation, but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant or to secure the due administration of its affairs so as to protect the rights of the stockholders and of creditors, and for the proper disposition of the assets.† Such a reservation, it is held, will not warrant the legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract.‡

Attempt is made in this case to show that the right to elect all of the directors except four had become vested in the stockholders owning a minority of the shares, and that the amendatory act giving to the city the power to elect seven impairs that vested right, but the court is entirely of a different opinion, as the legislature in conceding that right made the concession subject to the reserved power to alter or repeal the charter, as ordained in the constitution of the State, and also in the several statutes mentioned, which clearly give to the legislature the power to augment or diminish the number or to change the apportionment as the ends of justice or the best interest of all concerned may require.

* Hyatt *v.* McMahon, 25 Barbour, 467.

† Commonwealth *v.* Essex Co., 13 Gray, 253; Miller *v.* Railroad Co., 21 Barbour, 517.

‡ State *v.* Adams, 44 Missouri, 570; Zabriskie *v.* Railroad Co., 3 C. E. Green, 180; Railroad Co. *v.* Veazie, 39 Maine, 581; Sage *v.* Dillard, 15 B. Monroe, 357.

All parties supposed, when the charter was formed, and when the subscriptions to the stock were paid, that the capital stock would be eight hundred thousand dollars, and that the right conceded to the city to elect four out of the thirteen directors would give the city a fair proportion of the whole number, but circumstances have changed in consequence of the failure of a large class of the subscribers to the stock to make good their subscriptions. Payments being refused, the corporation found it necessary to reduce the capital stock, and to shorten the route, as before explained.

These changes from the original design made new legislation necessary to the ends of justice, and the amendatory act was passed to effect that object, and the court is of the opinion that the amendatory act is a valid law and that the judgment should be

AFFIRMED.

Mr. Justice BRADLEY, with whom concurred Mr. Justice FIELD, dissenting.

I dissent from the opinion of the court in this case, on the ground that the agreement with respect to the number of directors which the city of Rochester should elect, was not a part of the charter of the company, but an agreement outside of and collateral to it. Whilst the legislature may reserve the right to revoke or change its own grant of chartered rights, it cannot reserve a right to invalidate contracts between third parties; as that would enable it to reserve the right to impair the validity of all contracts, and thus evade the inhibition of the Constitution of the United States.

[See the next case.]

HOLYOKE COMPANY *v.* LYMAN.

1. By the settled law of Massachusetts, the rights of fishery in such rivers as the Connecticut, even above the point where it is navigable for boats or rafts, are public rights, and, unless there be some express provision to the contrary, are subject to such reasonable regulations as the State may make for their protection; including the right to require of persons who own or build dams, that they construct such fishways as will enable migratory fish to pass from the lower to the higher level of the water occasioned by such dams.
2. The provision of the Revised Statutes of Massachusetts, chapter 44, section 23, and General Statutes, chapter 68, section 41, declaring that acts of incorporation shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature; reserves to the legislature the authority to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or other public or private rights.
3. After a manufacturing corporation, chartered with authority to construct and maintain a dam across a river, paying damages to the owners of fishing rights above, and whose charter does not expressly exempt it from maintaining the dam without a fishway, and is subject under the provision above quoted to amendment, alteration, and repeal at the pleasure of the legislature, has paid such damages and constructed the dam without a fishway, so as to destroy the fishing rights above and to impair similar rights below (for the injury to which last no compensation has ever been made or provided), that corporation, or any other which purchases its dam under the authority of a subsequent statute, may be constitutionally required by the legislature to construct a fishway in the dam to the satisfaction of commissioners appointed by the legislature for the purpose.

ERROR to the Supreme Judicial Court of Massachusetts; the case being this:

The "General Laws"* of the State just named, provide that every act of incorporation passed since the 11th of March, 1831,

"Shall at all times be subject to amendment, alteration, or repeal *at the pleasure* of the legislature."

This general law being on the statute-book the legislature of the State in 1848 passed an act to incorporate the Hadley

* Chapter 68, § 41; Revised Statutes, chapter 44, § 23.

Falls Company, for the purpose of constructing and maintaining a dam across the Connecticut River, and of creating a water-power to be used by the corporation. The capital stock was fixed at $5,000,000, and it could hold $500,000 worth of real estate. The corporation was authorized and empowered "to construct and maintain a dam across the river" at a point named, sufficient to raise the water to a height not exceeding one specified. The act in its fourth section read thus:

"The said corporation shall pay such damages to the owners of the present fishing rights existing *above* the dam which the said company is herein empowered to construct, as may be awarded by the county commissioners of the counties in which said rights exist."

And a mode was provided by which either the company "or any owners of the said fishing rights" might at any time proceed to determine the damages done to *them*. Nothing was said about damages done to fishing rights *below* the dam, nor about making or maintaining, or not making and maintaining any "fishway." No power was given to condemn the land of others for the site of the dam or for any other purpose.

The Hadley Falls Company built at great expense a dam, but without any fishway in it. Before this dam was built shad were accustomed to pass up the river beyond the dam, and were of value to the private owners of riparian fishing rights for sale as food, and a source of income to such proprietors both above and below the dam. The dam, however, by preventing the passage of the fish up the river, destroyed the fishing rights above. And compensation to a large amount was made to the owners of fisheries above the dam for the injuries done to their said rights.

After the dam was built, and owing to it, the number of shad in the river below decreased in a small but appreciable degree; the dam preventing them from passing to their former spawning-grounds above; and to some extent causing them not to return to the river after their annual passage to

the sea. No owners of fishing rights below the dam had, however, ever claimed damages on this account.

On the 31st of January, 1859, the Hadley Company having failed, the same legislature passed an act incorporating the *Holyoke* Water-power Company, "for the purpose of upholding and maintaining *the* dam across the Connecticut River, *heretofore* constructed by the Hadley Falls Company," and gave to the new corporation full power "to purchase, take, *hold*, *receive*, *sell*, lease, and dispose of *all* and any part of the *estate*, with all the water-*power*, water-*courses*, water-*privileges*, dams, rights, easements, and appurtenances thereto belonging, or therewith connected, which have at any time heretofore belonged to the Hadley Falls Company."

The part of the Connecticut River where this dam was constructed runs through the State of Massachusetts, and is not navigable.

In this state of things the legislature passed in 1866 and subsequently, certain statutes, which authorized the commissioners of fisheries of the State to examine the several dams on the rivers of Massachusetts, and after notice to the owners thereof, to determine and define the mode and plan upon which suitable and sufficient fishways should be constructed. The statute regulated the plans, methods, &c., and provided that if any proprietor of any dam should refuse or neglect to agree with the commissioners to build the fishways for thirty days after a plan was duly furnished to him, the commissioners might build the same at his expense. Under and in pursuance of this legislation, the Holyoke Company was required to build a fishway in their dam. The fishway required was one that would cost about $30,000; and, as appeared, would not diminish the water-power of the company, except when they desired to add to it by what are known as "flash boards." The company refused to comply with the requirement, contending that the acts of incorporation to the two companies constituted contracts, that by the payment of damages to the owners of fishing rights *above* the dam the Holyoke Company had the right to maintain "*the* dam," theretofore constructed by the Hadley

Company, and that the acts of 1866, &c., were laws impairing the obligations of contracts, and so in violation of the Federal Constitution. The court below, on a proceeding authorized by the statute to make them do so, adjudged otherwise, and its judgment was now here for review.

Mr. F. Chamberlin, for the plaintiff in error:

1. Where an absolute right to do an act is given, a contract is made that the State will do no act to impair that absolute right. Thus if an absolute grant of land is made, the State cannot thereafter annex a condition restricting its use; or if power is given to erect a bridge of a certain character, the State cannot cause the owner to make an alteration in it. The same rule will apply to a right given without any reservation to make a dam.

In *The People* v. *Platt*,* the State of New York had granted lands on both sides of the Saranac River, without any reservation of the river, or any restriction on the use of it expressed in the grant. By a statute subsequently passed, owners of all dams were required to make fishways, and it was held that such a requirement was unconstitutional as to the defendants, because the unrestricted use of the land and river was given, and it could not be afterwards restricted.

In *Commonwealth* v. *New Bedford Bridge*,† a charter was granted to erect a bridge, with draws of a certain width, and it was held that a statute ordering draws of an increased width to be built was void. The court say:

"Nor can the legislature, without the assent of the defendants, in any way impair the original terms of the charter *by annexing new conditions or imposing additional burdens*, onerous in their nature or inconsistent with a reasonable construction of the compact."

In *West River Bridge Company* v. *Dix*,‡ this court gives the same construction of the clause of the Constitution about contracts on which we rely, and say:

"The language and meaning of the inhibition were designed

* 17 Johnson, 213. † 2 Gray, 339. ‡ 6 Howard, 533.

to embrace proceedings attempting the interpolation of *some new term or condition* foreign to the original agreement, and therefore inconsistent with and violative thereof."

Now in our case, we find an unreserved and unconditional right to erect and maintain a dam across the Connecticut River. Does not a statute that we shall erect a fishway at any cost which the State sees fit to require, interfere with our "perfect use and enjoyment of the thing granted?"

It is evident, also, that in granting these charters the legislature had this principle in mind; for it made a provision which was intended to reach the very matter of fishways. It provided that damages should be paid to certain persons supposed to be affected.

Will it be said that although there is no express reservation at all in the grant, yet that in Massachusetts, in all charters authorizing the erection of *dams*, there is an *implied* reservation, of a right to require the grantees to make any *fishways* in those dams which the legislature may think desirable? The position is not tenable; for the courts of that State have laid down no such general principle. They have only declared that owners of lands or privileges on streams, if they erect dams on them, do so subject to the usual rule that they must so manage them as not to interfere with the right of persons above or below, either to have the water flow, or to have fish pass.* But it follows not that when no reservation of power to cause fishways to be built has been made in the original contract, the State has power to "interpolate such term or condition foreign to the original agreement."

2. Even if in the State of Massachusetts there were an implied condition annexed to grants of power to build dams, the State, in the case at bar, has, by providing in our charter for this very right of fish passage, made another con-

* Stoughton *v.* Baker, 4 Massachusetts, 522; Commonwealth *v.* Chapin, 5 Pickering, 199; Vinton *v.* Welsh, 9 Id. 87; Commonwealth *v.* Essex Co., 13 Gray, 239.

tract, which, upon our accepting it and paying damages, as we have done, exempts us from any further requirement. This right to have fish pass up and down rivers is a *public* right solely. No owner of land above or below a dam can maintain any action against the builder of a dam which injures his fishery, nor proceed against the dam as a nuisance, nor is the owner liable to indictment.* If, however, a provision for damages *is* inserted in a charter, it is clear that this additional consideration is paid for the relinquishment by the State of the right to thereafter demand fishways, or payment of other or further damages than those required; and a contract to that effect arises by *necessary implication*, as clearly as if it was expressed in terms. For how unjust it would be, where only an *implied* condition of building a fishway existed, to put in an express condition that all damages should be paid, and then force the plaintiff, by building fishways, to give back to the owners what he had already paid them for the loss of. Our view does not leave the State without remedy. It may in the exercise of its right of eminent domain take back this right, by paying for it, as in all other similar cases.

3. Then will it be said that there is a general statute of Massachusetts, existing when this charter was made, which reserves the right to alter, modify, or repeal any charter theretofore granted, and that the State has the power under this statute to take back any right it has given *even* for a valuable consideration? If this construction can be maintained all that a State has to do, in order to avoid the provision of the Constitution against the passage of laws impairing the obligation of contracts, is to pass a law saying in substance: "In all contracts I may hereafter make I reserve the right to break them if I see fit." The constitutional provision cannot be evaded in such a manner. But no such construction can be given to this statute.† The distinction is this: The legislature may, under certain circum-

* Commonwealth *v.* Essex Co., 13 Gray, 239.

† Commonwealth *v.* Essex Co., 13 Gray, 239; and see Durfee *v.* Old Colony Railroad, 5 Allen, 230; Sage *v.* Dillard, 15 B. Monroe, 340.

stances, alter *the charter*, but they cannot do anything to affect or destroy any *rights of property acquired under the charter;* and if under such reservation they attempt to violate any contract they have made, they are met by a higher power than their own, which forbids it.

Mr. C. R. Train, Attorney-General of Massachusetts, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Rivers, though not navigable even for boats or rafts, and even smaller streams of water, may be and often are regarded as public rights, subject to legislative control, as the means for creating power for operating mills and machinery, or as the source for furnishing a valuable supply of fish, suitable for food and sustenance. Such water-power is everywhere regarded as a public right, and fisheries of the kind, even in waters not navigable, are also so far public rights that the legislature of the State may ordain and establish regulations to prevent obstructions to the passage of the fish, and to promote the usual and uninterrupted enjoyment of the right by the riparian owners. Proprietors of the kind, if they own both banks of the water-course and the whole soil over which the water of the stream flows, may erect dams extending from bank to bank to create power to operate mills and machinery, subject to certain limitations and conditions, and may also claim the exclusive right of fishery within their territorial limits, subject to such regulations as the legislature may, from time to time, ordain and establish. Persons owning the whole of the soil constituting the bed and banks of the stream are entitled to the whole use and profits of the water opposite their land, whether the water is used as power to operate mills and machinery or as a fishery, subject to the implied condition that they shall so use their own right as not to injure the concomitant right of another riparian owner, and to such regulations as the legislature of the State shall prescribe. Where such a proprietor owns the land on one side only of the stream, his right to the land and to the use of the water,

whether used as power to operate mills and machinery or merely as a fishery, extends only to the middle thread of the stream, as at common law, and is subject to the same conditions and regulations as when the ownership includes the whole soil over which the water of the stream flows. Authority to erect dams across such streams for mill purposes results from the ownership of the bed and the banks of the stream, or the right to construct the same may be acquired by legislative grant, in cases where the legislature is of the opinion that the benefit to the public will be of sufficient importance to render it expedient for them to exercise the right of eminent domain and to authorize such an interference with private rights for that purpose. Lands belonging to individuals have often been condemned for such purposes, in the exercise of the right of eminent domain, in cases where, from the nature of the country, mill-sites sufficient in number could not otherwise be obtained, and that right is, even more frequently, exercised to enable mill-owners to flow the water back beyond their own limits, in order to create sufficient power or head and fall to operate their mills. Concomitant with the authority to erect such dams for such purposes over the beds of water-courses, as resulting from the title to the banks and bed of the stream, is also the exclusive right of fishery, which also has its source in the same ownership of the soil, and the better opinion is that it is not divested or extinguished by any legislative act condemning the land to the use of another for mill purposes, unless the words of the grant conferring the authority to construct the dam plainly indicate that such was the intention of the legislature. Water rights of the kind, whether the streams are used for mill purposes or merely as fisheries, are justly entitled to public protection, as they are in many cases of great value to the community where they exist, but they are the source of many conflicting interests which the State legislatures as well as the courts have found it difficult to adjust, as appears from the countless efforts which have been made in that behalf without complete success.

Restatement of the case in the opinion.

Certain persons, their associates and successors, on the twenty-eighth of April, 1848, were incorporated by the name of the Hadley Falls Company, for the purpose of constructing a dam across the Connecticut River, and one or more locks and canals, in connection with the said dam, to create a water-power to be used for manufacturing and mechanical purposes, and also for the purpose of navigation, with all the powers and privileges and subject to all the duties, liabilities, and restrictions set forth in the thirty-eighth and forty-fourth chapters of the revised statutes of the State.* Power and authority are given to said corporation to construct and maintain a dam across said river at South Hadley, at any point between the present dam of the proprietors of the locks and canals and the lower locks of the said proprietors, of a height sufficient to raise the water to a point not exceeding the present level of the water above the dam of the said proprietors; and the farther provision is that the corporation shall pay such damages to the owners of the present fish rights above the dam to be erected as shall be awarded by the county commissioner. Pursuant to the act of incorporation the stockholders accepted the charter, constructed the dam, paid certain damages to the owners of fish rights above the dam as constructed, and expended, as the respondents allege, more than two millions of dollars, including the cost of the dam and the damages paid to parties adversely interested, in constructing their improvements, and failed in business. New parties acquired the title to the dam and the other improvements, and on the thirty-first of January, 1859, the respondents in this case, as such new proprietors, their associates and successors, were incorporated by the name of the Holyoke Water-power Company, and they were empowered to uphold and maintain the dam and other improvements constructed by the prior company, and to erect and maintain a water-power to be used for the same purposes as those described in the prior charter, with the same powers and privileges and subject to the same lia-

* 8 Special Laws, 949; Revised Statutes, 328–366.

Restatement of the case in the opinion.

bilities and restrictions.* Special power was conferred upon the governor, by and with the advice and consent of the council, by the act of the fifteenth of May, 1866, to appoint commissioners of fisheries in the said river and one other river, to hold their offices for five years unless sooner removed, and it was made their duty by the same act forthwith to examine the several dams on said rivers in said State, and after notice to the owners of the dams, to determine and define the mode and plan by which fishways shall be constructed, suitable and sufficient to secure the free passage of salmon and shad up said rivers during their accustomed seasons. Said commissioners are also authorized to agree with the proprietors of such dams to construct at their own expense said fishways according to the plans adopted, if the proprietors consent so to do, and if they fulfil the agreement and the fact is duly certified to the secretary of state, the provision is that the same, for the period of five years, shall be taken and deemed as in lieu of the fishways which such a proprietor is now required by law to keep and maintain for that purpose. Unless the proprietor of such a dam shall agree with the commissioners within thirty days from the time he is so furnished with the plan to build such fishway in the manner prescribed, the commissioners are authorized to construct the same in behalf of the State, and in that event the provision is that the expense shall be a charge against the owner of such dam, and the same may be recovered of the proprietor in an action of contract in the name of the State, or the commissioners may enforce the construction of such a fishway, by a bill in equity, to compel a specific performance.† Due notice having been given by the complainants, as such commissioners, to the respondents as the owners of said dam, of their intention to examine the dam pursuant to the provisions of the aforesaid acts of the legislature, they proceeded to perform that duty and determined and defined the mode and plan in which

* Private Acts, 1859, 225.

† Sessions Acts 1866, 231; Id. 1867, 741; Id. 1869, 677–741.

the fishway should be constructed therein, suitable and sufficient to secure the free passage of salmon and shad over the dam and up the river during their accustomed seasons. They also furnished the respondents with the plan and specifications of such fishway, and filed a copy of the same in the office of the secretary of state, and requested the respondents to construct such a fishway or to agree with them as such commissioners to comply with that requirement, but it appears that the respondents refused and neglected so to do, insisting that the State had no power or right to require them to build such a fishway. Entirely different views were entertained by the complainants, and they instituted the present suit to compel the corporation respondents to comply with that requirement, and the State court entered a decree for the complainants.* Dissatisfied with that decree the respondents sued out the present writ of error and removed the cause into this court.

Ample power was vested in the first company to hold real estate, not exceeding five hundred thousand dollars in value, but their act of incorporation did not give the company any authority to condemn the real estate of another to any extent or for any purpose. They were required to "pay such damages to the owners of present fish rights existing above the dam" as should be awarded by the county commissioners of the counties in which said rights existed, and they might at any time apply to said commissioners to proceed, ascertain, and determine the damages to said fish rights, subject, however, to an appeal to a jury from such assessment, as in cases of assessment of damages for land taken for highways. Damages for injuries to fish rights above the dam were to be ascertained and assessed, but no authority was conferred to condemn the land of another for the site of the dam or for any other purpose, nor was any provision made to ascertain and assess the damages to fish rights below the dam, nor does either charter contain a provision exempting

* Commissioners on Inland Fisheries *v.* Holyoke Water-power Co., 104 Massachusetts, 451; Weston *v.* Sampson, 8 Cushing, 347.

the builders and owners of the dam from the obligation to construct suitable and sufficient fishways for the free passage of fish up the river during their accustomed seasons.

None of these propositions are controverted, but the respondents insist that the acts of the legislature under which they have been required to make the fishways in question, impair the obligation of the contract contained in the charter incorporating their grantors, and that those acts are inoperative and void as contravening the article of the Constitution which prohibits the States from passing any law impairing the obligation of contracts.

Such a charter, when accepted by the corporators, is undoubtedly a contract that the powers, privileges, and franchises granted shall not be restrained, controlled, or destroyed without their consent, unless a power for that purpose is reserved to the legislature in the act of incorporation or in some prior general law, in operation at the time the act of incorporation was passed.* Private charters of the kind are held to be contracts, because they are based for their consideration on the liabilities and duties which the corporators assume by accepting the terms therein specified, and the general rule is that the grant of the franchise on that account can no more be resumed by the legislature or its benefits diminished or impaired, without the assent of the corporators, than any other grant of property or legal estate, unless the right to do so is reserved in the act of incorporation or by some immemorial usage or general law of the State, which was in operation at the time the charter was granted.† Charters of private corporations duly accepted, it must be admitted, are executed contracts, but the different provisions, unless they are clear, unambiguous, and free of doubt, are subject to construction, and their true intent and meaning must be ascertained by the same rules of interpretation as other legislative grants. Repeated de-

* Dartmouth College *v.* Woodward, 4 Wheaton, 709–712; Wales *v.* Stetson, 2 Massachusetts, 146.

† Pennsylvania College Cases, 13 Wallace, 213.

cisions of this court have established the rule, that whenever privileges are granted to a corporation, and the grant comes under revision in the courts, such privileges are to be strictly construed against the corporation and in favor of the public, and that nothing passes but what is granted in clear and explicit terms.* Whatever is not unequivocally granted in such acts is taken to have been withheld, as all acts of incorporation and acts extending the privileges of corporate bodies are to be taken most strongly against the corporations.†

Evidently the right of fishery, as well as the right to use the water of a stream for mill purposes, is the subject of private ownership, and when held by a good title, the one as much as the other is a vested right, and both alike are entitled to public protection, and are subject, in a certain sense, to legislative regulation and control. Difficulties, in every case, attend the proper adjustment of such rights, as the complete enjoyment of the one may interfere with the corresponding enjoyment of the other, but the presumption is, in construing any regulation upon the subject, that the framers of the regulation did not intend to allow either party to disregard the rule that he should so use his own property as not to injure the property of the owner of the other right.

Ownership of the banks and bed of the stream, as before remarked, gives to the proprietor the exclusive right of fishery, opposite his land, as well as the right to use the water to create power to operate mills, but neither the one nor the other right nor both combined confer any right to erect obstructions in the river to prevent the free passage of the fish up and down the river at their accustomed seasons, as such obstructions would impair and ultimately destroy all such rights owned by other proprietors both above and below the obstruction on the same stream. Authoritative support to

* Rice *v.* Railroad Co., 1 Black, 380; Charles River Bridge v. Warren Bridge, 11 Peters, 544.

† Sedgwick on Statutes and Constitutional Law, 339; Lees *v.* Canal Company, 11 East, 652.

these views is found in the judicial decisions and legislative enactments of the State throughout her history, commencing even before the Revolution, and continued in an unbroken series to the present time.*

Undoubtedly each proprietor of the land adjoining such a river or stream has in that State a several or exclusive right of fishery in the river immediately before his land, to the middle of the river, and may prevent all others from participating in it, and will have a right of action against any who shall usurp the exercise of it without his consent, but the Provincial Statute of 8 Anne, ch. 3 (A.D. 1709),† prohibited all persons, "without approbation or allowance," from placing in or across rivers or streams any weir, hedge, or other incumbrance to obstruct the free passage of fish in the proper seasons of the year. Persons who erect or build a dam across any river or stream where the salmon, shad, alewives, or other fish usually pass up into the natural ponds to cast their spawn, were required by the Provincial Statute of 15 George II, ch. 6 (A.D. 1741), to make a sufficient passageway for the fish to pass up such river or stream, and the owners of dams, so constructed that such fish could not conveniently pass up the river or stream, were required to make such a passageway and keep it open for a certain period in each year, as therein prescribed.‡ Laws of the kind, requiring the owners of dams across the rivers and streams of the State, to build fishways and keep them in repair, have been passed, in numerous instances, since the State constitution was adopted, many of which are still in full force. Such laws usually require the owners of the dam to build the fishway at their own expense, and subject their doings in that behalf to the approval of some supervisory board or committee.§ Reference was made at the argument to some thirty-five or forty statutes of the kind, passed at different periods, commencing the year the constitution of the

* Commonwealth v. Chapin, 5 Pickering, 204.

† 1 Provincial Laws, 162.

‡ Ib. 297; Ib. 17 Geo. II (A.D. 1743), 313; Ib. 19 Geo. II (A.D. 1745), 321.

§ 2 Laws of Massachusetts, Appendix, 1020-1026.

State was adopted (1780) and coming down to the present time, covering a period of more than ninety years.*

Statutes also encouraging mills by authorizing their owners or occupants to overflow the lands of other persons, by paying such damages as may be assessed in the mode prescribed, are also of very ancient origin, and have received the sanction of the courts of the State throughout the whole period of her history.†

Public rights, in all jurisdictions, are subject to legislative control, and it is settled law in Massachusetts, and has been for a century and a half, including her colonial history, that the right of fishery in such rivers as the Connecticut and Merrimac, even above the point where they are navigable for boats or rafts, and the right to erect and maintain dams to create water-power for mill purposes, are public rights, and that the owners of such rights are bound by such reasonable regulations as the State may make and ordain for their protection and enjoyment.

All persons, say the Supreme Court of that State, in the case of *Stoughton* v. *Baker*,‡ who may build a dam for mill purposes, on a stream annually frequented by fish, do it under an implied obligation to keep open sufficient sluices and fishways for the passage of fish at the proper seasons, and that the grant of the right to erect a dam, if made by the legislature, is to be construed to be under the same implied condition to keep open the fishways, unless such implication is excluded by an express provision exempting the grantees from such an obligation. By the statement of facts in that case it appears that the defendants' dam was an ancient dam; that they deraigned their title from the original

* Vinton *v.* Welsh, 9 Pickering, 90; Angell on Waters (6th ed.), 72; Washburn on Easements (2d ed.), 501; Peables *v.* Hannaford, 18 Maine, 106; Parker *v.* Mill Dam Co., 20 Id. 353.

† 1 Provincial Statutes, 12 Anne, ch. 1 (A.D.1709), 160; Ib. 12 Anne, ch. 8 (A.D. 1714), 181; Ancient Charter, 388-404; 2 Laws of Massachusetts, 729; Revised Statutes (1836), 676; Angell on Waters (6th ed.), 664; Washburn on Easements, 332; Murdock *v.* Stickney, 8 Cushing, 119.

‡ 4 Massachusetts, 528.

proprietor, who acquired his right thereto in 1633 by a grant from the town within whose limits the mill-site was then situated; that the grant included the mill privilege and a weir adjoining the mill, and the exclusive right of fishery; that the grant was subsequently confirmed by the legislature, and that no fishway was ever made through the dam until the year 1789, when one was constructed at the expense of third parties, pursuant to a resolution passed by the legislature of the State; that on the fifteenth of March, 1805, the legislature appointed a committee to examine the dams on that river and to order such alterations to be made in the fishways as in their opinion would be sufficient for the convenient passage of the fish at said dam. Three-fourths of the expenses were to be borne by the owners of the dams and one-fourth by the towns interested in the fisheries. Suitable fishways were accordingly constructed, and the towns having paid the whole expense instituted a suit to recover one-fourth of the expense of the owners of the dam. Able counsel appeared on both sides, and the opinion of the court was delivered by Chief Justice Parsons, all of the other justices concurring. Based on these facts it was contended for the defendants that the original grant was a bar to the claim, but the court, conceding that the grant as confirmed amounted to a franchise of a several fishery, nevertheless held that the franchise could not be construed to include the right of excluding all fish from passing above the weir, the court giving as a reason for the conclusion that the value of a fishery in such a stream depends upon the shoals of fish that enter the river and pass to the ponds above to cast their spawn, adding that if none were allowed to pass, the public would lose their supply, and that the fishery would become of little or no value. Evidence was introduced tending to show that the franchise of the exclusive fishery was lost by non-user, but the court held that the said franchise, if it was not lost, would be no objection to the right of the public to have a convenient passageway for the fish to ascend the river to the ponds. They also held that the original proprietor took a fee in the mill-privilege, and that he

had the right to erect the dam to raise water sufficient to operate his mill, but that the right to build a dam for the use of a mill was subject to the following limitations: (1.) That the proprietor must make compensation to the owners of the lands above the dam for damages occasioned by overflowing their lands. (2.) That he must so construct the dam that the fish will not be interrupted in their passage up the river to cast their spawn, adding that every owner of a water mill or dam holds it on the condition that a sufficient and reasonable passageway shall be allowed for the fish.*

Substantially the same questions were presented to the Supreme Court of the State in the case of *Vinton* v. *Welsh*,† in which the opinion of the court was delivered by Chief Justice Parker, and the decision was in the same way and to the same effect. He decided that the owners of dams across such rivers, as well as the owners of such fisheries, hold their property subject to such regulations as the legislature from time to time shall prescribe for the preservation of the fish, basing his conclusion chiefly upon the fact that the colonial and provincial governments, as well as the government of the State under the State constitution had exercised the right of prescribing such regulations from the first settlement of the country to the date of the decision in that case.‡

Litigations upon the subject ceased for a time, but the same questions thirty years later were again presented to the Supreme Court of the State in the case of *Commonwealth* v. *Essex Company*,§ in which the opinion of the court was delivered by Chief Justice Shaw, as the organ of the whole court. Special reference is made in that opinion to the prior decisions of the court upon that subject, and all the leading cases here referred to are approved and the propositions decided are reaffirmed, the court announcing the fol-

* Burnham *v.* Webster, 5 Massachusetts, 266; Nickerson *v.* Brackett, 10 Id. 212; Commonwealth *v.* McCurdy, 5 Id. 324; Cottrill *v.* Myrick, 12 Maine, 229.

† 9 Pickering, 92.

‡ Commonwealth *v.* Chapin, 5 Pickering, 204.

§ 13 Gray, 248.

lowing conclusions: That from the earliest times the right of the public to the passage of fish in rivers and the private rights of riparian proprietors, incident to and dependent on the public right, have been subject to the regulation of the legislature; that the mode adopted by the legislature, whether by public or private acts, to secure and preserve such rights, has been by requiring, in the erection of dams, such sluices and fishways as would enable these migratory fish, according to their known habits and instincts, to pass from the lower to the higher level of the water occasioned by such dam; so that, although their passage might be somewhat impeded, it would not be thereby essentially obstructed. It appears in that case that the company was duly incorporated with power to construct a dam across the Merrimac River at Lawrence, subject to the condition, among other things, that they should construct suitable fishways in their dam for the passage of migratory fish; that they applied to the county commissioners, requesting them, after due notice, to prescribe the mode in which they should construct such fishways in their dam; that such notice was given and a hearing had, and that the commissioners did prescribe the mode in which the company should comply with that requirement, and that the company did construct such fishways in their said dam according to the mode and plan so prescribed; that the fishways, however, as constructed, proved to be unsuitable and insufficient to provide as convenient passageway for the fish.* Circumstances occurring subsequently made it necessary for the company to ask for leave to increase their capital stock, and the legislature, in granting their application, also provided that the company should be liable for all damages occasioned to the owners of fish rights above the dam by the stopping or impeding the passage of the fish up and down the river by the said dam, and that such damages should be assessed by the county commissioners of the county in which such fish rights existed, saving to the respective parties the right to apply

* 8 Special Laws, 470.

for a jury to make such assessment in the manner provided for the recovery of damages from laying out highways.* Having accepted the amendatory act, the company availed themselves of that provision and caused the damages to the fish rights existing above the dam to be assessed, and they paid the several assessments to the owners of the same, amounting to the sum of twenty-six thousand dollars, "as damages for hindering or impeding the passage of fish by their said dam, with the aforesaid fishways therein, as previously constructed." Such fishways did not admit of the usual and unobstructed passage of the fish, as required by the law of the State and the seventh section of their act of incorporation. Complaints subsequently arose and the company was indicted for such neglect and the case came to trial, and the jury, under the rulings and instructions of the court, found the defendants guilty, and they excepted to the rulings and instructions of the court and the case was heard before the full court. Unquestionably the case was fully considered, and the court in the first place reaffirmed all of their previous decisions upon the subject, which hold that persons who build a dam for mill purposes on a stream frequented by migratory fish, do it under an implied obligation to keep open sufficient sluices and fishways for the passage of the fish in their accustomed seasons, and that every grant to erect such a dam is to be construed as under the same implied condition, unless such implication is excluded by an express provision to that effect. Still the court held that the legislature had the power to regulate the public right, and in view of the fact that the amended charter substituted a new proceeding for the recovery of damages by the owners of the fish rights, and that the same, as assumed by the court, had been executed, the court also held that the amended charter had in it all the elements of a contract executed by one party and binding on the other, and that it was not competent for the legislature, even under the power reserved in a prior general law, to amend, alter, or repeal

* 8 Special Laws, 990.

any such charter to require the proprietors of the dam, *without any change of circumstances*, to construct the fishways, which by the terms of the amended charter they had been exempted from any obligation to construct, basing their opinion upon the ground that the right acquired under that provision had become vested by a legitimate exercise of the power granted.*

Vested rights, it is conceded, cannot be destroyed or impaired under such a reserved power, but it is clear that the power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant and to protect the rights of the public and of the corporators, or to promote the due administration of the affairs of the corporation.†

Had it appeared in that case that the amended charter contemplated the assessment of damages for fish rights owned below the dam as well as those owned above the dam, the opinion would certainly be more satisfactory, as in that event the theory assumed by the court that all the parties damaged in their fisheries had been indemnified by the owners of the structure would be correct.‡ Fish rights below a dam, constructed without passageways for the fish, are liable to be injured by such a structure as well as those owned above the dam, as the migratory fish, if they cannot ascend to the head waters of the stream at their accustomed seasons will soon cease to frequent the stream at all, or in greatly diminished numbers.

Suppose the rule, however, to be correct, still it is quite clear that it does not control the case before the court for the reasons given by the same court in rendering the decree brought here for re-examination by the present writ of error. Passageways for the fish had been constructed in that case under the act passed incorporating the company, but they proved to be unsuitable and insufficient, and the court in sustaining the views of the defendants rested their decision upon the ground that the amended charter discharged them

* Sessions Acts 1831, 613.

† Miller *v.* The State, *supra*, p. 478.

‡ Moulton *v.* Libbey, 37 Maine, 484.

from the obligation to reconstruct such fishways, as the amended charter required them to make compensation for the injuries to the fish rights in the place of the prior obligation arising from the rules of the common law of the State and the terms of their original charter, the court holding that the government could not, *without any change of circumstances*, require the defendants to do the very acts which, by the terms of the amended charter, they had been exempted from doing, but the court declined to decide whether, if the fishways provided should prove to be wholly unfit and inadequate to their purpose the legislature could not by further legislation require the company to fulfil the original obligation. Sufficient appears to warrant the conclusion that no evidence was introduced in that case to show that the fish rights below the dam suffered any injury whatever, nor does it appear that the attention of the court was drawn to the fact that the river across which the dam was built runs through more than one State.* Different rules perhaps may be applied in ascertaining the power of a State legislature to authorize permanent obstructions to the free passage of fish in a river flowing through two or more States, like the Connecticut or Merrimac, from the rules which should be applied in a case where the river across which the dam is constructed is wholly within the State which authorizes the structure, but it is not necessary to consider that question in this case, as it was not raised in the State court nor was it presented here by either party.

Fishways have never been constructed by the respondents in their dam, and they contend that they are not obliged to make any such provision for the passage of the fish, as their charter does not create any such obligation; but the answer which the complainants make to that suggestion is decisive, that the charter does not contain any provision exempting them from that implied obligation, which arises in every such case by the common law of that State, unless the charter contains some provision which expressly negatives that

* Moor *v.* Veazie, 32 Maine, 353; Veazie *v.* Moor, 14 Howard, 571.

implication. Even suppose that is so, still they contend that the fourth section of the charter of their grantors should be construed as negativing any such implied condition, but the court is entirely of a different opinion, as that section makes no provision for any compensation to the owners of the fish rights below the dam, and the record shows that such fish rights, as well as those above the dam, are injured by the obstruction to the free passage of the fish in their accustomed seasons to the head waters of the river. Authority to construct and maintain a dam without a fishway, it is conceded, is not granted in terms in the charter, and it may be added that the charter does not contain any words to warrant any such implication. On the contrary, the terms and provisions of the charter are consistent with the theory that the legislature contemplated the construction of a dam with a convenient passageway for fish, so as not to impair unnecessarily the rights of the riparian owners either above or below the dam, and that the legislature, if the company failed to fulfil that obligation, may "compel them to do so by more specific legislation." Damages, it is true, were to be paid to "the owners of present fish rights existing above the dam," but the court here, in respect to that matter, concurs with the State court that the meaning of the sentence is satisfied by regarding it as providing for a partial interruption and injury of those rights and not as contemplating their utter destruction; that the legislature which granted the charter may well have supposed that a dam across the river at that place, with the best fishway that could be constructed, would, to some extent, obstruct the free passage of the fish, and may have intended by that provision to require the owners of the dam to make compensation for such injuries.

Viewed in any reasonable light it is quite clear that the charters of the respondents do not contain any stipulation or contract exempting them from the implied condition annexed to such a grant, not qualified by such a contract, that the corporation in erecting such a dam shall construct suitable and convenient fishways for the free passage of the fish

to the headwaters of the river in their accustomed seasons; and that the charter, in view of the fact that it contains no such exemption, is subject to the power reserved to the legislature by the general law, in operation when the charters were granted, that all acts of incorporation shall at all times hereafter be liable to be amended, altered, or repealed at the pleasure of the legislature. Such charters being subject to the implied condition to construct suitable fishways for the free passage of the fish, it follows that the corporations are not exempt from that burden, and that the legislature under the reserved power to amend, alter, or repeal the charter, may pass laws to enforce that duty, as such a law does not impair any contract created by the charter or infringe any right vested in the corporation.* Charters subsequently granted must be understood as standing just as they would if that reservation of the power to amend, alter, or repeal the same had been incorporated into each charter.† Power to legislate, founded upon such a reservation, is certainly not without limit, but it may safely be affirmed that it reserves to the legislature the authority to make any alteration or amendment in a charter granted, subject to it, that will not defeat or substantially impair the object of the grant, or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter.‡

Such a charter may doubtless be granted to build a dam across a river whose whole course is within the State granting the franchise, with a provision exempting the corporation from all obligation to construct such fishway for the free passage of the fish, as the enterprise of erecting a dam to create power to operate mills is so far public in its nature that it is competent for the legislature to exercise the power of eminent domain to accomplish the purpose, if suitable

* Revised Statutes, 366; Pennsylvania College Cases, 13 Wallace, 213.

† Miller *v.* The State, *supra*, p. 478.

‡ Commissioners on Inland Fisheries *v.* Holyoke Water-power Co., 104 Massachusetts, 451.

provision is made to compensate the owners of the property or rights condemned under that power, but it may be more doubtful whether the legislature of a State can make a contract with such a corporation authorizing them to construct a dam across a river flowing through two or more States, which shall permanently exempt the grantees from all such obligation and destroy forever the rights of fishery in the river throughout its whole course from its source to its confluence with tide waters.

Concede, however, that the power to make such a contract exists, and that it is as boundless as the theory of the respondents assumes it to be, still the court here is of the opinion that the decree of the State court is correct and that it should be affirmed, as the charters under which the dam in this case was erected and is maintained do not contain any such exemption from the implied obligation to construct fishways for the free passage of the fish, nor any provision which prohibits the legislature from imposing that obligation under the power reserved to amend, alter, or repeal the charter.

Properly construed neither of the charters affords any support whatever to the theory of the respondents, as they do not contain any semblance of a grant to take and subvert the fish rights below the dam, nor is there anything in the provision requiring compensation to be made to the owners of the fish rights above the dam, which is not perfectly consistent with the theory that it was incorporated into the charter merely to compensate the owners of such fish rights for injuries which they would suffer from the obstruction, even if the customary fishways were constructed as required by immemorial usage and the express enactment of the legislature.

DECREE AFFIRMED.

THE NITRO-GLYCERINE CASE.

[PARROT *v.* WELLS, FARGO & CO.]

1. In 1866 the defendants, who were expressmen engaged in carrying packages between New York and California, by way of the Isthmus of Panama, received at New York a box containing nitro-glycerine to be carried to California. There was nothing in the appearance of the box tending to excite any suspicion of the character of its contents. It was received and carried in the usual course of business, no information being asked or given as to its contents. On arriving at San Francisco, California, its contents were leaking and resembled sweet oil. The box was then taken for examination, as was the custom with the defendants when any box carried by them appeared to be damaged, to the premises occupied by them, which were leased from the plaintiff. Whilst a servant of the defendants, by their direction, was attempting to open the box the nitro-glycerine exploded, injuring the premises occupied by them and other premises leased by the plaintiff to, and occupied by, other parties. The defendants had no knowledge of, and no reason to suspect, the dangerous character of the contents. They repaired the injuries to the premises occupied by them: *Held*, that they were not liable for the damage caused by the accident to the premises occupied by other parties.
2. Common carriers are not chargeable, in cases free from suspicion, with notice of the contents of packages carried by them; nor are they authorized, in such cases, to require information as to the contents of the packages offered as a condition of carrying them.
3. Where there is nothing to excite the suspicion of a common carrier as to the contents of a package carried by him, it is not negligence on his part to introduce the package, when appearing to be damaged, into his place of business for examination, and to handle it in the same manner as other packages of similar outward appearance are usually introduced for examination and handled.
4. The measure of care against accidents, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected and the whole risk were his own.

ERROR to the Circuit Court for the District of California.

Parrot brought an action in the court below against certain defendants who composed the well-known firm of Wells, Fargo & Co., express carriers, to recover damages for injuries to certain large buildings owned by him in the city of San Francisco, caused in April, 1866, by the explosion of

nitro-glycerine whilst in charge of the said defendants. The action was originally begun in the State court of California, and was thence removed, on motion of the defendants, to the Circuit Court of the United States, where it was tried by the court without the intervention of a jury, by stipulation of the parties, under the recent act of Congress.

The complaint contained four counts. The first, was for technical waste by the landlord against his tenant from year to year, based on a statute of California. The waste was charged to have resulted from negligently introducing an explosive substance, &c., and treble damages were claimed.

The other counts were for injuries to premises demised to the defendants, and to the reversionary interest of the plaintiff in premises demised to other tenants, caused by the defendants, by themselves and their servants carelessly, negligently, and improvidently introducing upon the premises occupied by them, a box containing the explosive substance, and so carelessly, negligently, and unskilfully examining, handling, moving, and striking the box as to produce the explosion of the substance, causing the injuries complained of.

The answer joined issue on all the material allegations of the complaint; also set up a lease under which defendants occupied, and a right to carry on the business of expressmen in the demised premises; and also averred a repair of the demised premises, before suit brought, to the satisfaction of the plaintiff and with his approbation.

The facts of the case as found by the court were substantially these:

The plaintiff, being owner of the buildings injured, let, in November, 1855, *a portion* of them—the basement and first floors with the vaults and banking fixtures therein, together with a brick warehouse in the rear—to the defendants for a term of two years from the first of January, 1856. The lease contained covenants that the lessees would not receive in the demised premises, either for their own account or on storage, or allow any person to place therein "gunpowder, alcohol, or any other articles dangerous from their combus-

tibility;" that they would, during the term of the lease, "occupy the premises solely for the business of their calling," which was that of bankers and expressmen, and at the expiration of their term would "quit and surrender the said demised premises with all the fixtures therein contained in as good condition as the reasonable use and wear thereof would permit, damages by the elements excepted." The rent stipulated was $12,000 a year, payable in monthly instalments of $1000 each month in advance. The lease was on two occasions subsequently renewed on the same terms, once for two years from January, 1858, and again for two years from January, 1860. After the expiration of the latter term the premises were held over from year to year with the assent of the plaintiff, though without any special agreement on his part, and were thus held on the 16th of April, 1866, when the injuries complained of were caused, the defendants paying rent in accordance with the terms of the original lease. *The remaining portions of the buildings—being mostly portions above the part occupied by Wells, Fargo & Co.—were at the time let to other tenants.*

The premises occupied by the defendants were used by them for their business, as stipulated in the lease. They were engaged in the business of public express carriers in the States and Territories of the Pacific coast, and between New York and San Francisco by way of the Isthmus of Panama, using on the latter route the steamships of the Pacific Mail Steamship Company, running between New York and Aspinwall on the Atlantic side, and Panama and San Francisco on the Pacific side, to convey their express matter, and transporting the same across the isthmus by the Panama railroad. In 1866 the steamers left New York on the 1st, 11th, and 21st days of each month, and it was a regulation of the company that no express freight should be received at the wharf in New York on those days. On the afternoon of March 11th, 1866, and after the steamer sailing that day had left for Aspinwall, a man brought to the wharf from which the steamer had taken her departure, a case to be carried to California, and asked an employé of the defend-

ants to receive it for that purpose. The employé informed him that it was too late to receive freight on that day, but that he could leave the case at his own risk and come the next day and get a receipt. He thereupon placed the case on the dock opposite the freight office of the company. The employé noticed at the time that the case had not been marked or strapped, as required by the regulations of the company, and called the man's attention to the omission; whereupon he requested the employé to mark and strap the case at his expense. The case was accordingly strapped as required, and was marked with the proper address of the person for whom it was intended in California. Two days afterwards the man returned and obtained a receipt from the proper clerk of the company. The case remained on the dock where deposited till the next steamer left New York, when it was taken with other freight. At the time the case was presented it was clean and appeared to be in perfect condition. There was nothing in its appearance calculated to awaken any suspicion as to its contents. It required strapping and marking, and when this was done it was in proper condition for shipment. The case was an ordinary wooden box about two and a half feet square, and weighed three hundred and twenty-nine pounds. Nothing was said upon its delivery, or upon taking the receipt afterwards, or at any other time, about the contents of the case to the defendants, or to any of their employés, nor were any questions subsequently asked by any one respecting the contents. The case was shipped for California with a large quantity of other express freight, amounting to several thousand cases, on the steamer that left New York on the 21st of March, 1866. It was carried to Aspinwall, thence transported over the Panama railroad, reshipped on a steamer at Panama, and arrived in San Francisco on the 13th or 14th of April. On the afternoon of the 14th it was taken from the steamer and placed upon the wharf, when it was discovered that the contents were leaking. These contents had the appearance of sweet oil. Another box of similar size had been stained by the contents leaking and appeared to

be damaged. On the 16th of April, in accordance with the regular and ordinary course of the defendants' business, when express freight is found to be damaged, the two boxes were taken to the defendants' building, the premises in question, for examination. The agent of the steamship company was requested to send a representative to be present at the examination so that it might be determined, if possible, by inspection, where the responsibility rested between the two companies for the injury to the case. A representative of the company accordingly attended, and in his presence, and in the presence of an agent of the defendants, and of other persons, an employé of the defendants, by their direction, with a mallet and chisel, proceeded to open the case, and while thus engaged the substance contained in it exploded, instantly killing all the parties present, and causing the destruction of a large amount of property, and the injuries to the buildings occupied by the defendants, for which the present action was brought. Upon subsequent examination it was ascertained that the substance contained in the case was nitro-glycerine or glonoin oil. The other box contained silverware.

Nitro-glycerine, according to the account given of it in the record, in its pure condition, is a nearly colorless substance, but when impure it has the color and consistency of sweet oil. It is a liquid which, under some conditions, explodes with great violence, its explosion being produced by percussion and concussion, and by a high degree of pressure, but not by contact with fire. If a flame be applied it will burn slowly without exploding, and if the flame be withdrawn it will cease to burn. It will also explode upon being subjected to a heat of 360 degrees Fahrenheit, and in explosion combustion takes place. When kept in closed vessels it gradually decomposes, and in decomposing disengages gases, the pressure alone of which may cause an explosion. In this case the nitro-glycerine in some of the cans in the case had become partially decomposed, generating gases and producing pressure within the cans and a tendency to explode. In this condition of decomposition the percussion or concussion

caused by opening the box with the mallet and chisel, operating in connection with the internal pressure, produced the explosion.

The discovery of this substance was first announced at Paris, in 1847, but, prior to 1864, experiments with it were confined almost entirely to the laboratory of the chemist. It was manufactured only in small quantities for scientific purposes. In that year a gentleman in Europe by the name of Noble suggested that it might be used for blasting purposes, and in the following year he made experiments with it, demonstrating its extraordinary power, and succeeded in introducing it to a limited extent into some of the European quarries and mines. An account of its properties was also published during that year in England and in a scientific periodical in New York. In 1866, a few weeks before the explosion which has given rise to this case, a shipment of the article from Noble arrived in San Francisco. Efforts were making by the consignees to draw public attention to it for blasting purposes, when the explosion at the office of the defendants took place. A second shipment from the same person to the same consignees, made from Hamburg by the steamer "European," exploded on the 8th of April, 1866, at Aspinwall, destroying the steamer and other property. This was eight days before the explosion at the defendant's express office, and the news had not then reached San Francisco. Notwithstanding the efforts of Noble to bring his nitro-glycerine into notice in 1865, and the two shipments mentioned made by him early in 1866, at the time the case in question was shipped at New York and received at San Francisco, nitro-glycerine was not generally known to the public as an article of commerce. The explosions at Aspinwall and San Francisco, and subsequent ones occurring at Sidney and in England, attracted the attention of scientific men to the subject, and led to more careful investigation and experiment and to general knowledge of its properties.

The court found that neither the defendants, nor any of

the employés of the defendants, or of the Pacific Mail Steamship Company, who had anything to do with the package in question, nor the managing agent of the defendants on the Pacific coast, nor any of those killed by the explosion, knew the contents of the case in question, or had any means of such knowledge, or had any reason to suspect its dangerous character, and that they did not know anything about nitro-glycerine or glonoin oil, or that it was dangerous; that the case had the appearance of other cases usually received in the ordinary course of the defendants' business, and was received and handled by their employés in the same way that other cases of similar appearance were usually received and handled, and in the mode that men of prudence engaged in the same business would have handled cases having a similar appearance in the ordinary course of business, when ignorant of their contents, and with similar means of knowledge as that possessed by the defendants and their employés in this instance; and that there was no negligence on the part of the defendants in receiving the case, or in their failure to ascertain the dangerous character of the contents; and in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, there was no negligence in the handling of the case at the time of the explosion.

The defendants either repaired or paid for the repairs (to the amount of about $6000) of the premises occupied by themselves, except a portion of certain repairs made by the plaintiff, which were necessarily made in connection with repairs made to those portions of the premises occupied by the other tenants of the plaintiff, and which the defendants omitted to pay for by mistake.

For the amount thus omitted to be paid, and interest, the court gave judgment for the plaintiff, but held that the defendants were not liable for any damage caused by the explosion to other portions of the buildings of the plaintiff, leased to and occupied by other tenants.

To review this judgment the plaintiff sued out a writ of error from this court.

Messrs. R. M. Corwine and B. R. Curtis (with whom was Mr. Quinton Corwine), for the plaintiff in error:

The question is, are Wells, Fargo & Co. liable for injuries to those parts of the building not rented by them? We assert that they are.

I. They are liable under the covenants of the lease. They were tenants holding over, under the covenants of a written lease, and were bound to keep all those covenants as much as if the original lease were still running.

One of those covenants was that they would "not receive in the demised premises, either for their own account or on storage, or allow any person to place therein, gunpowder, alcohol, or any other articles dangerous from their combustibility."

So, too, there is the other covenant: "at the expiration of the said term to quit and surrender the said demised premises, with all fixtures thereon contained, in as good a condition as the reasonable use and wear thereof will permit, damages by the elements excepted." How is a room, or how are certain apartments in, part of, and inseparable from an immense and splendid structure rendered in as good a condition as they were, when the whole immense and splendid structure having been blown to pieces, the room is rebuilt, a separate thing, with all the rest of the edifice piled up in ruins around it? Where the demised premises are so connected with—so part of a whole edifice—that they can never be restored in as good a condition as they were, unless the whole be so restored, a covenant to restore the demised premises in as good a condition as they were taken, is a covenant to restore the whole; certainly so where the whole has been destroyed by the plaintiff's act.

II. But, waiving this ground of covenant, we assert that the defendants were still liable for all the injuries to the premises, which they have produced. They were bound to know the nature of the property which they were introducing into the demised premises. Every person who undertakes a business in which the public is concerned is bound to conduct it with care, and if for want of that care injury

occur, to repair the injury. Can any one doubt that if this explosion had occurred on the vessel in which the box had been, that Wells & Fargo would have been liable for all injury done? They had accepted this unknown thing from a stranger, and they themselves shipped it; for they were, in truth, the shippers. So here they put it into the demised premises; no way differing in this respect from the ship, for they were their own consignees. Public carriers, shipping thousands of boxes upon steamers where many people are constantly at sea, without the least means either of preventing accidents which the dangerous contents of the boxes may produce, or of alleviating the injuries produced by such accidents, and where nothing but a knowledge on their part of what they do can protect travellers from catastrophes by explosion, ignition, and poison, are bound to know what they do. They put what they please on the ship. No one supervises them; and they remain on land. No promise to the public—no contract with any one—could place upon them a higher moral obligation to inform themselves than that which their business imposes upon them; for they are daily shipping articles, which may include articles like this, of a frightful power, easily brought into action, and where, if their power is brought into action at all, the consequences are awful indeed. Certainly men exercising such an employment, as do these sort of shippers, are bound to observe and exercise the usual and necessary precautionary and prudential steps which govern the conduct of every one. Where the rights of others are so vitally concerned mere ignorance of the *effect* of their acts will not excuse them. What is known to others, even although not of universal notoriety, they should be presumed to be conversant with. If they *might* know the character of property intrusted to them and neglect to inform themselves, they must suffer the consequences of neglect. In the reckless disregard of human life common by land and water in our country, and where so many lives and so much valuable property are involved and liable to destruction by the introduction, on vessels and into storehouses, of dangerous compounds, public

policy demands the establishment and enforcement of these rules.

If, however, the defendants are not to be held to the most rigid rules of accountability for this frightful catastrophe, still their liability is absolute, because they were sufficiently put upon inquiry.

1st. The box was delivered at the dock of defendants, in New York, at an unseasonable hour and day, and this fact was remarked upon by the agent of defendants, who likewise called attention to the unsafe condition or fastenings of the box. Assuming that the person who delivered it was ignorant of the company's rules or regulations, the courts will presume that defendants' agent was versed and practiced in them, and that he was conscious of their violation when he received and receipted for this box. There was no explanation offered as to why the box was brought there at that improper time, nor was any question asked.

2d. The name of the party who delivered the box was not given, and, so far as the bill of exceptions or the finding of the court discloses, it was not asked for.

3d. Neither was the box strapped, marked, or weighed. But, even if the man who received it was inexperienced and so ignorant that he did not understand the rules, the box remained with the company two days before the person who delivered it called for his regular receipt. Thus there was ample time for the facts to be reported to the officers by the party who acted for the company in the receipt of it, in order that he might be instructed as to his course when the person who delivered it called again. But the shipping clerk, in the face of these suspicious circumstances, gave the company's regular receipt for the box to the party when he called, some days after leaving it. Had these facts been reported to the officers, it is not at all impossible that the nature of the contents of this box would have been carefully inquired into. Each of these omissions was a violation of the *rules* of the company. Certainly they were, taken together, suspicious, because unusual circumstances, which should have put the defendants upon inquiry. That they

did not inquire is only a fact which shows neglect on their part.

Mr. S. M. Wilson (*who argued the case thoroughly on the precedents, English and American*), *contra.*

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

It appears from the record that the court finds, that neither the defendants, nor any of their employés, nor any of the employés of the Pacific Mail Steamship Company, who had anything to do with the case of nitro-glycerine, knew the contents of the case, or had any means of such knowledge, or had any reason to suspect its dangerous character, and that they did not know anything about nitro-glycerine, or that it was dangerous. And it also appears that the court finds, that there was no negligence on the part of the defendants in receiving the case, or in their failure to ascertain the dangerous character of the contents; and in view of the condition of their knowledge, of the want of means of knowledge, and the absence of any reasonable ground of suspicion, that there was no negligence in the handling of the case at the time of the explosion.

The question presented to us is, whether upon this state of facts the plaintiff is entitled to recover for the injuries caused by the explosion to his buildings, outside of that portion occupied by the defendants under their lease. For the injuries to that portion the defendants admit their liability, as for waste committed, under the statute. Immediately after the accident they repaired that portion with the sanction of the plaintiff, and placed the premises in a condition as good as they were previously. It appears, however, that a part of the expenses incurred were by mistake paid by the plaintiff in settling for repairs on other buildings. For the part thus paid the court gave judgment for the plaintiff under the first count, and the defendants take no exception to its action in this respect.

To fasten a further liability on the defendants, and hold

them for injuries to that portion of the buildings not covered by their lease, it was contended in the court below, and it is urged here, that, as matter of law, they were chargeable with notice of the character and properties of the merchandise in their possession, and of the proper mode of handling and dealing with it, and were consequently guilty of negligence in receiving, introducing, and handling the box containing the nitro-glycerine.

If express carriers are thus chargeable with notice of the contents of packages carried by them, they must have the right to refuse to receive packages offered for carriage without knowledge of their contents. It would, in that case, be unreasonable to require them to accept, as conclusive in every instance, the information given by the owner. They must be at liberty, whenever in doubt, to require, for their satisfaction, an inspection even of the contents as a condition of carrying the packages. This doctrine would be attended in practice with great inconvenience, and would seldom lead to any good. Fortunately the law is not so unreasonable. It does not exact any such knowledge on the part of the carrier, nor permit him, in cases free from suspicion, to require information as to the contents of the packages offered as a condition of carrying them. This was ruled directly by the Common Pleas in England in the case of *Crouch* v. *The London and Northwestern Railway*.* The proposition that a carrier is, in all cases, entitled to know the nature of the goods contained in the packages offered to him for carriage, is there stated to be unsupported by any authority, and one that would not stand the test of reasoning.

In *Brass* v. *Braitland*,† it was held by the Queen's Bench that it was the duty of the shipper, when he offered goods which were of a dangerous nature to be carried, to give notice of their character to the owner of the ship, the Chief Justice, in delivering the opinion of the court, observing that "it would be strange to suppose that the master or mate, having no reason to suspect that goods offered to him

* 14 Common Bench, 291.

† 6 Ellis & Blackburn, 485.

for a general shipment may not be safely stowed away in the hold, must ask every shipper the contents of every package."

The case cited from the Common Pleas recognizes the right of the carrier to refuse to receive packages offered without being made acquainted with their contents, when there is good ground for believing that they contain anything of a dangerous character. It is only when such ground exists, arising from the appearance of the package or other circumstances tending to excite his suspicions, that the carrier is authorized, in the absence of any special legislation on the subject, to require a knowledge of the contents of the packages offered as a condition of receiving them for carriage.

It not, then, being his duty to know the contents of any package offered to him for carriage, when there are no attendant circumstances awakening his suspicions as to their character, there can be no presumption of law that he had such knowledge in any particular case of that kind, and he cannot accordingly be charged as matter of law with notice of the properties and character of packages thus received. The first proposition of the plaintiff, therefore, falls, and the second, which depends upon the first, goes with it.

The defendants, being innocently ignorant of the contents of the case, received in the regular course of their business, were not guilty of negligence in introducing it into their place of business and handling it in the same manner as other packages of similar outward appearance were usually handled. "Negligence" has been defined to be "the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."* It must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition

* Blyth *v.* Birmington Water Works, 11 Exchequer, 784.

of knowledge, and one state of circumstances, would be gross negligence with different knowledge and in changed circumstances. The law is reasonable in its judgments in this respect. It does not charge culpable negligence upon any one who takes the usual precautions against accident, which careful and prudent men are accustomed to take under similar circumstances.*

The case of *Pierce* v. *Winsor*,† decided by Mr. Justice Clifford, in the Circuit Court of the District of Massachusetts, furnishes a pertinent illustration of this doctrine. There a general ship was put up for freight. Among other freight offered and taken was mastic, an article new in commerce, and which was so affected by the voyage that it injured other parts of the cargo in contact with it, and caused increased expenditure in discharging the vessel. The court held the shipper and not the charterer liable, and observed that "the storage of the mastic was made in the usual way, and it is not disputed it would have been proper, if the article had been what it was supposed to be, when it was received and laden on board. Want of greater care in that behalf is not a fault, because the master had no means of knowledge that the article required any extra care or attention beyond what is usual in respect to other goods."

This action is not brought upon the covenants of the lease; it is in trespass for injuries to the buildings of the plaintiff, and the gist of the action is the negligence of the defendants: unless that be established, they are not liable. The mere fact that injury has been caused is not sufficient to hold them. No one is responsible for injuries resulting from unavoidable accident, whilst engaged in a lawful business. A party charging negligence as a ground of action must prove it. He must show that the defendant, by his act or by his omission, has violated some duty incumbent upon him, which has caused the injury complained of.

The cases between passengers and carriers for injuries stand upon a different footing. The contract of the carrier

* Sherman and Redfield, § 6.

† 2 Clifford, 18.

being to carry safely, the proof of the injury usually establishes a *primâ facie* case, which the carrier must overcome. His contract is shown, *primâ facie* at least, to have been violated by the injury. Outside of these cases, in which a positive obligation is cast upon the carrier to perform safely a special service, the presumption is that the party has exercised such care as men of ordinary prudence and caution would exercise under similar circumstances, and if he has not, the plaintiff must prove it.

Here no such proof was made, and the case stands as one of unavoidable accident, for the consequences of which the defendants are not responsible. The consequences of all such accidents must be borne by the sufferer as his misfortune.

This principle is recognized and affirmed in a great variety of cases—in cases where fire originating in one man's building has extended to and destroyed the property of others; in cases where injuries have been caused by fire ignited by sparks from steamboats or locomotives, or caused by horses running away, or by blasting rocks, and in numerous other cases which will readily occur to every one. The rule deducible from them is, that the measure of care against accident, which one must take to avoid responsibility, is that which a person of ordinary prudence and caution would use if his own interests were to be affected, and the whole risk were his own.*

And the principle is not changed whether the injury complained of follows directly or remotely from the act or conduct of the party. The direct or remote consequences of the act or conduct may determine the form of the action, whether it shall be case or trespass, where the forms of the common law are in use, but cannot alter the principle upon which liability is enforced or avoided. In *Brown* v. *Kendall*,† which was before the Supreme Court of Massachusetts, the action was in trespass for an assault and battery. The de-

* Hoffman *v.* Tuolumne County Water Co., 10 California, 413; Wolf *v.* St. Louis Indep. Water Co., Ib. 541; Todd *v.* Cochell, 17 Id. 97.

† 6 Cushing, 295.

fendant was trying to part two dogs, fighting, and in raising his stick for that purpose accidentally struck the plaintiff in his eye, injuring it severely. The court, Mr. Chief Justice Shaw delivering the opinion, held that the defendant was doing a lawful and proper act, which he might do by the use of proper and safe means; and that if in so doing, and while using due care and taking all proper precautions necessary to the exigency of the case to avoid hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefor, and that the burden of proof was on the plaintiff to establish a want of due care on the part of the defendant. In *Harvey* v. *Dunlap*,* which was before the Supreme Court of New York, the action was trespass for throwing a stone at the plaintiff's daughter, by which her eye was put out. It did not appear that the injury was inflicted by design or carelessness, but on the contrary that it was accidental, and it was held that the plaintiff could not recover. "No case or principle can be found," said Mr. Justice Nelson, in denying a new trial, "or, if found, can be maintained, subjecting an individual to liability for an act done without fault on his part;" and in this conclusion we all agree.

JUDGMENT AFFIRMED.

DEITSCH *v.* WIGGINS.

1. The court calls the attention of the bar to the necessity of a strict compliance with the 21st Rule in the assignment of errors; a compliance which it declared is necessary to the disposition of the business which now "presses" upon the court. It accordingly passes without any notice at all a number of errors meant to be assigned by the plaintiff in error, but which were not assigned in the way prescribed by the said rule.

2. In an action of trespass *de bonis asportatis*, where the issue involves the question as to where the ownership of the property was, evidence tending directly to show that an alleged sale, which the plaintiff relied on as the

* Lalor's Reports, 193.

basis of his action, was a fraudulent sale, is pertinent to the issue; and the rejection of it is error.

3. Evidence which, in connection with other evidence offered, tends to make out a defence, is properly receivable, though it may not itself prove all the facts necessary to constitute a defence.

4. In a suit of trespass *de bonis asportatis*, against C. (a sheriff) and D. (the plaintiff in a writ of attachment executed by the said sheriff), a plea contains all the averments essential to a justification when it alleges sufficiently, that the chattels mentioned in the declaration were the property of B. on the 4th of May, 1867, that on the 3d of the same May a writ of attachment was issued out of the court of a county named in favor of D., directed to the sheriff of the said county, commanding him to attach so much of the personal and real estate of said B. as should be sufficient to satisfy a sum specified; that on the said 3d of May, the said C. was sheriff of the county named; that on the said day the writ of attachment was delivered to him to execute; and that on the 4th of said May, he levied upon the said goods and chattels as the property of the said B., by virtue of the said writ, and that these were the supposed trespasses. And this is so, even though the plea do not allege that D. was a creditor of B., nor that the attachment was otherwise regularly issued, nor that D. did the acts complained of under the direction of the sheriff, nor that the attachment had been returned.

5. However informal such a plea may be, the informality is not such as that, after a traverse of its allegations, issue, and trial, it can be taken advantage of on error. The plaintiff should have demurred.

ERROR to the Supreme Court of the Territory of Colorado.

The 21st Rule of this court, as amended November 16th, 1872, and made operative from the first of the following January,* prescribes that the brief of counsel for the plaintiff in error shall contain:

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 on, which in cases brought up by writ of error, shall set out separately and specifically each error asserted and intended to be urged.

The same rule, as amended, further says:

§ 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.

* 14 Wallace, 11.

§ 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.

With this rule in force from January 1st, 1873 (and copies having been sent by the clerk of the court to counsel), the present case came on to be heard March the 14th following; and on being called was submitted on the record, with leave to file briefs by the 17th.

The brief for the plaintiff in error, made in this form its

STATEMENT OF THE CASE.

"This was an action of trespass *de bonis asportatis*, brought by H. B. Wiggins, David Nash & Henry Nash, partners under the name of Nash, Wiggins & Co., against W. Z. Cozzens (sheriff), Moritz Deitsch, the plaintiff in error, Isadore Deitsch, and Jonas Deitsch. (See Declaration, pp. 3 and 4 of Record.)

"Process was served on all of the defendants excepting Jonas Deitsch; as to him there was a return of 'not found.' (Record, p. 3.) The defendants served with process pleaded:

"1st. The general issue, and there was joinder thereon.

"2d. A special plea, alleging in substance that Cozzens, the sheriff, took the goods mentioned in the declaration by virtue of a writ of attachment sued out by his codefendants against the firm of O. S. Buell & Co. (Record, pp. 4 and 5.)"*

* The plea, which, as it stood in its exact averments, is referred to by this court in its opinion, was thus:

"And the said defendants, for a further plea in this behalf, according to the form of the statute in such case made and provided, say *actio non;* because they say that the goods and chattels in the said plaintiffs' declaration mentioned, at the time mentioned in the said declaration, to wit, the 4th day of May, A. D. 1867, were the goods and chattels of the firm of O. S. Buell & Co., a firm composed of O. S. Buell and other persons to these defendants unknown.

"And the said defendants aver that, heretofore, to wit, on the 3d day of May, A. D. 1867, a writ of attachment was issued out of the said District Court of Gilpin County aforesaid, at the suit of Moritz Deitsch, in favor of the said Moritz Deitsch, Isadore Deitsch, and Jonas Deitsch, partners doing business under the name and style of Deitsch & Brothers, directed to the sheriff of said Gilpin County; which said writ commanded the said sheriff to attach so much of the estate, real and personal, of the said O. S. Buell & Co. to be found in his county, to wit, the said county of Gilpin, as should be of value sufficient to satisfy the sum of $1478 and costs; and such estate so attached in his hands to secure, so as to provide that the same might be liable to further proceeding according to law, at a court to be holden at the city of Central, for the said county of Gilpin, upon the second Tuesday of July,

"The plaintiff replied:

"1st. By taking issue upon the right of property of Buell & Co. in the goods, on the 6th of May, 1867. (Record, pp. 5 and 6.)

"2d. Upon the right of property of Buell & Co., on the 4th May, 1867. (Record, pp. 6 and 7.)

"3d. They denied the issuance of the writ of attachment on the 3d May, 1867, returnable 6th July, 1867, and deny the levy of the same.

"On these pleadings the issues were closed. (Record, p. 7.) There was a trial by jury and a verdict of guilty against Cozzens (sheriff) and Moritz Deitsch, the plaintiff in error, damages assessed at $2315.90. (Record, p. 7.) It may be noted at this point that one of the defendants, Jonas Deitsch, disappears from the cause, so far as this record is concerned, and unless the entry on page 7 of the record is to be construed as an appearance in his behalf and another defendant, Isadore Deitsch, for whom there was an appearance and plea and issue joined, was dropped from the cause without a verdict for or against him. (Record, p. 7.)

"On page 8 of the record, the court render a judgment in his favor for cost, but there does not appear to be any verdict to support the judgment. Cozzens and Moritz Deitsch moved for a new trial, and their motion was overruled, and they each separately appealed to the Supreme Court of the Territory of Colorado. (Record, pp. 8 and 9.) A bill of exceptions sets out the evidence. (Record, pp. 9, 15.) Another bill of exceptions shows the rejection of sundry matters of testimony offered by the de-

1867, so as to compel the said O. S. Buell & Co. to appear and answer the complaint of the said Moritz, Isadore, and Jonas Deitsch, which said writ of attachment was duly signed and attested by the clerk of said court, and sealed with the seal of said court, and stamped and cancelled in accordance with the revenue law of the United States.

"And the said defendants further aver that at the time the said writ of attachment was issued as aforesaid, to wit, on the 3d day of May, A.D. 1867, W. Z. Cozzens, one of these defendants, was sheriff of said county of Gilpin, duly elected and qualified, and acting as such, and was required and authorized to execute all writs and process issued out of and by the said District Court of said Gilpin County, directed to the sheriff of said county, and that, on the said last-named day, the said writ of attachment was duly delivered to him, and that, on the said 4th day of May, A.D. 1867, he executed the said writ by levying upon and taking possession of the goods and chattels in the said declaration mentioned, as the property of the said O. S. Buell & Co., under and by virtue of said writ of attachment—which are the said several supposed trespasses in the said plaintiffs' declaration mentioned—as the said Cozzens might lawfully do; and this the said defendants are ready to verify. Wherefore they pray judgment, &c."

fendants, and ruled out by the court. (Record, pp. 15, 19.) Exceptions were also taken to certain instructions given by the court, and certain instructions refused. (Record, pp. 19 and 20.) The Supreme Court of the Territory affirmed the judgment of the inferior court. (Record, p. 22.) From the judgment of the Supreme Court of the Territory a writ of error is prosecuted in due form. (Record, pp. 24 to 27.)"

The brief then thus presented an

ASSIGNMENT OF ERRORS.

"Error. The Supreme Court of the Territory of Colorado erred—

"In affirming the judgment of the inferior court of said Territory, which judgment was erroneous in the following particulars:

"1st. In refusing a new trial upon the evidence contained in the record; 2d, in admitting testimony improperly, and in rejecting testimony improperly, as shown by the bills of exception and specifically as follows:

"In excluding testimony tending to show that the plaintiffs below closed up their business shortly after the levy, and how long they continued in business after the levy. (Record, p. 10.)

"In excluding evidence as to what was said and what occurred between Nash, one of the plaintiffs below, and Cozzens, one of the defendants below, at plaintiff's store when the goods were invoiced. (Record, p. 10, last paragraph.)

"In excluding testimony as to what was the occupation of Cozzens (sheriff), one of the defendants, at the time he took the goods, and the reasons he gave for taking them. (Record, p. 1.)

"In overruling the offer of defendants below to prove that the goods taken were a part of the stock of the merchandise of O. S. Buell, who transacted business under the style of O. S. Buell & Co., and that the witness, C. E. Sherman, was the clerk of said O. S. Buell for the space of about six months prior to the 4th day of May, 1867; that for two or three months prior to the 2d or 6th day of May, A.D. 1867, the said O. S. Buell was absent from the said Territory of Colorado; that during the absence of said Buell, said Sherman was the clerk of said Buell to carry on the regular business of said Buell, in Central City, Gilpin County, Colorado Territory, which was retailing

clothing and merchandising; that the said Sherman had no right or authority whatever to sell or dispose of the entire stock of goods of said Buell, but was only authorized to sell in the regular course of business; that on the 29th of April, 1867, J. Q. Nash, agent of the plaintiff, well knowing that said Sherman was not authorized to sell the entire stock of goods, fraudulently agreed, combined, and confederated with the said Sherman to make a pretended purchase of the entire stock of goods for the purpose of hindering, delaying, and defrauding the defendants, Moritz Deitsch, Isadore Deitsch, and Jonas Deitsch, defendants herein, and other creditors; that the said Nash well knew that the said Jonas Deitsch, Moritz Deitsch, and Isadore Deitsch, defendants, were creditors of said Buell to a large amount, and that such sale was designed by him to cheat, hinder, and defraud said defendants; that said stock of goods was well worth the sum of $10,000, but was sold to said Nash, Wiggins & Co. for a grossly inadequate sum; that whatever money was paid, if any, or securities given, if any, were so cancelled, smuggled, and arranged to protect and place it beyond the reach of defendants and for the benefit of the said Buell, Nash, Wiggins & Co., and J. Q. Nash and said Sherman. (Record, p. 15.)

"In excluding the evidence of the attachment proceedings against O. S. Buell & Co. (Record, pp. 15–18.)

"In instructions of the court given to the jury and the instructions refused. (Record, pp. 19 and 20.)"

The brief then concluded thus, with

POINTS AND ARGUMENT FOR THE PLAINTIFF IN ERROR.

"The points and argument are sufficiently developed in the statement of the case and the assignment of errors, and it would be but repetition to state them in a different form. The rulings of the court of original jurisdiction were clearly erroneous in admitting improper testimony, in excluding testimony that was legitimate and proper, and in its instructions to the jury given and refused.

"In the narrative contained in the foregoing statement this court will note some irregularities, but how far they can benefit this plaintiff in his present suit the undersigned pretends not to say. The matters referred to are these: The rendition of a judgment for costs in favor of Isadore Deitsch after an issue joined without any verdict upon that issue. (Record, pp. 7 and

8.) The disappearance from the record of the proceedings of Jonas Deitsch after a return of 'not found,' without even a continuance or a *nol. pros.*; the sheriff's return as to him, is on page 3 of the record. These are mere matters of form, yet the forms of judicial proceedings often become matters of substance. It is, however, confidently believed that the refusal to allow the official character of the sheriff's proceedings to be proved, and the *res gestæ* at the time of the seizure in their entirety, will be conclusive of this case. Furthermore, it is insisted that the paragraph on page 19 of the record, from the judge's charge, in the following words, is a fatal error: 'If the jury believe from the evidence that, at the time defendant, Cozzens, was packing up the goods and chattels mentioned in the declaration, Moritz Deitsch was there assisting in selecting the same, without consent of plaintiffs, then he was guilty of trespass, and if he had the consent of the said plaintiffs, it is incumbent on the defendant, Deitsch, to prove such consent.'

"That paragraph should have been qualified under all the circumstances of the case by words to show that assisting a sheriff in the execution of process was not trespass."

The brief for the defendant in error argued the case just as if the brief of the plaintiff in error (which when the former brief was filed had not apparently been yet seen), had been in strict conformity with the 21st Rule; the counsel for the defendant in error, who prepared it, getting the whole of the plaintiff in error's case out of the record, and anticipating or conjecturing the argument which would be made upon it.

As respected the special plea, this brief argued that being joint it was defective for several reasons, and among them:

1st. In not alleging that the Deitsches were creditors of O. S. Buell & Co., against whom they had a subsisting debt.

2d. In not making an allegation that the Deitsches did the acts complained of, under the direction of the sheriff, &c., nor any attempt to justify the act on the part of any one except Cozzens.

3d. In not making any allegation that the writ of attachment had been returned; for if (it was argued) the return-day had passed before the special plea was filed, the officer

justifying under the writ should allege a return; since if he did not return it he was a trespasser, even if the goods were the property of Buell & Co.

Mr. J. Hughes, for the plaintiff in error; Messrs. Chipman and Hosmer, contra.

Mr. Justice STRONG delivered the opinion of the court.

Most of the assignments of error have been made in total disregard of the twenty-first rule of this court. That rule is necessary to the disposition of the business which presses upon us, and it is our intention hereafter to enforce strict compliance with its demands. If errors are not assigned in the manner required, the assignments will be treated as if not made at all, and we feel justified in passing without notice the greater number of those which are alleged to appear in this record. There are, however, some of the assignments which, though not made in full conformity with the rule, we think it is proper for us to consider.

The action was trespass "*de bonis asportatis*," and the plaintiffs in the court below averred "property" in the goods in themselves. The declaration was met by a plea of the general issue, and by a special plea alleging that the *property* in the goods was in O. S. Buell & Co., and that the alleged trespass consisted in a sheriff's seizure under an attachment issued out of the District Court of Gilpin County at the suit of Deitsch & Brothers. The special plea was in some respects informal, but instead of demurring, the plaintiffs traversed its averments, and the parties went to trial on the issues thus formed. It was then a material inquiry whether the ownership of the goods was in the plaintiffs when the seizure was made, or whether it was in O. S. Buell & Co., and to that inquiry the evidence offered by the defendants, that they had belonged to Buell & Co., that during the absence of the firm from the Territory, their clerk, without authority, and in fraudulent combination with the plaintiffs' agent, had made a sale of them to the plaintiffs, was undoubtedly pertinent. If there was no au-

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thority to sell, plainly the plaintiffs had acquired no title. And if the sale was a fraud upon the creditors of Buell & Co., the goods were liable to an attachment at the suit of those creditors. It was an error, therefore, to exclude the evidence.

The attachment should also have been received in connection with the proof of the unauthorized and fraudulent sale. It is no sufficient objection to it that it did not itself prove all the facts necessary to constitute a complete defence. It is said the special plea averring the attachment was bad. If so, it should have been met by a demurrer. But we think the plea contained all the averments essential to a justification, and had the facts set forth in it been established, a recovery by the plaintiffs below would have been impossible.

There are other errors apparent in the record, but as they are not properly assigned we pass them without notice.

JUDGMENT REVERSED, AND A VENIRE DE NOVO DIRECTED.

HANNEWINKLE *v.* GEORGETOWN.

1. A bill to restrain the collection of a tax cannot be maintained on the sole ground of the illegality of the tax. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or the allegation of some cause presenting a case of equity jurisdiction.
2. There exists no such cloud upon the title as justifies the interference of a court of equity, where the proceedings are void upon their face. *Dows* v. *The City of Chicago* (11 Wallace, 109), affirmed.

APPEAL from a decree of the Supreme Court of the District of Columbia.

Hannewinkle filed his bill against the corporation of the city of Georgetown and its collector of taxes, to enjoin them from selling certain real estate for a tax claimed by the corporation under a certain act of Congress, which made part of the city charter. The bill alleged that the corporation attempted to condemn to public use, and open and improve Stoddard Street in that city; that the complainant owned

certain premises described on that street; that a part of the premises were condemned to public use, and his damages assessed at $3139; that the same jury which thus assessed his damages, assessed him also for benefits to the residue of his property arising from the same improvements in the sum of $3425, and attempted to make the assessment a lien and charge on the said residue, by and for which the same could be sold. This the bill alleged was without authority of law and contrary to the act of Congress under which the city professed to act. The bill prayed that the defendants might be restrained from selling the property. An answer was put in. The cause was brought to a hearing upon an agreed state of facts, and the bill dismissed with costs. From this decree of dismissal the defendant now appealed to this court.

Mr. Samuel Tyler, for the appellant; Mr. W. A. Cook, contra.

Mr. Justice HUNT delivered the opinion of the court.

The action in this case cannot be sustained. It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits, or some cause presenting a case of equity jurisdiction. This was decided as early as the days of Chancellor Kent, in *Mooers* v. *Smedley*,* and has been so held from that time onward. The remedy was held to be at law by writ of certiorari or by action of trespass.

It has long been held, also, that there exists no cloud upon the title which justifies the interference of a court of equity, where the proceedings are void upon their face, that is, the same record which must be introduced to establish the title claimed, will show that there is no title.†

* 6 Johnson's Chancery, 28.

† Heywood *v.* City of Buffalo, 14 New York, 534; Susquehanna Bank *v.* Supervisors Broome County, 25 New York, 312.

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The whole subject has been recently examined in this court in *Dows* v. *The City of Chicago*.* The head note of the case is in these words: "A suit in equity will not lie to restrain the collection of a tax on the sole ground that the tax is illegal. There must exist in addition, special circumstances bringing the case under some recognized head of equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or where the property is real estate, throw a cloud upon the title of the complainant." The sole ground of the present bill is the illegality of the tax.

We are all of the opinion that the bill states no cause of action, and that it was properly dismissed.

JUDGMENT AFFIRMED.

RIGGIN *v.* MAGWIRE.

1. The fifth section of the Bankrupt Act of 1841 enacts that—

> "All creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having *uncertain or contingent demands* against such bankrupt, shall be permitted to come in and prove such debts and claims under the act, and shall have a right when those debts or claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained under the direction of such court, and allowed them accordingly, as debts *in præsenti*."

Under this section, so long as it remains wholly uncertain whether a contract or engagement will ever give rise to an actual duty or liability, and there is no means of removing the uncertainty by calculation, such contract or engagement is not provable under the act.

2. A claim for a breach of covenant that the grantor has an indefeasible estate in fee in land sold—the claim arising from the right of his wife, yet living, to be endowed of the estate—is of this character during the life of the husband.

ERROR to the Supreme Court of the State of Missouri.

Magwire sued Riggin in the Circuit Court of St. Louis County, Missouri, to recover damages for a breach of cove-

* 11 Wallace, 109.

nant. The defendant pleaded a discharge under the Bankrupt Act of 1841, obtained in June, 1843, but his plea was disallowed, both by the lower court and by the Supreme Court of Missouri on appeal. He, therefore, brought the case here by writ of error.

The case was this:

On the 2d of December, 1839, Riggin conveyed a certain tract of land near St. Louis to one Ellis, in fee. The operative words of the conveyance were "grant, bargain, sell," &c., which words in Missouri create a covenant that the grantor has an indefeasible estate in fee.* The fact was that, prior to the execution of this deed, the property had belonged to one Martin Thomas, whose wife had never relinquished her right to dower in it. But Thomas was then living, and did not die until 1848, several years after the alleged discharge of Riggin as a bankrupt. The property afterwards, by regular devolution of title, came into possession of Magwire, who sold it in lots to various persons. In 1868 these persons were sued by Mrs. Thomas, widow of Martin Thomas, for the value of her dower, and were obliged to pay it, and the plaintiff was obliged to refund them the amount. He, therefore, brought this suit against Riggin for damages under his implied covenant of indefeasible seizin.

The question was, whether Riggin was discharged from this demand by his decree of discharge in bankruptcy in 1843? Whether he was or not depended on the question whether the claim could have been proved in that proceeding. The 5th section of the Bankrupt Act of 1841† declares as follows:

"All creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurance, sureties, indorsers, bail, or other persons having *uncertain or contingent demands* against such bankrupt, shall be permitted to come in and prove such

* Revised Statutes of 1855, c. 32, § 14; Magwire *v.* Riggin, 44 Missouri, 512.

† 5 Stat. at Large, 445.

debts and claims under the act, and shall have a right, when these debts or claims become absolute, to have the same allowed them; and such annuitants and holders of debts payable in future may have the present value thereof ascertained under the direction of such court, and allowed them accordingly, as debts *in præsenti*."

Messrs. Glover and Shepley, for the plaintiff in error:

The plain words of the fifth section include all "uncertain and contingent demands," *i. e.*, "uncertain and contingent demands" of every kind and character. The claim for the wife's dower was undoubtedly a valid claim, and a claim always subsisting; and because it was an uncertain and contingent claim it was provable under this fifth section.

The question now before the court was considered in effect by the Supreme Court of New York in *Jemison* v. *Blowers*,* where a discharge was pleaded against a suit brought upon the covenant for quiet enjoyment, and after a careful examination of the act of 1841 the court came to the conclusion that the discharge was a bar to the action. *Shelton* v. *Pease*, in the Supreme Court of Missouri,† is to a similar effect.

Messrs. Blair and Dick, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

It is argued that under the right given by the fifth section of the Bankrupt Act of 1841 to prove "uncertain and contingent demands," the claim in this case could have been proven under the act. But the better opinion is, that as long as it remained wholly uncertain whether a contract or engagement would ever give rise to an actual duty or liability, and there was no means of removing the uncertainty by calculation, such contract or engagement was not provable under the act of 1841. See 1 Smith's Leading Cases,‡ notes to *Mills* v. *Auriol*, by Hare. In 1843 Martin Thomas was still living, and there was no certainty that his wife would ever sur-

* 5 Barbour, 686.

† 10 Missouri, 475.

‡ Page 1137, 6th American edition.

vive him. It was uncertain whether there would ever be any claim or demand. On what principle, then, could the covenant have been liquidated or reduced to present or probable value? If an action at law had been brought on the covenant at that time nominal damages at most, if any damages at all, could have been recovered. It did not come within the category of annuities and debts payable in future, which are absolute existing claims. If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the principles of life annuities. Had a proposition for a compromise of her right been made between her and the owner of the land, such a mode of estimation would have been very proper. But, without authority from the statute, the assignee would not have been justified in receiving such an estimate and making a dividend on it.

It is unnecessary to review the authorities *pro* and *con* on the subject. They are quite numerous, and are mostly cited in the note of Mr. Hare, above referred to. The case is so clear that we have hardly entertained a doubt about it.

JUDGMENT AFFIRMED.

FROW v. DE LA VEGA.

1. A final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others.
2. If one of several defendants to a bill making a joint charge of conspiracy and fraud, make default, his default and a formal decree *pro confesso* may be entered, but no final decree on the merits until the case is disposed of with regard to the other defendants. The defaulting defendant is simply out of court and can take no farther part in the cause.
3. If the bill in such case be dismissed on the merits, it will be dismissed as to the defendant in default, as well as the others.

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

De La Vega filed a bill in the court below against Frow

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and thirteen other defendants, charging eight of them (including Frow) with a *joint* conspiracy to defraud him, the complainant, out of a large tract of land in Texas, by the use of a forged power of attorney purporting to be executed by the complainant, and by various conveyances and mesne conveyances, deraigning a false and fraudulent title from him. The defendants, other than Frow, all put in answers to the bill on the merits; but Frow's answer having been delayed (as he insisted, by misunderstanding, sickness, and other accidents), a decree *pro confesso* was taken against him at September Rules, 1868; and notwithstanding he afterwards prepared his answer and asked leave to file it (being in substance the same as the answers of the other defendants), yet the court afterwards, on the 23d of March, 1870, on application of the complainant, and against the protestation of Frow, made a final decree absolute against him, adjudging the title of the land to be in the complainant, and awarding to him a perpetual injunction as against the appellant. From this decree the present appeal was taken. After this final decree against the appellant, the court proceeded to try the issues made by the answers of the other defendants, and decided the merits of the cause adversely to the complainant and dismissed his bill. This fact was made to appear by the return to a certiorari sued out by De La Vega himself.

The question now was, whether the court in such a case as that mentioned could lawfully make a final decree against one defendant separately, on the merits, whilst the cause was proceeding undetermined against the others.

Mr. P. Phillips, for the appellant, argued that it was improper to have granted the prayer against a single defendant whose interests were all bound up with those of the other defendants.

Mr. T. J. Durant, contra, insisted that everything done had been done in accordance with the 18th Rule in Equity, prescribed by this court.

Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

If the court in such a case as this can lawfully make a final decree against one defendant separately, on the merits, while the cause was proceeding undetermined against the others, then this absurdity might follow: there might be one decree of the court sustaining the charge of joint fraud committed by the defendants; and another decree disaffirming the said charge, and declaring it to be entirely unfounded, and dismissing the complainant's bill. And such an incongruity, it seems, did actually occur in this case. Such a state of things is unseemly and absurd, as well as unauthorized by law.

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree *pro confesso* against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. He will not be entitled to service of notices in the cause, nor to appear in it in any way. He can adduce no evidence, he cannot be heard at the final hearing. But if the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. If it be decided in the complainant's favor, he will then be entitled to a final decree against all. But a final decree on the merits against the defaulting defendant alone, pending the continuance of the cause, would be incongruous and illegal. This was so expressly decided by the New York Court of Errors, in the case of *Clason* v. *Morris*.* Spencer, J., says: "It would be unreasonable to hold, that because one defendant had made default, the plaintiff should have a decree even against him, where the court is satisfied from the proofs offered by the other, that in fact the plaintiff is not entitled to a decree."†

Irregularities, if any occurred in the proceedings after

* 10 Johnson, 524.

† See 1 Hoffman's Chancery Practice, 554.

the decree complained of, are not now before us for adjudication.

DECREE REVERSED with costs, and the cause remanded for further proceedings,

IN CONFORMITY WITH THIS OPINION.

ADGER *v.* ALSTON.

1. Where a suit was brought in Louisiana, for a debt due January 1st, 1858, the writ being served February 29th, 1868, *held* that in view of the decision in *The Protector* (12 Wallace, 700) that in the State named, the war of the rebellion began on the 19th of April, 1861, and closed on the 2d of April, 1866, the plea of what is known in Louisiana as "prescription of five years" could not be sustained.
2. A statute of Louisiana passed in 1858 enacts that—

> "Parol evidence shall not be received to prove any acknowledgment or promise of a party deceased to pay any debt or liability against his succession, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed; but in all such cases the acknowledgment or promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact."

The purpose of such an act is that no verbal declaration of a deceased man shall be given in evidence to prove against him an acknowledgment of a debt which would otherwise be barred by the statute of limitations; and that no written evidence shall be offered unless signed by him or his agent.

Held accordingly that oral statements of conversations and admissions of a decedent, tending to prove an acknowledgment of a debt, as due, within the period of prescription, and also indorsements, by himself, on the bond of payments made of interest up to a term which took it out of that period, were neither of them admissible under the statute, in a suit against his estate.

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

On the 29th of February, 1868, Alston, a citizen of South Carolina, brought an action in the court below against W. E. Adger, administrator of John Adger, the latter in his lifetime and the former at the commencement of the action citizens of Louisiana; the foundation of the action being a

penal bond conditioned for the payment of $4500, with interest, *on the 1st of January*, 1858. Anticipating, probably, a defence of what is called in Louisiana "prescription" (a defence equivalent to that known in other States as that of the "statute of limitations"), the petition set forth that the interest had been paid to the 1st of January, 1863; all which it was alleged "will appear by the said bond annexed for reference and made part of the petition." An instrument which purported to be the bond was accordingly annexed to the petition; and on it were various indorsements in the handwriting of Alston, or in what purported to be so, and signed by *him*, acknowledging payment of interest at various times "up to January 1st, 1863."

The law of prescription of the State of Louisiana was relied on as a defence, and this defence presented the only matter assigned for error in this court.

The defendant pleaded and relied on the five years' prescription in his *answer*, and also filed what in the practice of that State is called the *exception* of the five years' prescription. This exception according to that practice was tried by the court without a jury, and on this trial the court ruled, as is shown by a bill of exceptions, "that the whole of the time of the late rebellion or civil war, viz., from the 26th of January, 1861, when the ordinance of secession was passed by the convention in Louisiana, to the 20th of August, 1866, when the proclamation of the President was made, declaring the restoration of peace between the States, should be deducted from and not counted as the time during which prescription ran, and, therefore, there was not a period of five years between the claim as made in the plaintiff's petition, to the service of the citation in the suit at bar."

This court had held, in *United States* v. *Anderson*,* previously to the decision in the present case in the Circuit, that as to the time of bringing suits in the *Court of Claims under the Captured and Abandoned Property Act*, which, by the terms of that act, must be within two years after the close

* 9 Wallace, 56.

of the war, the proclamation of the President of August 20th, 1866, announcing that peace prevailed all over the United States, which had also been adopted by Congress as the close of the war in regard to certain military services, must, as to those matters, be held to be the date of its termination. No date was fixed for its commencement.

Notwithstanding the ruling already mentioned of the court below, by which the court decided against the plea of prescription, the question of prescription was submitted to the jury on the facts under the defence set up in the answer; and the court admitted on the trial, against the defendant's objection, oral statements of conversations and admissions of the defendant's intestate, tending to show that he had acknowledged the debt as lately as 1863, and also admitted for the same purpose the indorsements on the bond of the payment of interest.

A statute of Louisiana, passed in 1858,* it is here necessary to state, enacts as follows:

"SECTION 2. Hereafter parol evidence shall not be received to prove any acknowledgment or promise of a party deceased to pay any debt or liability against his succession, in order to take such debt or liability out of prescription, or to receive (revive) the same after prescription has run or been completed; but in all such cases the acknowledgment or promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact."

Judgment having been given for the plaintiff the case was now here on error.

Mr. W. W. Boyce, in support of the judgment, and for the defendant in error:

1. Was the plea of prescription set up made out? It will be admitted by all that the civil war, during which the Federal courts were closed, suspended the running of the prescription or statute of limitations. This is settled by *Hanger* v. *Abbott.*

* Acts of Louisiana of 1858, No. 208, p. 148.

Now, we must assume that the commencement of the war was on the day when the ordinance of secession of Louisiana passed. This was January 26th, 1861. The close of the war was decided by this court in *United States* v. *Anderson* to have been August 20th, 1866. In other words, the war in Louisiana lasted five years, six months, and twenty-four days. Then the matter of the prescription of five years stands thus:

	Yrs.	mos.	dys.
From January 1st, 1858, when the bond was due, to January 26th, 1861, when suit, before the war, might have been brought, is	3	0	26
From August 20th, 1866, when an ability to sue, after the war began, till February 29th, 1868, when the writ was served, is	1	6	9
Whole term, from date when the bond became due to the time when the writ was served, within which suit could have been brought, ...	4	7	5

Or, putting the thing in another form—

	Yrs.	mos.	dys.
From January 1st, 1858, when the bond became due, to February 29th, 1868, when the writ was served, was	10	1	29
The war, as above stated, and during which no suit could be, lasted, as above stated, ...	5	6	24
Leaving as the whole term, when the ability to sue existed, ...	4	7	5

Unless, therefore, we assume some later date than the actual "secession" of the State for the commencement of the war, or fix some later date for its ending than what this court fixed in *United States* v. *Anderson*, or do both, the court below decided rightly that the plea of five years' prescription was not made out.

2. Did the evidence admitted contravene the statute of 1858?

The "acknowledgment or promise," required by the second section of the act of 1858, to be proved by "written evidence," can in the nature of things, apply to express acknowledgments or promises alone. It cannot apply to implied ones. Express acknowledgments or promises are spoken words, and *can* always be put in writing. Im-

plied acknowledgments or promises are not spoken words, but conclusions of law from antecedent facts, and *cannot* ever be put in writing. What can be in words, the statute requires to be in writing. What cannot from their very nature be in words the statute does not require to be in writing.

This distinction is supported by analogies in the law. For example, the liability of a guarantor under the statute of frauds is required to be in writing. But where the guarantor is liable on other grounds than his guarantee, the promise need not be in writing.*

So the statute of frauds which requires certain declarations of trust to be proved by writing, exempts trusts arising by implication of law; that is, express trusts must be evidenced by writing; implied trusts not.†

In addition. The policy of the act of 1858 was to guard against recollections of verbal statements or conversations, so difficult to remember precisely, and so easy of perversion. But this policy does not apply to proving a fact like payment. "The payment of principal or interest," says Tindall, C. J.,‡ "stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment. We think payment of money by one of several joint contractors an acknowledgment not within the mischief or the remedy provided by the legislature against the effect of an oral promise."

The distinction between part payment and a verbal acknowledgment or promise is specially taken by Lord Tenterden, act 9, Geo. IV, c. 14.§

And an admission by a creditor that money has been paid him (on account of the admission being proved, to be made before the prescription or statute begins to run), being an

* 1 Saunders, 211, note J; Smith on Contracts, § 48, note A, p. 36.

† Hill on Trustees, p. 56. ‡ Wyatt *v.* Hodson, 8 Bingham, 309.

§ See act in full, Angell on Limitations, Appendix, ch. 20, p. 8. Edition of 1869.

admission against his interest, may be well received as evidence. In the case of a person deceased, the presumption is that they were so made.

Messrs. T. J. Semmes and W. A. Meloy, contra.

Mr. Justice MILLER delivered the opinion of the court.

This court held, previous to the decision in the present case in the circuit, that as to the time of bringing suits in the Court of Claims under the Captured and Abandoned Property Act, which must be within two years after the close of the war, the proclamation of the President of August 20th, 1866, announcing that peace prevailed all over the United States, which had also been adopted by Congress as the close of the war in regard to certain military services, must, as to those matters, be held to be the period of its termination. No period was fixed for its commencement, because none was necessary.

Assuming that the commencement of the war was the ordinance of secession of Louisiana, and its close the President's proclamation of August 20th, 1866, and applying the principle of deducting the period of the war from the time in which prescription would have otherwise been counted, as held by this court in *Hanger* v. *Abbott*,* the ruling of the court below as shown by the bill of exceptions, on the exception of the five years' prescription, would have been sound.

But in the case of *The Protector*,† the question of the precise period of time to be deducted for the interruption in the running of the statute of limitations to be made in consequence of the civil war, was much considered; and the necessity of fixing the precise period was felt by the court to be very pressing. An examination of the several proclamations of the President, and other acts of the political department of the government was had; and as a result it was found that different periods of time must be fixed for different States. It was held that the commencement of the war

* 6 Wallace, 532. † 12 Id. 700.

must be governed by the President's proclamations of blockade, of which there were two. The first, dated April 19th, 1861, embraced the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana, and Texas; and the second, dated April 27th, 1861, embraced the States of Virginia and North Carolina. So there were two proclamations declaring that the war had closed; the first, issued April 2d, 1866, embraces the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana, and Arkansas; and the second, issued on the 20th of August, 1866, embracing the State of Texas. And it was held that these dates must be taken as the commencement and the close of the war as to those States respectively, in the question of the time to be deducted for the existence of that war, in counting time under the statutes of limitation.

Under this rule the time which elapsed between the 19th of April, 1861, and the 2d April, 1866, being deducted from the time of the maturity of the bond and the service of the writ in this case, there still remained more than five years, and the plea of prescription in that view would be a bar.

But the question of prescription was submitted to the jury on the facts, under the defence set up in the defendant's answer, and on the trial the court admitted as evidence, against the objection of the defendant, oral statements of conversations and admissions of decedent, tending to prove an acknowledgment of the debt, as due, within the period of prescription, and also admitted for the same purpose indorsements on the bond of payments made of interest up to the year 1863.

In this we think the court erred also. A statute of the legislature of Louisiana, of the year 1858, by its second section enacts that: "Hereafter parol evidence shall not be received to prove any acknowledgment or promise of a party deceased to pay any debt or liability against his succession, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed; but in all such cases the acknowledgment or promise

to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact."

The principle of this act is not new in the legislation of England and this country, and its purpose and construction are equally obvious and well understood. It is that no verbal declaration of a deceased man shall be given in evidence to prove against him an acknowledgment of the debt, which would otherwise be barred by the statute of limitations; and that no written evidence shall be offered unless signed by him or his agent.

The case before us comes precisely within both the letter and spirit of the statute. The evidence offered was parol evidence, and if the indorsements of credits on the bond are not strictly parol they are not written evidence signed by the party to be charged; and the object is to prove an acknowledgment of the debt, against his succession, of a deceased man, by such evidence.

There seems no room for doubt that whatever may be the rule as to parties who are alive, no such evidence is admissible against the administrator of a deceased party.

On both points ruled by the court concerning prescription we think the court erred, and the judgment is, therefore, REVERSED, with directions to grant

A NEW TRIAL.

YOUNG v. GODBE.

When a suit turns on the question whether money claimed in it by the plaintiff has been advanced to the defendant, in one capacity or in another, evidence of what a person who had settled an account on the subject with the defendant *said* that the defendant told him, is not legal proof.

The fact that the court in allowing the evidence to go to the jury, told them that they might consider it for what it was worth, does not alter the case.

In a case where interest as a general thing is due (as *ex. gr.*, in the case of an account stated), the fact that there may be no statute in the place where the account is settled and the transaction takes place, does not

Statement of the case.

prevent the recovery of interest. In such a case interest at a reasonable rate, and conforming to the custom which obtains in the community in dealings of the same character, will be allowed by way of damages for unreasonably withholding an overdue account.

IN error to the Supreme Court of the Territory of Utah.

Godbe filed a complaint in the court below against Brigham Young, "*as trustee in trust of the Church of Jesus Christ, a religious association in the Territory of Utah*," alleging an account stated by "said defendant" prior to February 12th, 1866, and upon such statement a balance of $10,020 "due from said defendant;" a payment of $5000, May 30th, 1868, and praying judgment with interest at 10 per cent. "by way of damages."

The defendant demurred, assigning for cause that it did not sufficiently appear from the complaint whether the suit was against the defendant "in his individual capacity or in his capacity as trustee in trust for the Church of Jesus Christ of Latter-Day Saints." The demurrer was overruled. The defendant then pleaded that no account had ever been settled by him as "*trustee in trust*," as alleged in the complaint, and that neither the sum stated in the complaint nor any other sum had been found due to the plaintiff from "*said defendant as said trustee.*"

On the trial evidence was given tending to show that the money alleged to have been advanced by the plaintiff had been advanced to Young in some capacity, and an account stated and credit given as alleged. In what capacity was the question on which the controversy turned; whether, as alleged in the complaint, to him "as trustee in trust of the church," &c., or whether as agent of a company known as the "Deseret Irrigation and Canal Company;" a company which one of the witnesses swore was "so mixed up with the church that he did not know the difference between them." The plaintiff sought to prove that it had been advanced to Young as "trustee in trust of the church," &c. Letters from Young sought to cast the debt on the Irrigation and Canal Company.

The defendant having given evidence tending to show

that the Irrigation and Canal Company had an office in what was known as the Council House, and that the "trustee in trust," &c., had his at what was known as the President's Office, and that these departments were separate and distinct from each other, and had a separate set of clerks,—the plaintiff brought one Armstrong, who testified that he was in 1857, and had been ever since, the bookkeeper of a firm known as Kimball & Lawrence, merchants in Salt Lake City; that they had an account of some $10,000 against the Deseret Irrigation and Canal Company; that Mr. Lawrence, one of the firm, took the account and went away with it, and in a short time returned "*stating* to this witness that it had been settled by the 'trustee in trust,' by giving credit to a certain person on tithing, and that the transaction so appeared on the books of Kimball & Lawrence." The defendant objected to all this evidence, for the reason "that it was not in rebuttal and therefore illegal." The court overruled the objection (the defendant excepting) "and the testimony was permitted to go to the jury *for what it was worth.*"

In charging, the court charged that if the jury should find for the plaintiff, they would find $5020, with interest on $10,020 from the day the account was rendered until the day of the payment of $5000, and from that date to the day of trial on the amount remaining due.

Verdict and judgment having gone for the plaintiff, the admission of the evidence above mentioned and the instruction to the jury were, among other matters, assigned for error.

Messrs. C. J. Hillier and Thomas Fitch, for the plaintiff in error; no opposing counsel.

Mr. Justice DAVIS delivered the opinion of the court.

The testimony of Armstrong, the bookkeeper of Kimball & Lawrence, was objected to by the defendant for the reason that it was not in rebuttal, and therefore illegal, but the court overruled the objection and permitted the testimony to go to the jury for what it was worth.

Opinion of the court.

We are not prepared to say that Godbe could not rebut the case made by Young by showing that the affairs of the company were so connected with the church that, as one of the witnesses said, "he did not know the difference between them." But the evidence on this subject should not have been the declaration by one person of what another said. The fact that Young had settled the account of Kimball & Lawrence in the way he did was proper evidence to go to the jury, if Lawrence had testified to it, but Armstrong's statement of what Lawrence told him was pure hearsay. Besides, the court on its own motion enlarged the scope of the evidence by directing the jury to consider it for what it was worth. This direction enabled the jury to take a wider range of the subject than they otherwise would, and naturally inclined them to consider the evidence as fixing the right of the plaintiff to recover from the defendant in the capacity in which he was sued.

On account of the error in admitting the testimony of Armstrong, and in indicating the effect which the jury should give to it, the judgment will have to be reversed.

But as the case goes back for a new trial, it is proper to say a word upon the subject of interest, which seems more than anything else to be the chief point of difference between the parties. We can see no objection to the charge of the court on this subject. If a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensation for the delay in payment. And if the account be stated, as the evidence went to show was the case here, interest begins to run at once.*

It is said there is no law in the Territory of Utah prescribing a rate of interest in transactions like the one in controversy in this suit, and that, therefore, no interest can be recovered. But this result does not follow. If there is no statute on the subject, interest will be allowed by way of damages for unreasonably withholding payment of an over-

* 1 American Leading Cases, 5th edition, pp. 626 and 514.

due account. The rate must be reasonable, and conform to the custom which obtains in the community in dealings of this character.

JUDGMENT REVERSED, AND A VENIRE DE NOVO AWARDED.

POLICE JURY *v.* BRITTON.

The trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous debt.

ERROR to the Circuit Court for the District of Louisiana.

Messrs. E. T. Merrick and G. W. Race, for the plaintiff in error; Messrs. T. J. Semmes and W. A. Meloy, contra.

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

Britton and Koontz brought an action in the court below against the Police Jury of the parish of Tensas, Louisiana, to recover the amount of four hundred and sixty coupons, for $6 each, due on the 1st of July, 1870, for one year's interest on four hundred and sixty bonds of $100 each. The following is a copy of one of the bonds, and they were all of the same date and form, differing only in number:

$100. STATE OF LOUISIANA, **No. 423.**

ST. JOSEPH, July 1, 1869.

The Parish of Tensas *will pay to bearer, six years after date or sooner, at the pleasure of the Parish, one hundred dollars, with six per cent. interest thereon, payable annually at the office of the Parish Treasurer, as per coupons attached. This obligation is issued to fund the debt of the Parish in accordance with an ordinance passed by the Police Jury on the 18th day of January,* 1869.

ELI TULLIS,
President Police Jury.

REEVE LEWIS,
Clerk Police Jury.

Statement of the case in the opinion.

The defendants put in an answer denying the validity of the bonds, of the ordinance under which they were issued, and of the drafts or orders for which they were substituted.

The cause was tried by a jury, and a verdict found for the plaintiffs. The case came here upon a number of exceptions taken at the trial, which, under the view we have taken of the case, it is not necessary to examine in detail.

The substantial facts of the case were, that in December, 1860, and January, 1861, the levee inspector of the parish of Tensas issued to certain persons by the name of Kennedy and Maxwell five "levee warrants" (as they are called) for work done on the levees in ward No. 3 of said parish, amounting in the aggregate to over fifteen thousand dollars. They were all sight drafts drawn by Charles B. Tenney, as levee inspector of the parish, on one Snyder, treasurer of the levee fund of the parish, in favor of Kennedy and Maxwell, or order, and expressed as "being for amount due them for and on account of work done on levees in ward No. 3 this day."

These warrants seem to have been issued in regular course, according to the laws then in force on the subject. Originally the levees were made by the riparian owners, who received their lands upon this condition; and, if they neglected their duty, the police juries of the several parishes (who are the local boards representing them) were required to have the work done, and to collect the expense from the delinquent landowner. Modifications of this system have from time to time been made by various acts of the legislature. The law under which the levee warrants above referred to were issued was passed in 1848; with amendments, passed in 1850 and 1852. It related to the parish of Tensas alone; and the substance of it, so far as is necessary for our purpose, was, that the police jury of that parish should appoint a levee inspector, whose duty was to direct and superintend the construction and repairs of all levees in the parish in accordance with the requisition of the police jury; to survey the levees, and where work was required to let it out to the lowest bid-

der; and, after the work was finished on any particular section, the statute directed as follows:

"Then the inspector shall issue a warrant, payable to the contractor, which shall be a legal order upon the treasurer of the levee fund for the amount therein specified."

The statute then provided for the levee fund as follows:

"The police jury are authorized to levy and collect, in the same manner that the State and parish taxes are now collected, an annual tax upon the assessed value of real estate, as returned by the assessors of the State taxes. Said tax, when collected, shall form a special fund for levee purposes alone."

We have quoted these specific directions for the purpose of showing how carefully the legislature has prescribed the duties of all parties in relation to this matter. Not a word is anywhere said authorizing the parish jury to issue any bonds, or create any other evidences of debt, for work on the levees.

The general powers of the police juries of the State are carefully and particularly laid down in a statute on that subject passed in 1813, with some amendments in subsequent years. They are enumerated under eighteen distinct heads.* The section conferring powers commences as follows:

"The police juries shall have power to make all such regulations as they may deem expedient:

"1st. For the police of slaves in their respective parishes, and the pursuit of runaways, &c.

"2d. As to the proportion and direction, the making and repairing of the roads, bridges, causeways, dikes, levees, and other highways.

"3d. To lay such taxes as they may judge necessary to defray the expenses of their several parishes."

Other heads relate to clearing the Mississippi and other streams from obstruction, to the height of fences, the mark-

* Revised Statutes of Louisiana, title "Police Jury."

ing of cattle, the regulating of taverns, the establishment of ferries and toll bridges, &c., &c.

In restraint of the power of police juries and all other municipal bodies of the State to incur expenditures, the legislature in 1853 passed the following act:

"The police juries of the several parishes, and the constituted authorities of incorporated towns and cities in this State, shall not hereafter have power to contract any debt or pecuniary liability without fully providing in the ordinance creating the debt the means of paying the principal and interest of the debt so contracted."

And it is declared that such ordinance shall remain in force until the debt and interest are paid.* Nothing of the kind was done in this case, and the defendants insist that the bonds are void on this account. But this provision can hardly be said to apply to the proceedings of the inspector of levees, acting under the special statutes above mentioned; though we do not see why it is not applicable to the police jury, when that body attempts to charge the parish with a new set of securities payable at a distant day, with regular interest warrants, and negotiable from hand to hand; even though such securities were issued to fund a previous liability. But waiving this point, we proceed to other aspects of the case.

As bearing on the question of authority it is pertinent to notice that, in 1860, the legislature passed an act expressly authorizing the police jury of the parish of Tensas "to issue their bonds for a sum not to exceed $200,000, not having more than five years to run, and payable at one of the banks of the city of New Orleans, and not to be for less than one thousand dollars each." Other specific directions and conditions are contained in the law. It is not pretended that the bonds in question were issued in accordance with this act, and no other act is referred to giving any such power. This instance, however, goes to show that special legislative

* Revised Statutes of 1856, p. 345.

authority was deemed requisite to enable the police jury to issue bonds when such securities were required for raising money to meet the necessities of the parish.

It thus appears that the police jury had no express authority to issue the bonds in question, and that if they had any authority it must be implied from the general powers of administration with which they were invested. We have, therefore, the question directly presented in this case whether the trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have an implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bonâ fide* holders, for the purpose of raising money or funding a previous indebtedness?

This subject as applied to various municipal bodies has been much discussed in the courts of this country, and various conclusions have been reached, depending sometimes upon the peculiar character and statutory powers of the corporation, sometimes upon the character of the objects to be attained, and sometimes upon the naked implication of power supposed to arise from the express power to make expenditures. A collection of the cases may be found in Dillon on Municipal Corporations.* That a municipal corporation which is expressly authorized to make expenditures for certain purposes may, unless prohibited by law, make contracts for the accomplishment of the authorized purposes, and thereby incur indebtedness, and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to any equitable considerations that may exist or arise between the parties, and to any modification, abatement, or rescission in whole or in part that may be just and proper in consequence

* Section 407, note.

of illegalities, or disregard or betrayal of the public interests. Such contracts are very different from those which are in controversy in this case. The bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day and transferable from hand to hand. Such instruments transferred before maturity to a *bonâ fide* purchaser leave behind them all equities and inquiries into consideration and the conduct of parties; and become, in the hands of an innocent holder, clean obligations to pay, without any power on the part of the municipality to demand any inquiry as to the justice or legality of the original claim, or to plead any corrupt practice of the parties in obtaining the security. This characteristic of commercial paper, which no court has more faithfully enforced than this, raises the doubt whether the power to issue it can be implied from the ordinary powers of local administration and police which are conferred upon the boards and trustees of political districts. The power to issue such paper has been the means, in several cases which have recently been brought to our notice, of imposing upon counties and other local jurisdictions burdens of a most fraudulent and iniquitous character, and of which they would have been summarily relieved had not the obligations been such as to protect them from question in the hands of *bonâ fide* holders. As such we have been reluctantly compelled to sustain them, but only on the ground that the power to issue them had been expressly, or by necessary implication, conferred by the legislature. The power to issue such obligations, and thus irretrievably to entail upon counties, parishes, and townships a burden for which perhaps they have received no just consideration, opens the door to immense frauds on the part of petty officials and scheming speculators. It seems to us to be a power quite distinct from that of incurring indebtedness for improvements actually authorized and undertaken, the justness and validity of which may always be inquired into. It is a power which ought not to be implied from the mere authority to make such improvements. It is one thing for county or parish trustees to have the power to

incur obligations for work actually done in behalf of the county or parish, and to give proper vouchers therefor, and a totally different thing to have the power of issuing unimpeachable paper obligations which may be multiplied to an indefinite extent. If it be once conceded that the trustees or other local representatives of townships, counties, and parishes have the implied power to issue coupon bonds, payable at a future day, which may be valid and binding obligations in the hands of innocent purchasers, there will be no end to the frauds that will be perpetrated.

We do not mean to be understood that it requires, in all cases, express authority for such bodies to issue negotiable paper. The power has frequently been implied from other express powers granted. Thus, it has been held that the power to borrow money, implies the power to issue the ordinary securities for its repayment, whether in the form of notes, or bonds payable in future. So, the power to subscribe for stock in a railroad, or to purchase property for a market-house, and other like powers which cannot be carried into execution without borrowing money, or giving obligations payable in the future, have been held sufficient to raise the implied power to issue such obligations. But in our judgment these implications should not be encouraged or extended beyond the fair inferences to be gathered from the circumstances of each case. It would be an anomaly, justly to be deprecated, for all our limited territorial boards, charged with certain objects of necessary local administration, to become the fountains of commercial issues, capable of floating about in the financial whirlpools of our large cities.

In the case before us, where was the necessity of funding the levee warrants held by the contractors? If it was desired to avoid the danger of prescription, an acknowledgment authorized by the police jury would have had all the effect which a new security could give. Where, among all the powers given to the police jury, can the power be found or fairly inferred, of funding the indebtedness of the parish, by issuing six or ten year bonds payable to bearer, with the

regular apparatus of coupons—securities specially framed and contrived for distant and diffusive circulation? When the legislature deemed it desirable for the parish to issue such paper to enable it to raise money, the power was expressly given, with proper safeguards and limitations. This very fact indicates the legislative understanding that no general and indefinite power of the kind had any existence.

In our opinion the police jury had no authority to issue the bonds and coupons in question; and therefore the judgment must be

REVERSED.

PARTRIDGE *v.* THE INSURANCE COMPANY.

1. An agent of an insurance company who had been engaged in a State different from that where it was situated, in soliciting business for it, and getting fixed commissions on all premiums which actually came into his hands—his right to all which was not questioned in the suit—being a little put out at other agents being sent into the same State, inquired of the company by letter what his "*status*" was, "if the State agency is open to the trial of candidates?" To this the company replied in writing: "Your *status* is simply this—you are working up a business for yourself, and are paid the highest commissions which we pay." *Held*, the agent being afterwards discharged from the company's service, that he could not prove by witnesses that the phrase in the company's letter had a technical meaning, and that there was a usage between insurance companies and their agents in the place where the agency was that all agents should have the right to solicit and cause policies to be issued according to the published rules of the company, and to collect all premiums on renewal thereof during the time the policy was in force, and that if the agent was discharged without sufficient cause, and against his will, he was entitled to be paid immediately the present value of his commissions, calculated by the actuarial rule used to value policies. The ground of the holding was that the language of the letter was neither ambiguous nor technical, and that to suffer such evidence to go in would have established by parol a new term to a written contract.
2. Where, in proceedings in State courts, the laws of a State allow a set-off pleaded to be interposed and tried in the same suit with the claim against which it is pleaded, the same thing may be done when the suit is brought or transferred into the Federal courts from them.

Statement of the case.

ERROR to the Circuit Court for the District of Missouri; the case apparently having been thus:

In January, 1867, one Winslow being agent for the State of Missouri of the Phœnix Mutual Life Insurance Company of Hartford, Connecticut, in the business of soliciting persons to insure and keep insured in that company, Partridge made an arrangement with him to go into partnership with him in the agency; and Winslow having written to the company accordingly, the company in reply tell him that there was a Mr. Jones—"now the company's agent for Minnesota, and a man second to none in the West for energy and sound judgment"—who was very sanguine that *he* could make arrangements with him, Winslow, for a systematic and thorough "working" of the two States, which would prove mutually beneficial. And that "without meaning to be understood as saying one word against Mr. Partridge —on the contrary, not seeing why matters cannot be arranged so as to have *him* also as one of the workers for the company—the company would advise Winslow to hold on and wait a little before making any permanent arrangement."

Jones coming to St. Louis soon after this, he, Winslow, and Partridge entered into an arrangement by which Winslow retired, leaving Jones and Partridge partners in the State agency. Jones in a short time went to Hartford, and was sent by the company on business in Iowa, &c., leaving Partridge alone in Missouri. Partridge went on as he had been going on from his first arrangement with Winslow, in soliciting people who had not previously been insured to insure themselves in the company and in getting renewals of such policies as had been made previous to his coming in and had now run out.

On all first insurances he received 20 per cent. of the premium, and on all renewals 7½ per cent. About his right to these, or to his having actually received them, there was no dispute.

In September, 1867, the company having written to Partridge about persons who had applied for an agency in Mis-

souri, he writes to the company, responding civilly to some inquiries, but says—

"I am free to confess a little surprise at your remarks, coupling the persons you speak of with the general agency of the State of Missouri. I supposed it was settled that Mr. Jones and myself were to occupy the position of State agents. *And just here permit me to inquire what my status is*, if the State agency is open to the trial of candidates."

To this the company, by a letter dated September 7th, 1867, reply:

"Concerning your status in Missouri, it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay, and in any arrangements which we may make for the State, will not overlook your interests, but we had no idea of giving you the exclusive control of a State which it will require a most experienced agent to take charge of and work up."

"After I received this letter of the 7th of September," said Partridge, in speaking of it, "I understood it, and was satisfied with it, and continued on as agent, soliciting policies, collecting premiums and renewals, and reporting as required by the rules of the company."

In December, 1867, the company sent out a Mr. Dye to St. Louis, telling Partridge that it is with a view to his procuring the company a greater amount of business out of the State; that Dye's efforts would not conflict with his, and that he, Partridge, "can proceed in his own way on his own account."

Difficulties, however, soon occurred in consequence of Dye's coming out, and on the 15th of February, 1868, a little more than a year after his agency began, Partridge was discharged by the company, he having at this time a sum of $1772 in his hands collected for premiums. He now brought suit in one of the State courts of Missouri against the company. The company removed the case into the Federal court, under the act of Congress of 1866, and that of 1867 amendatory thereof. These enact that after a suit

removed from a State court has been entered in the Federal court, it shall proceed in the same manner as if it had been brought there by original process, and the pleadings have "the same force and effect, in every respect, and for every purpose, as the original pleadings would have had by the laws and practice of such State if the cause had remained in the State court."

On the trial the plaintiff admitted that he had received 20 per cent. commissions on all first premiums, and $7\frac{1}{2}$ per cent. commissions on all renewal premiums that had been actually collected by him, and that there was in his hands at the time of his discharge $1772 in money, the property of the company, if they were not liable to him for the value of future commissions to accrue on the policies.

It was then announced by him that the real point of dispute in the cause was this, viz.: that, under the facts and circumstances of his employment and service, the letters and correspondence had with him by the company, and particularly by the terms of the aforesaid letter of September 7th, 1867, and by force and virtue of a general usage existing in St. Louis at that time in regard to the business of life insurance companies and their agents, he was entitled to retain the agency, and, in case of his removal against his will, and without sufficient cause, was entitled to be paid a commutation equal to the present value of his commissions, computed by the actuarial rule for computing the present value of policies.

The defendants maintained that they were not bound by any usage except that of their own company; that the plaintiff was their agent only at the will of the company, and might be discharged at any time without cause, and was not entitled to any payment or commutation on policies solicited during his agency, except his commission actually accruing during his agency, which, as he admitted, he had received.

They pleaded further their set-off; to their pleading which no objection was made by the plaintiff.

The plaintiff then propounded to a witness the following

question, the witness having first qualified himself as an expert in insurance matters, terms, and language:

"Is there in the phrase contained in the letter of defendant of September 7th, 1867, to wit—

"'Concerning your status in Missouri, it is simply this: You are there working up a business for yourself, and are paid the highest commissions which we pay'—

"any peculiar or technical meaning as used by men engaged in life insurance, and as applied to the business of life insurance, different from the ordinary meaning of these terms?"

In answer to which question the plaintiff offered to prove by this witness, and by many others experienced in life insurance, that the said phrase did have a peculiar meaning in that regard, well understood by men in the business of life insurance, and not well understood by those not familiar with the business; that its meaning as understood in that business was that the agent should have the right to solicit and cause policies to be issued according to the published rules and rates of the company, and should have the right during the life and force of such policies to collect all renewal premiums thereon, and have commissions on such renewals, and that if he was discharged by the company without sufficient cause he was entitled to be paid immediately, the present value of his commissions, to be computed by the actuarial rule used by such companies to value policies.

The question offered to be put was objected to by the defendant, and the objection was sustained by the court, on the ground that the language referred to was plain and intelligible, and required no explanation, and that such evidence as was offered would vary the contract between the parties. To this ruling the plaintiff excepted.

The jury found a verdict for the company, $1772 on the counter claim, and judgment was entered accordingly. The plaintiff now brought the case here.

Messrs. T. W. B. Crew and J. F. Hardin, for the plaintiff in error:

1. The question was what an agent's "working up" the business of life insurance means? Now, on their face, have those words in connection with that business, a full, plain, unquestionable meaning, known to all who hear them? We offered to prove by persons in the business that they had not such a meaning, but contrariwise had a technical and peculiar meaning, understood only by persons in the business, and we offered moreover to show exactly what that meaning was. Yet, thus to show the true meaning of the contract, the court held would vary its true meaning, and that though we offered to prove it on its face ambiguous, it was on that same face without the possibility of two meanings.

2. The court erred in entering judgment for the $1772. Even if by the laws of the State and practice of its courts such a thing had been allowable (which we do not concede), when the company elected to remove the cause to the Federal court it abandoned all rights under the State laws and practice, and was bound to conform to the rules of practice in the Federal courts. These are common-law rules, and set-off does not prevail.

Mr. N. P. Chipman, contra.

Mr. Justice MILLER delivered the opinion of the court.

The question did not arise whether the custom which the plaintiff offered to prove could have been proved as the measure of his compensation, in the absence of any express contract, because the plaintiff had introduced in evidence a letter from the defendant in reference to this compensation, under which he said he had acted in taking the policies for which he now claimed the additional commission. There was no question as to the amount, or percentage, or premium, which was to be paid under this letter. The plaintiff stated that he had retained a certain percentage, which was that allowed by the company. The testimony was not

offered to show what was the highest commission paid by the company.

It appears to us, as it did to the Circuit Court, that the testimony offered would have established a new and distinct term to the contract. It would have established a contract very different from the written one introduced by plaintiff. The language of the letter was neither ambiguous nor technical. It required and needed no expert, no usage to discover its meaning. To have admitted the usage offered in evidence in this case would have been to make a contract for the parties differing materially from the written one under which they had both acted for some time.

The tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place, has gone quite as far as sound policy can justify. It places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law. When this is confined to establishing an *implied* contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well-expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts.

A question is raised in this court not raised in the Circuit Court as to the right of the defendant to recover, by way of set-off or cross-action against the plaintiff, a sum of money in his hands as agent of the plaintiff, which was admitted to be due, if plaintiff's claim was not established. The amount was admitted by plaintiff, and no objection was

made to pleading it as a set-off. Therefore, none can be made here. But if the point were open to inquiry, it is settled by the case of *West* v. *Aurora City*,* that defendants in the Circuit Courts of the United States can avail themselves of the laws which prevail in the State concerning the right of set-off generally. It would be a most pernicious doctrine to allow a citizen of a distant State to institute in these courts a suit against a citizen of the State where the court is held and escape the liability which the laws of the State have attached to all plaintiffs of allowing just and legal set-offs and counter claims to be interposed and tried in the same suit and in the same form.

JUDGMENT AFFIRMED.

LIFE INSURANCE COMPANY *v.* TERRY.

In the case of a policy of life assurance, where there is a condition in the instrument that if the assured shall "die by his own hand," the policy shall be void, the rules to be applied in case of the death of the party by such means, are these, that is to say:

If the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery.

If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

ERROR to the Circuit Court for the District of Kansas.

Mary Terry brought an action in the court below against the Mutual Life Insurance Company of New York, to recover the sum of $2000, claimed by her as due upon a policy of in-

* 6 Wallace, 139.

surance on the life of her husband George Terry, made and issued to her as his wife.

The policy contained a condition, of which a portion was in these words:

"If the said person, whose life is hereby insured, . . . shall die by his own hand, . . . this policy shall be null and void."

Within the term of the policy, George Terry died from the effects of poison taken by him.

Evidence was given tending to show that at the time he took the poison he was insane. Evidence was also given tending to show that at that time he was sane, and capable of knowing the consequences of the act he was about to commit.

Thereupon the counsel for the defendant requested the court to instruct the jury thus:

"*First.* If the jury believe from the evidence in the case, that the said George Terry destroyed his own life; and that, at the time of self-destruction, he had sufficient capacity to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, the plaintiff cannot recover on the policy declared on in this case.

"*Second.* That if the jury believe from the evidence that the self-destruction of the said George Terry was intended by him, he having sufficient capacity at the time to understand the nature of the act which he was about to commit, and the consequences which would result from it, then, and in that case, it is wholly immaterial in the present case that he was impelled thereto by insanity, which impaired his sense of moral responsibility, and rendered him, to a certain extent, irresponsible for his action."

The court refused to give either of these instructions, and charged as follows:

"It being agreed that the deceased destroyed his life by taking poison, it is claimed by defendant that he 'died by his own hand,' within the meaning of the policy, and that they are, therefore, not liable.

Argument for the insurance company.

"This is so far true that it devolves on the plaintiff to prove such insanity on the part of the decedent, existing at the time he took the poison, as will relieve the act of taking his own life from the effect which, by the general terms used in the policy, self-destruction was to have, namely, to avoid the policy.

"It is not every kind or degree of insanity which will so far excuse the party taking his own life as to make the company insuring liable.

"To do this, the act of self-destruction must have been the consequence of the insanity, and the mind of the decedent must have been so far deranged as to have made him incapable of using a rational judgment in regard to the act which he was committing.

"If he was impelled to the act by an insane impulse which the reason that was left him did not enable him to resist, or if his reasoning powers were so far overthrown by his mental condition that he could not exercise his reasoning faculties on the act he was about to do, the company is liable. On the other hand, there is no presumption of law, *primâ facie* or otherwise, that self-destruction arises from insanity, and if you believe from the evidence that the decedent, although excited, or angry, or distressed in mind, formed the determination to take his own life, because, in the exercise of his usual reasoning faculties, he preferred death to life, then the company is not liable, because he died by his own hand within the meaning of the policy."

The cause came to this court on exceptions to the refusal of the court to give the instructions requested by the insurance company, and to the charge which was actually given.

The case was submitted on briefs; where it was elaborately argued on principle and precedents by *Messrs. H. E. and J. T. Davies, for the plaintiff in error:* the English case of *Borradaile* v. *Hunter** being referred to as the leading one, where the rule, it was said, was early settled in England against the pretensions of cases like the present, and settled in accord with what the counsel maintained was a just construction of the words of the contract; a case, it was urged, which had been supported by the weight of authorities both

* 5 Manning & Granger, 639.

in England and with us; as *Clift et al.* v. *Schwabe*,* *Dufaur* v. *Professional Life Insurance Co.*,† *Cooper* v. *The Massachusetts Mutual Life Insurance Co.*,‡ *Nimick et al.* v. *Mutual Life Insurance Co.*,§ and *Gay* v. *Union Mutual Life Insurance Company of New York.*‖

Mr. W. W. Nevison, *contra*, relied on *Breasted* v. *The Farmers' Loan and Trust Co.*,¶ *Barrett* v. *Buxton*,** *State* v. *Felter*,†† and submitted that the charge of the court below was in truth sustained by the Circuit Court for Connecticut, in *Gay* v. *Union Mutual Life Insurance Co.*, relied on by the other side.

Mr. Justice HUNT delivered the opinion of the court.

The request for instructions made by the counsel of the insurance company, proceeds upon the theory that if the deceased had sufficient mental capacity to understand the nature and consequences of his act, that is, that he was about to take poison, and that his death would be the result, he was responsible for his conduct, and the defendant is not liable; and the fact that his sense of moral responsibility was impaired by insanity, does not affect the case.

The charge proceeds upon the theory that a higher degree of mental and moral power must exist; that although the deceased had the capacity to know that he was about to take poison, and that his death would be the result, yet, if his reasoning powers were so far gone that he could not exercise them on the act he was about to commit, its nature and effect, or if he was impelled by an insane impulse which his impaired capacity did not enable him to resist, he was not responsible for his conduct, and the defendant is liable.

It may not be amiss to notice that the case does not present the point of what is called emotional insanity, or *mania*

* 3 Manning, Granger & Scott, 437.
† 25 Bevan, 602.
‡ 102 Massachusetts, 227.
§ 10 American Law Register, New Series, 101.
‖ 9 Blatchford, 142.
¶ 4 Hill, 73; S. C. on appeal, 4 Selden, 299.
** 2 Aikens, 167.
†† 25 Iowa, 67.

transitoria, that is, the case of one in the possession of his ordinary reasoning faculties, who allows his passions to convert him into a temporary maniac, and while in this condition, commits the act in question. This case is expressly excluded by the last clause of the charge, in which it is said that anger, distress, or excitement, does not bring the case within the rule, if the insured possesses his ordinary reasoning faculties.

The case of *Borradaile* v. *Hunter*, reported in 5th Manning & Granger,* is cited by the insurance company. The case is found also in 2 Bigelow, Life and Accident Insurance Cases,† and in a note appended are found the most of the cases upon the subject before us. The jury found in that case that the deceased voluntarily took his own life, and intended so to do, but that at the time of committing the act he was not capable of judging between right and wrong. Judgment went for the defendant, which was sustained upon appeal to the full bench. The counsel for the company argued that where the act causing death was intentional on the part of the deceased, the fact that his mind was so far impaired that he was incapable of judging between right and wrong did not prevent the proviso from attaching; that moral or legal responsibility was irrelevant to the issue. The court adds: "It may very well be conceded that the case would not have fallen within the meaning of the condition had the death of the assured resulted from an act committed under the influence of delirium, or if he had, in a paroxysm of fever, precipitated himself from a window, or, having been bled, removed the bandages, and death in either case had ensued. In these and many other cases that might be put, though, strictly speaking, the assured may be said to have died by his own hands, the circumstances clearly would not be such as the parties contemplated when the contract was entered into." In delivering the opinion of the court Erskine, J., says: "All that the contract requires is, that the act of self-destruction should be the voluntary

* Page 639.

† Page 280.

and wilful act of a man having at the time sufficient powers of mind and reason to understand the physical nature and consequences of such act, and having at the time a purpose and intention to cause his own death by that act, and the question whether at the time he was capable of understanding the moral nature and quality of his purpose, is not relevant to the inquiry further than as it might help to illustrate the extent of his capacity to understand the physical character of the act itself." Chief Justice Tindal dissented from the judgment. In speaking of the verdict he says: "It is not, perhaps, to be taken strictly as a verdict that the deceased was *non compos mentis* at the time the act was committed, for if this latter is the meaning of the jury, the case would then fall within that description mentioned in the argument to be without the reach of the proviso, namely, the case of death inflicted on himself by the party whilst under the influence of frenzy, delusion, or insanity."

This authority was followed in *Clift* v. *Schwabe*,* where it was substantially held that the terms of the condition included all acts of voluntary self-destruction, and that, whether the party is a voluntary moral agent, is not in issue.

These decisions expressly exclude the question of mental soundness. They are in hostility to the tests of liability or responsibility adopted by the English courts in other cases from Coke and Hale onwards. Coke said, "A little madness deprives the lunatic of civil rights or dominion over property, and annuls wills." But, to exempt from responsibility for crime, he says "complete ignorance of the knowledge of right and wrong must exist." Lord Mansfield holds the legal test of a sound mind to be the knowledge of right and wrong, of good and evil; of which the converse is ignorance of knowledge of right and wrong, of good and evil. Lord Lyttleton held the test to be the state called *compos mentis* or sound mind. Lord Erskine† defined it to be the absence of any practicable delusion traceable to a criminal or immoral

* 3 Common Bench, 437.

† Defence of Hadfield.

act. In Pritchard, on the Different Forms of Insanity,* will be found the somewhat lengthy definition of insanity by Lord Lyndhurst.

The English judges refuse to apply to the act of the insured in causing his death the principles of legal and moral responsibility recognized in cases where the contract, the last will, or the alleged crime of such person may be in issue.

In *Hartman* v. *Keystone Insurance Co.*,† the doctrine of *Borradaile* v. *Hunter* was adopted, with the confessedly unsound addition that suicide would avoid a policy, although there were no condition to that effect in the policy.

In *Dean* v. *Mutual Life Insurance Co.*‡ the courts of Massachusetts held substantially the doctrine of *Borradaile* v. *Hunter*.

In Kentucky, in *St. Louis Life Insurance Co.* v. *Graves*,§ the court were divided upon the question of the soundness of *Borradaile* v. *Hunter*, but held unanimously that, where the suicide was committed during an uncontrollable passion caused by intoxication, the condition was broken and the policy avoided.

In *Cooper* v. *Massachusetts Life Insurance Co.*‖ the doctrine of *Dean* v. *American Life Insurance Co.* was affirmed; the plaintiff offering to prove that the deceased was insane at the time he committed the act; that he acted under the influence and impulse of insanity, and that his act of self-destruction was the direct result of his insanity.

In *Nimick* v. *Insurance Company*,¶ McKennan, Circuit Judge of the United States for the Western District of Pennsylvania, held that if the assured comprehended the physical nature and consequences of the act, and intended to destroy his life, the policy was void, although he did not comprehend the moral nature of the act.

* Vol. 1, p. 16; and see 1 Shelford on Lunatics, 46.

† 21 Pennsylvania State, 466.

‡ 4 Allen, 96.

§ 6 Bush, 268.

‖ 102 Massachusetts, 227.

¶ 10 American Law Register, New Series, 102.

On the other hand, in *Eastabrook* v. *Union Insurance Co.*,* the judge at the trial instructed the jury "that if the insured was governed by irresistible or blind impulse in committing the act of suicide, the plaintiff would be entitled to recover." This decision was sustained by the Supreme Court of the State of Maine.

In the State of New York the question arose in *Breasted* v. *Farmers' Loan and Trust Co.*† In an action upon the policy the defendants pleaded that the deceased committed suicide by drowning himself in the Hudson River, and died by his own hand. To this the plaintiff replied that the assured was "of unsound mind and wholly unconscious of the act." The defendants demurred. The Supreme Court overruled the demurrer, holding that the reply afforded a sufficient answer to the plea. The case afterwards came before the Court of Appeals of that State,‡ when it was held that the provision in the policy had reference to a criminal act of self-destruction, that the self-destruction of the insured while insane, and incapable of discerning between right and wrong, was not within the provision.

In the case of *Gay* v. *The Union Mutual Life Insurance Co.*,§ it was held that if the deceased was conscious of the act he was committing, if he intended to take his own life, and was capable of understanding the nature and consequences of it, the policy was void, but if the insured destroyed himself while acting under an insane delusion, which overpowered his understanding and will, or if he was impelled to the act by an uncontrollable impulse, the case did not fall within the proviso of the policy. This decision, it is stated by Bigelow,‖ was the result of a careful deliberation between Judges Woodruff and Shipman at a Circuit Court of the United States held by them jointly.

In his work on Insurance,¶ Mr. Phillips, after citing the cases, closes thus: "And I take our law to be that any mental derangement which would be sufficient to exonerate

* 54 Maine, 224. † 4 Hill, 73. ‡ 4 Selden, 299.
§ Cited in 2 Bigelow, Life and Accident Insurance Cases, 4.
‖ *Supra.* ¶ Section 894.

a party from a contract would render a person incapable of occasioning the forfeiture of a policy under this condition."

There is a conflict in the authorities which cannot be reconciled.

The propositions embodied in the charge before us are in some respects different from each other, but in principle they are identical. They rest upon the same basis,—the moral and intellectual incapacity of the deceased. In each case the physical act of self-destruction was that of George Terry. In neither was it truly his act. In the one supposition he did it when his reasoning powers were overthrown and he had not power or capacity to exercise them upon the act he was about to do. It was in effect as if his intellect and reason were blotted out or had never existed. In the other, if he understood and appreciated the effect of his act, an uncontrollable impulse caused by insanity compelled its commission. He had not the power to refrain from its commission, or to resist the impulse. Each of the principles put forth by the judge rests upon the same basis,—that the act was not the voluntary intelligent act of the deceased.

The causes of insanity are as varied as the varying circumstances of man.

> ——"Some for love, some for jealousy,
> For grim religion some, and some for pride,
> Have lost their reason; some for fear of want,
> Want all their lives; and others every day,
> For fear of dying, suffer worse than death."*

When we speak of the "mental" condition of a person, we refer to his senses, his perceptions, his consciousness, his ideas. If his mental condition is perfect, his will, his memory, his understanding are perfect, and connected with a healthy bodily organization. If these do not concur, his mental condition is diseased or defective.

Excessive action of the brain whereby the faculties become exhausted, a want of proper action whereby the

* Armstrong on Health, book 4, v. 84. Cited in Shelford on Lunatics, In. 1, 43.

functions become impaired and diminished, the visions, delusions, and mania which accompany irritability, or the weakness which results from an excess of vital functions, indigestion and sleeplessness, are all the result of a disturbance of the physical system. The intellect and intelligence of man are manifested through the organs of the brain, and from these, consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind, do proceed. Without the brain these cannot exist. With an injured or diseased brain, their powers are impaired or diminished.

We have not before us the particular facts on which the questions of the sanity of Terry were presented. We may assume that proof was given upon which the propositions of the charge were based. We do not know whether he was sleepless, unduly excited, or unnaturally depressed; whether he had abandoned his accustomed habits and pursuits and adopted new and unusual ones; from a quiet, orderly man, had become disorderly, vicious, or licentious;—that his fondness for his wife and children changed to dislike and abuse; that jealousy, pride, the fear of want, the fear of death had overtaken him. He may have realized the state supposed by the counsel in arguing *Borradaile* v. *Hunter*, viz., that his death might have resulted from an act committed under the influence of delirium, or that in a paroxysm of fever he might have precipitated himself from a window, or having been bled, he might have torn away the bandages. Whether he swallowed poison or did the other insane acts, might result from the same condition of body and mind.

Delirium, fever, tearing away the bandages for preserving the life, the taking of poison, in a case like that before us, are all results of bodily disease. If bodily disease in these or other forms overthrew Terry's reasoning faculties, in other words, destroyed his consciousness, his judgment, his volition, his will, he remained the form of the man only. The reflecting, responsible being did not exist. In the language of the successful counsel in *Borradaile* v. *Hunter*, "In these and many other cases, though, strictly speaking, the assured may be said to have died by his own hands, the cir-

cumstances clearly would not be such as the parties contemplated when the contract was entered into."

That form of insanity called impulsive insanity, by which the person is irresistibly impelled to the commission of an act, is recognized by writers on this subject.* It is sometimes accompanied by delusions, and sometimes exists without them. The insanity may be patent in many ways, or it may be concealed. We speak of the impulses of persons of unsound mind. They are manifested in every form,—breaking of windows, destruction of furniture, tearing of clothes, firing of houses, assaults, murders, and suicides. The cases are to be carefully distinguished from those where persons in the possession of their reasoning faculties are impelled by passion, merely, in the same direction.

Dr. Ray, cited by Fisher,† approves the charge of the judge in Haskell's case, where he says: "The true test lies in the word *power*. Has the defendant in a criminal case the power to distinguish right from wrong, *and the power to adhere to the right and avoid the wrong?*"

The question of sanity has usually been presented upon the validity of an agreement, the capacity to make a will, or upon responsibility for crime. If Terry had made an agreement under the circumstances stated in the charge, a jury or a court would have been justified in pronouncing it invalid. A will, then, made by him, would have been rejected by the surrogate if offered for probate. If upon trial for a criminal offence, upon all the authorities, he would have been entitled to a charge, that upon proof of the facts assumed, the jury must acquit him.‡

We think a similar principle must control the present case, although the standard may be different.

We hold the rule on the question before us to be this: If

* See Blandford on Insanity—"Impulsive Insanity."

† Fisher on Insanity, p. 83.

‡ Freemen *v.* People, 4 Denio, 9; Willis *v.* The People, 32 New York, 719; Seaman's Society *v.* Hopper, 33 Id. 619; The Marquess of Winchester's case, 6 Reports, 23; Combe's case, Moore, 759.

the assured, being in the possession of his ordinary reasoning faculties, from anger, pride, jealousy, or a desire to escape from the ills of life, intentionally takes his own life, the proviso attaches, and there can be no recovery. If the death is caused by the voluntary act of the assured, he knowing and intending that his death shall be the result of his act, but when his reasoning faculties are so far impaired that he is not able to understand the moral character, the general nature, consequences, and effect of the act he is about to commit, or when he is impelled thereto by an insane impulse, which he has not the power to resist, such death is not within the contemplation of the parties to the contract, and the insurer is liable.

In the present instance the contract of insurance was made between Mrs. Terry and the company; the insured not being in form a party to the contract. Such contracts are frequently made by the insured himself, the policy stating that it is for the benefit of the wife, and that in the event of death the money is to be paid to her. We see no difference in the cases. In each it is the case of a contract, and is to be so rendered as to give effect to the intention of the parties. Nor do we see any difference for this purpose in the meaning of the expressions, commit suicide, take his own life, or die by his own hands. With either expression, it is not claimed that accidental self-destruction, death in endeavoring to escape from the flames, or the like, is within the proviso.

JUDGMENT AFFIRMED.

Mr. Justice STRONG dissented.

BROWN *v.* KENNEDY.

1. Under the act of July 17th, 1862, "to seize and confiscate the property of rebels," &c., which authorizes the confiscation of all "the estate, property, money, stocks, and *credits*" of rebels,—if the information be filed against a bond and mortgage, praying process against them and against "the estate, property, claim, *credits*, and rights thereto and therein" belonging to the mortgagee, and the warrant, in directing the

Statement of the case.

marshal to attach and retain in his possession, use these same words; and the marshal return that he has attached "the bond, mortgage, and *credit*," and has cited the mortgagee; and the decree, reciting the return, order that the said "bond, mortgage, and *credit*" be condemned and forfeited—the forfeiture is good, and the record of the proceeding of forfeiture is a bar to a bill of foreclosure on the mortgage.

2. This is so, though in point of fact the bond and mortgage were never in the district of the United States where the proceedings in forfeiture took place.

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

An act of Congress of July 17th, 1862, "to seize and confiscate the property of rebels," provided, that if any persons in the then rebel States being engaged in armed rebellion against the government of the United States, or aiding or abetting such rebellion, shall not, within a time specified, cease to aid, countenance, and abet such rebellion, and return to his allegiance to the United States, "all the estate, property, money, stocks, and *credits* of such persons, shall be liable to seizure as aforesaid," and it was made the duty of the President to seize and use them as aforesaid, or the proceeds thereof. The statute further enacted, "that to secure the condemnation and sale of *any* such property, proceedings *in rem* shall be instituted in the name of the United States," in the District Court; and that the proceedings shall conform as nearly as may be to proceedings in admiralty and revenue cases; "and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid or comfort thereto, the same shall be condemned as enemies' property."

This act had now three times been before this court for construction. It came up once in *Pelham* v. *Rose*,* where the court took a distinction between a promissory note, the *evidence* of a credit and the credit itself; and held that when the debtor had given to his creditor a promissory note, and that note was in existence, *and was the thing proceeded against*, it was necessary to the legal service of any monition that

* 9 Wallace, 103.

the marshal should seize and take *it* into his possession and control. The corollary was, that when the note, at the commencement of and during the pendence of proceedings to confiscate, was beyond the jurisdiction of the marshal, there was no due service and no confiscation.

The statute came up for consideration at a later date in *Miller* v. *United States*.*

In that case a libel had been filed under the act to confiscate railroad stocks belonging to a rebel, and the notice, instead of being served on the owner, was served on the officers of the railroad company.

The court held that the service was good. It said that "the act of Congress made it the duty of the President to cause the seizure of all the estate, property, money, stocks, *credits*, and effects of the persons described, and in order to secure the condemnation and sale of such property after its seizure, directed judicial proceedings *in rem* to be instituted. It contemplated that every kind of property mentioned could be seized effectually in some mode. It had in view not only tangible property, but that which is in action. It named stocks and credits; but it gave no directions respecting the mode of seizure. It was, therefore," the court said, "a fair conclusion that the mode was intended to be such as was adapted to the nature of the property directed to be seized, and in use in courts of revenue and admiralty. And it was legitimate," the court added, "in certain proceedings in courts of admiralty, to attach *credits* and effects of such an intangible nature that they cannot be taken into actual possession by the marshal, and the mode of attachment was by notice, dependent upon statutory enactment."

The court accordingly held that the confiscation and sale had made a valid transfer of the stock.

The act came up a third time, in *Pelham* v. *Way*, reported in an earlier part of this volume,† where the court said "that undoubtedly a *debt* or *credit* was capable of seizure under the confiscation acts, and of subsequent condemnation and

* 11 Wallace, 296.

† *Supra*, 196. See the case.

sale;" though the court there held that the proceeding not having been against the *debt* or *credit*, but only against the material evidence of it, and that material evidence having been out of the marshal's jurisdiction, and not having been seized, no confiscation of anything had taken place.

The statute thus above explained being in force, an information was filed by the district attorney in the District Court of the United States for the District of Kansas against a bond, dated May 28, 1860, executed by Lawrence Kennedy to Edward S. Brown, and secured by mortgage made and acknowledged by said Lawrence and Eliza his wife, on the same day, and on it recorded. The information prayed that process might issue against the bond and mortgage, and against "the *estate*, *property*, *claim*, *credits*, *and rights thereto and therein belonging to said Edward S. Brown*, to enforce the forfeiture thereof." Following this information a warrant was issued on the 28th of March, 1863, to the marshal of the district, commanding him to "attach said bond and mortgage, and the *estate*, *property*, *claim*, *credits*, *and rights thereto and therein belonging to the said Edward S. Brown*," and to retain the same in his custody to await the further order of the court, giving notice to all persons claiming the same to appear on the 20th of April, 1863, and show cause, if any they had, why the property should not be condemned as forfeited. To this warrant the marshal made return that he had attached the "bond, mortgage, and *credit*," and had cited Lawrence Kennedy and Eliza Kennedy (the obligors and mortgagors), and all other persons having, or pretending to have, any right, title, or interest therein, as he was commanded. Then followed the decree of the court, entered May 5th, 1863, which, after reciting the marshal's return that he had attached the bond and mortgage, *credits*, and property, and given due notice, after reciting also that proclamation had been made, and that default had been entered, ordered that "the said bond, mortgage, and credit" be condemned and declared forfeited to the United States. The decree also ordered Kennedy, one of the obligors and mort-

gagors, to pay the debt into the court for the use of the United States, and in pursuance of the decree payment was made to the officers of the court.

In 1868 Brown obtained a pardon from the President, and on his application, previously made, the District Court ordered that all the money that had been collected under the confiscation decree by the officers of the court should be paid to him, after deducting therefrom some unpaid legal costs. And subsequently he caused to be filed in the confiscation proceedings a petition praying for judgment in his favor against those officers for the money. In point of fact, however, Brown received nothing on account of the order.

In this state of things Brown filed a bill in the court below, the Circuit Court for the District of Kansas, against Lawrence Kennedy and wife for the foreclosure of the mortgage. The principal defence was that the mortgage and the debt secured by it had been confiscated under the act of Congress; the defendant asserting also that by coming in to get the money produced by the confiscation, the complainant was estopped from proceeding by way of foreclosure. This defence was the less pressed, as the complainant expressly disclaimed wanting more than one satisfaction. As matter of fact, it was admitted by a statement of facts agreed on, that Brown, the complainant, was, and always had been, a resident of Virginia, and from June, 1860, till September, 1865, had continuously, at his home, in that State, the bond and mortgage, and that neither of the instruments was, during any part of that term, in the District of Kansas.

The court below dismissed the bill; and from its action herein, this appeal came.

Mr. E. S. Brown, for the appellant:

The court held in *Pelham* v. *Rose*, and *Pelham* v. *Way*, that the note, being capable of manual caption, must be taken into the actual custody of the marshal to constitute a valid seizure, and without this the court cannot adjudicate the condemnation thereof. In the appeal now before the court, it is part of the case as agreed on and admitted, that there

was no seizure of the bond and mortgage by the marshal for the District of Kansas; but that at the time of the said pretended confiscation proceedings, the bond and mortgage were without the District of Kansas, and within the exclusive possession and control of Brown, at his home in Virginia, so that the court acquired no jurisdiction thereof.

The whole argument, then, of the other side, must rest on the use of the word *credit* in the proceedings.

But this word in the marshal's return can mean nothing but the bond and the mortgage. He describes the bond and mortgage, and nothing else; and when he says "the following described bond, mortgage, and *credit*," to wit, he means the bond and mortgage, and nothing else. He uses the word (credit) as a synonym with them. On this return, specially hinges the jurisdiction of the court. No matter what had been done before, if the official act of the marshal did not bring the *res* within the territorial jurisdiction of the court, no jurisdiction was acquired over the subject.

Further indeed. If the marshal had adopted the language of the information and the warrant, and after the words, "the bond and mortgage" he had added "and the estate, property, claim, credits, and rights *thereto and therein* belonging to the said Edward S. Brown," that return would have comprehended no other *res* than Brown's bond and mortgage. To pretend that the owner's right to the *res* may be seized in one territorial jurisdiction, while the *res* is in another, is far beyond what was ever maintained in any court. Can it be maintained that the owner's right to his horse may be seized in Kansas, while the horse is in his quiet possession in Virginia? or, that the captain's right to his ship may be seized in Kansas, while the captain is in command, and the ship securely sailing in mid-ocean? The forfeiture of the horse, or ship, or bond and mortgage, is nothing but the forfeiture of the owner's "estate, property, claim, credits, and rights *thereto and therein.*"

Miller v. *United States* does not interfere with the position taken above, nor the views expressed thereon. It is distinguished therefrom in *Pelham* v. *Way*.

Opinion of the court.

Messrs. E. Stillings and T. P. Fenlon, contra.

Mr. Justice STRONG delivered the opinion of the court.

The bill was for the foreclosure of a mortgage, and the principal defence set up is that the mortgage and the debt secured by it had been confiscated under the act of Congress of July 17th, 1862. If it had been, the complainant was not entitled to a decree of foreclosure, and his bill was properly dismissed.

We are unable to perceive why the record of the proceeding in the District Court of the United States for the District of Kansas, on which the defendant chiefly relied, does not show an effective confiscation of the debt, and its forfeiture to the United States, as well as satisfaction thereof by the mortgagors. Doubtless it is true that the court had no authority to decree confiscation of anything which had not by seizure of the marshal been brought within its jurisdiction. Seizure is essential to confer jurisdiction. But the marshal's return that he had attached the bond, mortgage, and credit, conclusively establish that a seizure was made, and that the subjects of the seizure were within the jurisdiction of the court. In this collateral proceeding the complainant is not at liberty to traverse the marshal's return. An attempt was made to traverse it, in part at least, as appears from the agreed statement of facts. It is recited therein that from June, 1860, to September, 1865, continuously, Edward S. Brown had in his possession at his home in the State of Virginia the bond and mortgage, and that during this whole period they were not in the District of Kansas. From this we are expected to infer that the marshal could not have seized them. We can, however, make no such inference against the marshal's return, without disregard of the established rule that such a return is conclusive of the facts stated by it.

The next position taken by the appellant is that, at most, only the bond and mortgage were confiscated, leaving the debt, of which the bond and mortgage were mere evidences, still due. In support of this we are referred to *Pelham* v.

Rose,* and *Pelham* v. *Way*, more recently decided.† If this were so, it would not be easy to see how the appellant could make use of the mortgage to collect the debt, when his title to the mortgage no longer exists—when it has been adjudged forfeited to the United States. But *Pelham* v. *Rose* and *Pelham* v. *Way* furnish no support to the position that the debt due from the mortgagors was not confiscated as well as the instruments which the parties had adopted as the evidences of the debt. In those cases the information was against a promissory note, and nothing else. So was the warrant or monition. The marshal returned that he had arrested the property mentioned in the warrant, and the court decreed condemnation of "the note." The nature of the proceeding is clearly shown in the opinion of Mr. Justice Field in *Pelham* v. *Rose*, where he said: "In the case at bar, a visible thing, capable of physical possession, is the subject of the libel. It is the promissory note of Pelham which constitutes the *res* against which the proceeding is instituted, and not a credit or debt, which the note is supposed by the defendant's counsel to represent. . . . The object of the present libel is to reach the note itself. This appears at every stage of the proceedings; in the information; in the monition to the marshal; in his return; in the decree of the court, and in the sale made." It was for this reason it was ruled in *Pelham* v. *Way* that the debt was not confiscated.

But the present case, as is apparent from the record, is very different. Not only were the bond and mortgage given to Brown informed against, ordered to be attached, seized, and condemned, but so, also, was the credit. We have seen that the marshal was commanded to attach the bond and mortgage *and the estate, property, claim, credits, and rights thereto and therein belonging to the said Edward S. Brown.* What is the credit in a bond and mortgage, if it is not the debt secured or evidenced by them? What are rights in a mortgage, as well as to it, if they are not the rights of the

* 9 Wallace, 103. † *Supra*, 196.

mortgagee to claim and receive the money secured by the mortgage? The ownership of the written instrument is a distinct thing from ownership of the right or credit of which the instrument is the evidence. The word "credit" does not describe ownership of a mortgage, nor do the words "rights therein." The warrant was therefore directed against the debt, as well as against the written evidence of it. The marshal returned that he had attached the bond, mortgage, and credit, and the decree condemned expressly the bond, mortgage, and credit. That the debt was attachable in confiscation proceedings was held by this court in *Miller* v. *The United States*,* and it was ruled that attachment or seizure could be made without manual caption of the visible evidences of the credit. To the doctrines laid down in that case we adhere; and, as the marshal's return conclusively establishes that the credit was seized, and was therefore within the jurisdiction of the court, we must hold that the decree of condemnation was warranted, and that the debt was effectively confiscated.

It is, perhaps, not necessary to say more. Yet it may be added that the appellant seems to have acquiesced in the decree of condemnation, and in the subsequent payment of the debt by the mortgagors to the officers of the court. The agreed statement of facts exhibits that in 1868, after he had obtained a pardon, on his application the District Court ordered that all the money that had been collected under the confiscation decree by the officers of the court should be paid to him, after deducting therefrom some unpaid legal costs. And subsequently he caused to be filed in the confiscation proceedings a petition praying for judgment in his favor against those officers for the money. Whether, after this, he could assert that the proceedings by which the money was collected were a nullity we will not determine. It is enough that, in our opinion, the debt due originally to him from the mortgagors was confiscated before his bill was filed.

DECREE AFFIRMED.

* 11 Wallace, 268.

Statement of the case.

Mr. Justice DAVIS: I concur in the judgment in this case on the ground that Brown waived his rights when he appealed to the confiscation proceedings, and by petition prayed the court to have the money realized from those proceedings paid over to him; which petition was granted by the court.

Mr. Justice FIELD dissented from both the judgment and the opinion.

HOLDANE *v.* SUMNER.

When a corporation of Louisiana which had leased premises on which it had goods liable to the landlord's lien, was owing rent (for the payment of which by the law of the State the landlord had a right by a judicial proceeding to seize the goods, and for the space of fifteen days, if they were removed, to follow and seize them) undertook, in supposed pursuance of the laws of Louisiana which authorize "*any person*" to make a *cessio bonorum*, to make such cession, and the judge having jurisdiction of the matter of cessions generally accepted the cession for the benefit of creditors, and directed that all judicial proceedings against the property be "*stayed*," after which—things proceeding in regular course—the syndic took possession of and sold the goods, *Held*, on a contest between the landlord and judgment creditors for the proceeds of them in the syndic's hands, that although it was finally decided in the Supreme Court of the State that a corporation was not entitled by the laws of Louisiana to make a *cessio bonorum*, and although, accordingly, the order staying all judicial proceedings was vacated and annulled, yet that the landlord had not lost his lien by omitting to follow and seize the goods in the syndic's hands, within the fifteen days after the syndic removed them; and that although the decision in the first instance, of the judge staying all judicial proceedings against the property of the corporation might have been void, as it was finally adjudged to be, yet as the subject generally belonged to him; as the parties were before him, and as he had to decide, in the first instance, the question of his own jurisdiction, his acts were binding till reversed or set aside; and that, as he was acting judicially in what he did, the landlord was not bound, in the face of an express inhibition of judicial proceeding against the goods, to attempt to seize them and thus meet the court with the issue of the strong hand.

APPEAL from the Circuit Court for the District of Louisiana.

This was a bill in equity filed by Sumner and others, as

lessors, against Holdane & Co., one Jeffries, and the Bank of America, to enforce a lien for rent upon certain moneys deposited in the bank, the proceeds of goods which were formerly on the leased premises, and thereby subject to the lessors' privilege. The bank was but a stakeholder. The real defendants were the other parties named, judgment creditors who had garnisheed the moneys for the payment of their judgments. The controversy arose as far back as 1859. The leased premises were known as the Belleville Iron Works, situated near the Mississippi River opposite New Orleans. The tenants were an incorporated company known as the Belleville Iron Works Company. The term of the lease was ten years, commencing the 1st of January, 1856, the rent being a percentage on the amount of work done by the lessees, not to be less than $7500 per annum.

At the close of the year 1858 the company was insolvent, and sought to obtain the benefit of the insolvent laws of Louisiana by making a *cessio bonorum*. The existing law on this subject, which was passed in 1855, declared that *any person* may make a cession of his property to his creditors, provided the surrender be made *bonâ fide*, without fraud, and agreeably to the formalities prescribed therefor. It then directed that any debtor wishing to make a surrender of his estate to his creditors must present his petition for that purpose to any judge having jurisdiction. This petition is to contain a statement of the debtor's affairs, with a schedule of his property, debits, and credits, and be sworn to. The sixth section of the act directs as follows:

"That whenever the judge shall be convinced that the debtor who wants to surrender his property has complied with all the formalities prescribed, he shall indorse on the schedule that the cession of all the property of the insolvent is accepted for the benefit of his creditors, and shall order a meeting of the creditors, to be called in the manner and within the time prescribed for respites; he shall also appoint an attorney to represent the creditors absent or residing out of the State, if there be any mentioned in the schedule."

The seventh section enacts:

"That when issuing the order for the meeting of the creditors, the judge shall order that *all the proceedings, as well against the person as the property of the debtor, be stayed.*"

The act then provides for the appointment of a syndic to take possession of the property, and to administer and sell the same, and contains other provisions regulating the entire proceedings.

In pursuance of this law the Belleville Iron Works Company, on the 29th of December, 1858, presented their petition in due form to the judge of the Fourth District Court of New Orleans (the proper judge for the purpose), who took cognizance of the case, and by an order of the same date accepted the cession for the benefit of the creditors, appointed a time and place for their meeting, and further directed that in the meantime "*all judicial proceedings against the property of said company be stayed.*" After this the cause proceeded in the regular course. A syndic was duly appointed and qualified, and took charge of the property of the company; and having obtained an order of sale, the whole property was sold under his direction by the sheriff, and netted over $50,000. Out of this money he paid the rent of the works up to April 1st, 1859, the arrears and interest then amounting to over $14,000. He then made and filed in the court a tableau of distribution, by which he arranged the claims against the estate in the order of priority and privilege, and placed the entire rent to accrue on the lease after the 1st of April, 1859, being for six years and nine months, amongst the privileged claims; which, with a few other privileged claims, largely exceeded the proceeds of the property remaining in his hands. This tableau was filed May 23d, 1859. It met with strenuous opposition from the ordinary creditors, and a long litigation ensued. Suits were commenced by the defendants and others; and Holdane & Co. recovered judgments in the Circuit Court of the United States on May 11th, 1859, amounting in the aggregate to over $4000. The other defendant, Jeffries, sued in the Fourth District Court of New Orleans, and the suit was cumulated with the insolvency proceedings. These proceedings being finally carried by

appeal to the Supreme Court of Louisiana, were wholly set aside, on the ground that the insolvency law was intended for natural persons only, and that a corporation, like the Belleville Iron Works Company could not make a *cessio bonorum* under it. After this decision of the Supreme Court, the cause was remanded to the Fourth District Court of New Orleans, and that court, on the 23d of March, 1860, made the following decree:

"It is ordered, adjudged, and decreed, that the order of the court, entered on the 29th December, 1858, in the case of *The Belleville Iron Works Company* v. *Its Creditors*, staying all judicial proceedings against the property of said company, be vacated and annulled; and it is further ordered, that the plaintiff do have and recover of the defendant, The Belleville Iron Works Company, the sum of $3262.86," &c.

The Supreme Court subsequently held, when the case came up on another appeal,* that the effect of this judgment was to annul the order of 29th December, 1858, in all its parts, and to allow the creditors to proceed as if there had been no surrender, and that the money in the hands of the syndic remained the property of the company and could be seized on execution, and did not become the property of its creditors, by virtue of the *cessio bonorum*.

The defendants having been thus left at liberty to prosecute their judgments to effect, issued executions, and as before said, garnisheed the balance of money in the hands of the syndic, amounting at this time to about $11,000, which he had deposited in bank.

The complainants then, February 23d, 1867, filed this bill to have the said moneys applied to the payment of their rent.

The defendants insisted that the complainants had lost their privilege by not proceeding against the goods themselves, before they were removed from the leased premises, or within fifteen days afterwards; within which time, under the provision of the code, the lessor might seize them if

* Jeffries *v.* Belleville Iron Works Co., 18 Louisiana Annual, 688.

there had been no change of property, and the chattels were still capable of being identified.

The plea of prescription of three years.

The court below, in which the bill was filed, decided that the money belonged to the complainants, lessors of the iron works, and from that decree Holdane & Co., with Jeffries, the opposing creditors, appealed to this court.

Mr. T. J. Durant, for the appellants:

1. The opinions and decrees of the Supreme Court of Louisiana decide that the Belleville Iron Works Company could not make a *cessio bonorum*, and that all the proceedings in the Fourth District Court of New Orleans were void from beginning to end. With these decisions we have a judgment in our favor on all the points involved in the case, and fatal in all respects to the hopes of the privileged creditors.

There can be no question of landlord's privilege. *Farnet et al.* v. *Their Creditors, and Del Campo, Opponent*,* shows that if there be no *cessio*, and the goods are removed, the landlord loses his lien unless he seize them within fifteen days afterwards.

2. The landlord did nothing from 1858 till the filing of this bill, nearly ten years. A prescription runs.

Mr. Conway Robinson, contra:

1. The landlord was prevented from seizing by a judicial order staying proceedings. This saves his rights; such is the established rule in Louisiana,† and the rule accords with the principles of equity maintained in this court and elsewhere.‡ The case of *Farnet et al.* v. *Their Creditors, and Del Campo, Opponent*, cited on the other side, shows that if there be a *cessio* the landlord's lien is not lost.

2. The landlord having been guilty of no laches, no prescription runs. The war suspended all statutes of limitation.

* 8 Louisiana Annual, 372.

† Paulding *v.* Ketty, 9 Martin, Old Series, 187; Robinson *v.* McCay, 8 Id., New Series, 106; Dennistoun *v.* Malard, 2 Louisiana Annual, 14.

‡ Oliver *v.* Piatt, 3 Howard, 401; Overseers *v.* Bank, 2 Grattan, 548.

Opinion of the court.

Mr. Justice BRADLEY delivered the opinion of the court.

By the Civil Code of Louisiana, the lessor has for the payment of his rent, and other obligations of the lease, a right of pledge on the movable effects of the lessee which are found on the property leased; and in the exercise of this right, the lessor may seize the objects which are subject to it, before the lessee takes them away, or within fifteen days after they are taken away, if they continue to be the property of the lessee, and can be identified.* This seizure is effected by means of a writ of provisional seizure, which is issued to the sheriff upon the lessor filing a petition in the local court showing the amount of rent due, or the amount accruing on the lease, whether due or not, and swearing that he has good reason to believe that the property will be removed.†

But when the goods are *in custodiâ legis*, as where they are seized by a sheriff under an execution, or are placed in the hands of a syndic under a *cessio bonorum*, the lessor cannot exercise this power of seizure, and does not lose his privilege by not exercising it, but said privilege attaches to the proceeds of the property in the officer's hands. This is the immediate result of the laws directing the proceedings in such cases, and has been expressly decided by the Supreme Court of Louisiana. Sheriffs, on execution, are directed to sell subject to the privileges or special mortgages on the property sold.‡ The syndic, under the insolvent law of 1855, is directed to sell the property absolutely, and to distribute it according to the priorities.§ The curator of a decedent's estate is required to sell the property and distribute it in the same manner. In *Robinson* v. *McCay, Curator*,‖ the curator removed the goods from the leased premises, and then, in opposition to the lessor's privilege, set up that he had not asserted his claim by seizure of the goods. The court said: "The representatives of an estate can do nothing which will destroy or impair a claim existing on the deceased's person or property at the moment of his decease.

* Civil Code, Articles 2675, 2679. † Code of Practice, Article 287.
‡ Code of Practice, Articles 679, 683, 706, &c.
§ Note to Civil Code, Article 2169. ‖ 8 Martin, N. S. 106.

In this instance the removal by the curator cannot have the effect of destroying the privilege, because the lessor could not exercise his privilege on the thing subject to it. The law makes it the duty of the former to take the property into his possession, sell it, and after the sale to settle the order of privileges contradictorily with the other creditors. The proceeds in the hand of the curator represented the thing. The want of power in the lessor to seize prevented the prescription from running against him."

It seems that the sheriff may also sell the goods absolutely upon condition of paying the lessor his rent. If the latter apprehends any danger of the goods being sold and removed without his rent being paid, he may get a rule on the sheriff to pay the rent, or get out an injunction. In *Robinson* v. *Staples*,* the court directed the sheriff not only to pay the lessor the rent that was then due but to reserve sufficient to pay that which was yet to accrue. The exception was taken in that case that the lessor had not exercised his right of provisional seizure. But the court said: "It is not well argued by the plaintiff's counsel that the lessors cannot have their privilege in this case because they did not make a provisional seizure under the statute. The proceeding was unnecessary, the property being already *in custodiâ legis* under the *fieri facias*. Another creditor threatened to absorb by his proceedings the lessor's security, and if they were not permitted to protect their privilege prospectively, the security would have been lost." It appears from this case, as indeed the words of the Code import, that the lessor's privilege extends to his unaccrued rent as well as to that which is due; but the purpose of quoting it here is to show that when goods are *in custodiâ legis* the lessor's privilege attaches to the proceeds without any act of seizure on his part.

But it has been held that if the goods are not *in custodiâ legis*, or in course of legal administration, the lessor will lose his privilege, unless he enforces his remedy. Thus, in *Farnet et al.* v. *Their Creditors, and Del Campo, Opponent*,† the

* 5 Louisiana Annual, 712.

† 8 Id. 372.

lessees becoming insolvent, an amicable meeting of their creditors was had, at which liquidators were appointed, who were to take charge of the property and act as trustees of all the creditors until the will of the foreign creditors could be ascertained. The property was thereupon removed from the leased premises and put on storage in another building. About a month afterwards one of the lessees made a regular *cessio bonorum*, and the lessor insisted on being placed on the tableau as a privileged creditor. The court held that as no formal assignment was made at the first meeting, it was impossible to give to an amicable arrangement of that sort the effect of a *cessio bonorum*, "by which," said the court, "the rights of creditors are fixed at the date of the surrender. If formal assignment had been made and possession had been given, it might have created an equity in favor of Del Campo [the lessor] against the creditors who took part in the assignment, but certainly against none others;" and the lessor's claim was overruled because he had suffered the fifteen days to go by without exercising his right of seizure.

Both parties cited this case; the complainants to show that if there be a regular assignment or *cessio bonorum* in form, the lessor's privilege is preserved without his making a seizure; the defendants, to show that if the assignment is not regularly made, the lessor must avail himself of the remedy which the law gives him. In this case a regular *cessio bonorum* in form was made; but the Supreme Court set it aside as unauthorized by the law. The question is, whether this unauthorized *cessio* excused the lessors from following up their remedy, or not. From the authorities which have been cited from the Louisiana reports, it would seem to result that the lessor is only excused from making a seizure in order to preserve his privilege, when he cannot lawfully make it in consequence of the goods being *in custodiâ legis;* in other words, when he is prevented from making it by the act of the law. If, in the present case, the proceedings taken by the Belleville Iron Works Company were absolutely void, the lessors were not precluded from seizing the property; if only voidable, they were precluded.

After the decision of the Supreme Court of Louisiana in the case, the cause was remanded to the Fourth District Court of New Orleans, and that court, on the 23d of March, 1860, ordered, adjudged, and decreed, that the order of the court, entered on the 29th December, 1858, staying all judicial proceedings against the property of the company, be "vacated and annulled;" and that the plaintiff (Jeffries) recover of the company the sum of $3262, &c. The Supreme Court subsequently held, when the case came up on another appeal, that the effect of this judgment was to annul the order of 29th December, 1858, in all its parts, and to allow the creditors to proceed as if there had been no surrender, and that the money in the hands of the syndic remained the property of the company and could be seized on execution, and did not become the property of its creditors, by virtue of the *cessio bonorum*.

This vacation of the original order, and setting aside the proceedings had under it, does not, of itself, afford an answer to the question whether the proceedings were absolutely void or only voidable. Proceedings are often set aside for mere irregularities. The judge who accepted the cession had jurisdiction of the subject-matter, and the parties were before him. The order accepting the cession contained an inhibition that all judicial proceedings against the property of the company should be stayed. The defect in the proceedings was, that the corporation was not such a person as was entitled to the benefit of the law. Could such an order be disregarded so long as it was not vacated or reversed? Was it not the duty of the lessors to respect it? How could they safely issue a writ of provisional seizure when there was an express inhibition of all judicial proceedings against the property in a proceeding to which they were parties? The order of the judge accepting the cession, and inhibiting judicial proceedings, was a judicial act. In making it he had to decide on the question of his own jurisdiction over the subject-matter and the parties; and although his decision may have been wrong, acts done in pursuance of it were binding until they were reversed or set aside. All

parties acted on this principle. The defendants complied with all orders directed to them in the case. When their actions were cumulated with the insolvent proceedings, they acquiesced in the order of the court, and followed up their rights in regular procedure by contestation and appeal; and only proceeded to enforce their judgments when they had obtained a decision of the Supreme Court in their favor, and a decree of the District Court of New Orleans in pursuance thereof, vacating the original order. Under these circumstances it hardly lies in the mouths of the defendants to say that the lessors ought to have disobeyed the order of the judge, and disregarded all the subsequent proceedings before they were reversed; and that they should have met the court with the issue of the strong hand.

But without relying on this equitable aspect of the case arising from the respect due to the solemn acts of a judicial tribunal, and the conduct of all the parties concerned, there seems to be no sound technical reason for regarding the act of the judge in making the order of December 29th, 1858, as absolutely void. He had jurisdiction, both of the subject-matter and of the parties; but the principal party, the applying debtor, was incapacitated to sue for the relief afforded by the law. Being a corporation, though a "person" in the legal sense of the term, it was not embraced within the intent and meaning of the insolvent law. Is this anything more than the common case of a party instituting a suit in court who turns out to have no legal standing in the court? And yet no one would assert that this predicament renders the entire proceedings absolutely void, and the court and all its officers trespassers. If a married woman brings an action in her own name, without joining her husband, the proceeding is not void, although the defect may be pleaded in bar, or set up as a defence on the trial.

Without pursuing the subject further, it suffices to say that, in our judgment, the lessors, under the circumstances of this case, were properly excused from making a seizure of the property of the Belleville Iron Works Company as a means of retaining their privilege for the rent accruing on

the lease, and that said privilege attached to the proceeds of said property in the hands of the syndic.

The plea of prescription cannot be sustained in this case, inasmuch as the bill was filed in February, 1867; and we have lately held, in the case of *Adger* v. *Alston*,* that all statutes of prescription and limitation were suspended, at least in the Federal courts, during the period of the late civil war, which was not solemnly determined in Louisiana until the President's proclamation of April 2d, 1866.

DECREE AFFIRMED.

GUNN *v.* BARRY.

An exemption law of Georgia, passed several years ago, exempted from execution in favor of each head of a family, "fifty acres of land, and five additional ones for each of his children under the age of 16 years, the land to include the dwelling-house and improvements if the same do not exceed $200," and exempted many other things, chiefly household furniture, wearing apparel, books, family portraits, &c.; the value of which was not limited, and which might vary with different debtors and their families. With that law in force A. obtained a judgment for $531 against B., who had 272½ acres of land, worth $1300, and had no other property but land worth $100, from which the judgment could be satisfied. In this state of things Georgia having passed an "ordinance of secession," withdrew her senators and representatives from the Congress of the United States, and went into the rebellion. The rebellion being suppressed, but Georgia not being allowed by Congress yet to send senators and representatives to its sessions, Congress passed what was known as the Reconstruction Act. This act reciting that "no legal State government or adequate protection for life or property now existed in the rebel State of Georgia," authorized the said State to make a constitution, which being submitted to Congress and approved by it, the State was to be entitled to representation. The people of the State did accordingly make a new constitution and submit it to Congress. This new constitution provided that "each head of a family should be entitled to a homestead of realty to the value of $2000 in specie, and personal property to the value of $1000 in specie, to be valued at the time they are set apart;" and ordained further that—

"No court or ministerial officer in the State shall ever have jurisdiction or

* *Supra*, p. 555.

Statement of the case.

authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase-money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The constitution with this exemption and these provisions in it was submitted to Congress, which approved part of it and disapproved of other parts; enacting only that after certain changes were made the State should be entitled to representation. No objection was made to the clauses of exemption or the provisions above quoted. The State of Georgia complied with the requirements of Congress, and a constitution satisfactory to that body being made—these clauses of exemption and the accompanying provisions, being in it—the State was declared entitled to representation. *Held*,

1st. That as respected a creditor who had obtained by his judgment a lien on the land which the old exemption secured to him while the new one destroyed it, the law creating the new exemption impaired the obligation of a contract, and was unconstitutional and void.

2d. That the fact that the constitution had been made under the special circumstances and in the special way above mentioned, and under the eye of Congress, did not change the case.

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

By a statute of Georgia, passed many years ago, it was enacted that the following property, belonging to a debtor who was the head of a family, should be exempt from levy and sale.

"Fifty acres of land, and five additional ones for each of his children under the age of 16 years, the land to include the dwelling-house, if the same and improvements do not exceed $200.

"One farm horse or mule.

"One cow and calf.

"Ten head of hogs.

"Fifty dollars' worth of provision, and *five dollars' worth for each additional child.*

"Beds, bedding, and *common* bedsteads sufficient for the family.

"One loom, one spinning-wheel, two pair of cards, and one hundred pounds of lint cotton.

"*Common* tools of trade for himself and his wife.

"Equipments and arms of a militia soldier and trooper's horse.

"*Ordinary* cooking utensils and table crockery.

"Wearing apparel of himself and family.

"Family Bible.

"*Religious works* and school books.

"*Family portraits.*

"The library of a professional man not exceeding $300 in value, to be selected by himself."

In 1861, with this statute in existence, the State of Georgia passed what was called "an ordinance of secession" from the United States; and joined in the treason and rebellion against the Federal government into which the slaveholding States, for the most part, entered. Her senators and representatives withdrew from Congress; her State government passed into the hands of persons at war with the United States; and she became one of the States styled "The Confederate States of America;" a confederacy which waged war for several years on the government, and whose insurrection and rebellion the government, on the other hand, sought by force of arms to suppress. The arms of the United States having proved triumphant, the so-called government of the Confederate States fell to pieces, and the State of Georgia was left where she had put herself, that is to say, in the hands of traitors and rebels. No senators or representatives were allowed by the Congress of the United States to come back to its chambers as of old.

In this state of things, in May, 1866, Gunn obtained judgment in one of the courts of the State for $402.30 principal, and $129.60 interest (in all $531.90), against a certain Hart. For what the judgment had been obtained did not appear. Hart had at this time 272½ acres of land, worth $1300, and the judgment bound it as a lien. He had no other land but one piece worth about $100.

On the 2d of March, 1867, the rebellion being suppressed, but the ancient relation of Georgia to the General Government, being still, in point of fact, not restored by representation, the Congress of the United States passed "an act to

provide for the more efficient government of the rebel States;" the act commonly called the Reconstruction Act.* This act—reciting that "no legal State governments or adequate protection for life or property now existed in the rebel States of Virginia, *Georgia*, North Carolina," &c., and that it was "necessary that peace and good order should be enforced in the said State till loyal republican State governments could be legally established," and putting these said States under military rule—enacted that when the people of any one of the said rebel States should have formed a constitution of government in conformity with the Constitution of the United States in all respects . . . and "*when such constitution shall have been submitted to Congress for examination and approval, and Congress shall have approved the same* . . . &c., *said State shall be declared entitled to representation in Congress, and senators and representatives shall be admitted therefrom.*"

In pursuance of what was contemplated by this act, and of certain amendments to it, the people of Georgia did make a constitution. This constitution by the first section of its seventh article ordained that—

"Each head of a family, or guardian, or trustee of a family, of minor children shall be entitled to a homestead of realty to the value of $2000 in specie, and personal property to the value of $1000 in specie, to be valued at the time they are set apart."

It went on further to declare:

"And no court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase-money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The constitution having been thus adopted in form by the people of Georgia, was sent with this article included to the Congress of the United States, which by an act of June

* 14 Stat. at Large, 428.

25th, 1868,* "to admit the States of Georgia, &c., to representation in Congress," reciting that whereas the people of Georgia, North Carolina, &c., had in pursuance of the already quoted act of March 2d, 1867, "framed constitutions of State government which are republican, and have adopted said constitutions," enacted that each of the States of North Carolina, *Georgia*, &c., shall be entitled and admitted to representation in Congress as a State of the Union when the legislature of such State shall have duly ratified the amendment to the Constitution of the United States . . . known as "Article Fourteen:" *Provided*, That the State of Georgia shall only be entitled and admitted to representation upon this further fundamental condition, that the first and third subdivisions of section seventeen of the fifth article of the constitution of said State except, &c., shall be null and void, and that the General Assembly of said State by solemn public act shall declare the assent of the State to the foregoing provision.

The State having afterwards ratified the fourteenth amendment, and complied with other requirements, was by an act of Congress, passed July 15th, 1870,† declared entitled to representation in Congress.

The constitution of Georgia being thus approved by Congress, and operative, the legislature of Georgia, on the 3d of October, 1868, passed

"An act to provide for setting apart a homestead of realty and personalty and for the valuation of said property, and for the full and complete protection and security of the same to the sole use and benefit of families, as required by section first of article seventh of the constitution and for other purposes."

The language of this act was the same as the provision of the constitution. Under the act all the land of Hart, which altogether, it will have been observed, was worth about $1400, was set apart to him and his family as a homestead.

On a requirement by Gunn, to the sheriff of the county, one Barry, that he should levy on the 277½ acres, Barry re-

* 15 Stat. at Large, 73.

† 16 Id. 363.

fused to do so, upon the ground that they had been set off to Hart and his family under the act of 1868, and on a petition for mandamus against Barry to compel him to make the levy, the courts of Georgia, including the Supreme Court, having decided that the refusal of the sheriff was right, the case was brought here.

The question involved was of course the constitutionality as against Gunn, who had got his judgment before its passage, of the new exemption.

Mr. P. Phillips, for the plaintiff in error:

Hart having had 272½ acres of land, worth $1300, of which land 50 acres, or at very most, say a half, was exempt under the old law, obtained a judgment for $531.90. His debt is thus perfectly secure. He has an interest in the land to the extent of the judgment; an interest which binds it in the hands of the debtor and to whomsoever the debtor may transfer it. Then comes the new constitution and law, which withdraws the whole of the land from the lien, and for all practical purposes dissolves or destroys the lien. The remedy, which was before complete, is now annihilated. And the creditor who, before, would have been paid in full, is deprived of getting anything. If this is not impairing the obligation of a contract—if it is not destroying vested rights—what is?

There was, no doubt, great inducement in the Southern States, arising out of the disasters of the war, to legislation in favor of debtors. But while much may be said in extenuation of such legislation, nothing, when it is like that here, can be judicially said in justification of it. In Arkansas an exemption of $7000 has been made. In Mississippi of $4000. In other Southern States exemptions more or less large. With the operation of these exemptions on contracts made subsequently to them, we do not deal. But when applied to contracts made when no such exemptions were allowed or thought of, the illegality is obvious.

Some singular results follow as respects the State of Georgia. The population of the State is estimated at

1,500,000. Under the new exemption every head of a family is entitled to $2000 in land. Assuming that five persons constitute a family, we have 300,000 heads of families; and if each "head" obtained the $2000 in land, the law appropriates land to the amount of $600,000,000. *This is three times more than all the land in the State is estimated at.*

No counsel appeared on the other side; but the court was referred to arguments made in Georgia, where the validity of the laws making the new exemption had been sought to be maintained. So far as the reporter understood them, the grounds were somewhat thus:

The old law, so far as it operated on contracts made after its date, was confessedly valid. Practically from the time of its passage no court or ministerial officer of the State had jurisdiction or authority to enforce any judgment, decree, or execution against property set aside under *it.*

The old law being valid, what made the exemption of 1868 invalid? It was not invalid.

I. In *Von Hoffman* v. *Quincy*,* this court said:

"It is competent for the States to change the *form* of the remedy or to *modify* it otherwise as they may see fit, provided no *substantial* right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are deemed legitimate and those which under the form of modifying the remedy impair substantial rights. *Every case must be determined upon its own circumstances.*"

So, in that same case, this court referring to an observation made in an earlier case—that "one of the tests that a contract has been impaired is that its value has by legislation been diminished"—say:†

"This has reference to legislation which affects the contract *directly, and not incidentally or only by consequence.* The right to imprison for debt is not a part of the contract. It is regarded as penal rather than remedial. The States may abolish it *whenever*

* 4 Wallace, 553.

† Page 553.

they think proper. They may *also* exempt from sale under execution the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said,* 'regulations of this description have always been considered in every civilized community as properly belonging to the remedy to be exercised by every sovereignty *according to its own views of policy and humanity.*'"

This court, then, here admitted that though a contract was in existence the legislature might legislate upon it so as to *diminish* its value provided the legislation were indirect. And the very sort of legislation which was in question in this case is given as an illustration of the means through which a diminution, lawful in character, may be made. The reason of the lawfulness, though the legislation be retroactive, was also plainly adumbrated. It was that the principles of humanity having in all civilized countries, time out of mind, induced legislatures to intervene between the creditor and his debtor to prevent the former from stripping the latter and his family of those articles which are necessary to their existence, and this sort of legislation being exercised by every sovereign "according to his own views of policy and humanity," every person entering into a contract enters into it with a full recognition of the right of the legislature to act on the subject according to such, its own views—views which, of course, must vary according to times and exigencies.

Hence, if the right of the legislature was legitimately exercised; if, in other words, the particular law did not transcend the limits of fair legislation, the "obligation of contracts" was not impaired even though the legislation were retroactive, and though by a change in the character of the articles exempted the remedy might, in particular cases, be less visibly efficacious, as in others it might be more so.

Now, was the argument this, to wit, that the act of 1868 is unlawful because abstractly and in itself considered it

* Beers v. Houghton, 9 Peters, 359; Ogden *v.* Saunders, 12 Wheaton, 230; Mason *v.* Haile, 12 Id. 273; Sturges *v.* Crownenshield, 4 Id. 200.

made an exemption too great in amount? That fact was denied. An exemption of a house and lot worth $2000, and of personalty worth $1000, was not so plainly an excessive exemption as to be certainly void; void whether considered prospectively or retrospectively. Such a thing cannot be affirmed; the legislature of Georgia having had a right within fair limits to act according to "its own views of policy and humanity."

Then, was it void because by it a greater amount was exempted than by the former act? If the fact were so, still, if the increase were made by the legislature of the State in a fair exercise of the legislature's "views of humanity and policy," it would be hard to say, under the language of this court above quoted from *Von Hoffman* v. *City of Quincy*, that from this cause merely—the increase not being really great—it was void *in toto*. But the increase in the magnitude of the exemption was denied by the argument in Georgia. On the contrary, looking at the number of items exempted under the old law, and their character, it was asserted that in some cases of land in some families the exemption would be much less. A homestead of at least 50 acres, *worth any sum*, and if a man had ten children, of 100 acres, was exempted. Then the "bedsteads," "tools," and "cooking utensils" exempted must all be "common" or "ordinary." But nothing else was so required to be. *All* wearing apparel of the debtor and of all his family—however numerous the family or valuable the apparel—was exempted; so would a theological library be, however extensive and valuable, and family portraits which, if by certain artists, would have great value. In a case where the 50 acres were near a city, or where the family was of any quality and with members at all numerous, the articles exempted by the old law could hardly fail far to exceed $3000 in value. The new provision was but an equalization to all the people of the State of what was meant to be given by the old law, but was not really given.

II. Then was the case affected by the fact that the constitution and statute changing the character of the exemption

declare that no court or ministerial officer in the State shall ever have authority to enforce any judgment, decree, or execution against said property so set apart? &c. How did that affect the matter? Under the old exemption no court or ministerial officer of the State could ever have had jurisdiction or authority to enforce any judgment, decree, or execution against the property set apart. Assuming that the exemption itself was valid, any prohibition by words was useless, and any words of prohibition were but surplusage. The prohibition followed from the validity of the exemption, and followed as much without words of prohibition as with them.

The case, then, was this. The legislature acting on "its own views of policy and humanity" has so far modified an old exemption that, instead of some real estate, the value of which varied and might be worth much more than $2000, and a great number of articles of personalty *nominatim*, whose value also varied and which, of themselves, might be worth much more than $1000, and might be found in some families and not at all in others; now exempts realty worth $2000 and personalty worth $1000; so as to make the law operate for all as equally and equitably as possible. Is the legislative power constitutionally incapable of making such a change?

Then it could not be contended that by the mere contract, whatever it was, on which this judgment had been obtained, any *lien* was acquired. The new constitution withdrew nothing from the operation of the *contract*. And though a lien was acquired by the *judgment*, yet, if the new exemption did withdraw the land from the operation of *it*, the obligation of no *contract* was impaired.

But the strongest view, it was said, remained. In 1865 a revolution had swept over the land. The old State government had gone to wreck. The people had no civil government, and were in anarchy. The Congress of the United States invited them to make a government, and undertook to guarantee to the State one of a republican form. The constitution of 1868 was the result. It was made through

Recapitulation of the facts in the opinion.

the power and agency of Congress, under *its* law and under its eye. It was more the work of Congress than of the State. Congress insisted that a portion of the proposed constitution, which it disliked, should be fundamentally rejected; and that place should be given to new propositions which it thought good. The people of the State wanted neither change. But all that Congress prescribed to be done was done. Congress then assented that the instrument should go into effect, and it is in virtue of that assent that it did go into effect. The constitution of Georgia is, therefore, an act of Congress, and it has, accordingly, all the validity of such an act. Now there is no doubt that Congress may if it please pass a law impairing the obligation of contracts,* though the States may not.

Mr. Justice SWAYNE delivered the opinion of the court.

On the 12th of May, 1866, the plaintiff in error recovered in the Superior Court of Randolph County a judgment against W. R. Hart for the sum of $402.30 principal, and $129.60 interest up to the date of the judgment, and costs. An execution was issued upon the judgment, and placed in the hands of the defendant in error as sheriff of that county. He was thereby commanded to make the sums above mentioned and further interest upon the principal from the 12th of May, 1866, and the costs. The plaintiff in error requested him to levy upon a tract of land of 272½ acres, belonging to Hart, the defendant in the judgment. Barry refused. He assigned as the only reason for his refusal that the premises had been set off to Hart under the provisions of the act passed by the General Assembly of the State, and approved October 3d, 1869, entitled "An act to provide for setting apart a homestead of realty and personalty, and for the valuation of said property, and for the full and complete protection and security of the same to the sole use and benefit of families, as required by section first of article seventh of the constitution, and for other purposes."

* Evans *v.* Eaton, Peters's Circuit Court, 322.

Recapitulation of the facts in the opinion.

Gunn thereupon petitioned the Superior Court of the county, for a writ of mandamus to compel the sheriff to make the levy. The petition set forth that the land in question was the only property known to him subject to the lien of his judgment, except a tract of 28 acres of the value of $100, situated in the county of Stuart, which was also included in the homestead so set apart; that the premises in question were worth the sum of $1300, and that they embraced a much larger number of acres than the real estate exempt from levy and sale by the laws in force when the judgment was recovered and when the debt on which it was founded was contracted. It does not appear that these allegations were denied, and we do not understand that there is any controversy upon the subject. After a full hearing the court affirmed the validity of the act in its retrospective aspect, and gave judgment against the petitioner. The Supreme Court of the State affirmed this judgment.

The first section of the seventh article of the constitution of Georgia of 1868 provides that "each head of a family, or guardian or trustee of a family of minor children, shall be entitled to a homestead of realty to the value of $2000 in specie, and personal property to the value of $1000 in specie, to be valued at the time they are set apart, and no court or ministerial officer in this State shall ever have jurisdiction or authority to enforce any judgment, decree, or execution against said property so set apart, including such improvement as may be made thereon from time to time, except for taxes, money borrowed or expended in the improvement of the homestead, or for the purchase-money of the same, and for labor done thereon, or material furnished therefor, or removal of incumbrances thereon."

The first section of the act of the 3d October, 1868, is in the same terms.

It may well be doubted whether both these provisions were not intended to be wholly prospective in their effect. But as we understand the Supreme Court of the State has come to a different conclusion, we shall not consider the question.

The statute in force when the judgment was rendered declared that the following property belonging to a debtor who was the head of a family should be exempt from levy and sale (to wit): "Fifty acres of land and five additional ones for each of his children under the age of sixteen years, the land to include the dwelling-house, if the same and improvements do not exceed two hundred dollars; one farm horse or mule, one cow and calf, ten head of hogs, and fifty dollars' worth of provisions, and five dollars' worth additional for each child; beds, bedding, and common bedsteads sufficient for the family; one loom, one spinning-wheel, and two pairs of cards, and one hundred pounds of lint cotton; common tools of trade for himself and his wife; equipments and arms of a militia soldier and trooper's horse; ordinary cooking utensils and table crockery; wearing apparel of himself and family; family Bible, religious works and school books; family portraits; the library of a professional man in actual practice or business, not exceeding three hundred dollars in value, to be selected by himself."

No one can cast his eyes over the former and later exemptions, without being struck by the greatly increased magnitude of the latter.

Section 10 of Article 1 of the Constitution of the United States declares that "no State shall pass any law impairing the *obligation* of contracts."

If the remedy is a part of the obligation of the contract, a clearer case of impairment can hardly occur than is presented in the record before us. The effect of the act in question, under the circumstances of this judgment, does not indeed merely impair, it annihilates the remedy. There is none left.

But the act reaches still further. It withdraws the land from the lien of the judgment, and thus destroys a vested right of property which the creditor had acquired in the pursuit of the remedy to which he was entitled by the law as it stood when the judgment was recovered. It is in effect taking one person's property and giving it to another with-

out compensation. This is contrary to reason and justice, and to the fundamental principles of the social compact.* But we must confine ourselves to the constitutional aspect of the case. A few further remarks will be sufficient to dispose of it. It involves no question which has not been more than once fully considered by this court.

Georgia, since she came into the Union as one of the original thirteen States, has never been a State out of the Union. Her constitutional rights were, for a time, necessarily put in abeyance, but her constitutional disabilities and obligations were in nowise affected by her rebellion. The same view is to be taken of the provision in her organic law and of the statute in question, as if she had been in full communion with her sister States when she gave them being. Though her constitution was sanctioned by Congress, this provision can in no sense be considered an act of that body. The sanction was only permissive as a part of the process of her rehabilitation, and involved nothing affirmative or negative beyond that event. If it were express and unequivocal, the result would be the same. Congress cannot, by authorization or ratification, give the slightest effect to a State law or constitution in conflict with the Constitution of the United States. That instrument is above and beyond the power of Congress and the States, and is alike obligatory upon both. A State can no more impair an existing contract by a constitutional provision, than by a legislative act; both are within the prohibition of the National Constitution.

The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation. A State may change them, provided the change involve no impairment of a substantial right. If the provision of the constitution, or the legislative act of a State, fall within the category last mentioned, they are to that extent utterly void. They are, for all the purposes of the contract which they impair, as if they had never existed. The constitutional provision and statute

* Calder v. Bull, 3 Dallas, 388.

here in question, are clearly within that category, and are, therefore, void. The jurisdictional prohibition which they contain with respect to the courts of the State, can, therefore, form no impediment to the plaintiff in error in the enforcement of his rights touching this judgment, as those rights are recognized by this court.*

THE JUDGMENT IS REVERSED, and the cause will be remanded to the Supreme Court of Georgia with directions to enter a judgment of reversal, to reverse the judgment of the Superior Court of Randolph County, and thereafter to proceed

IN CONFORMITY TO THIS OPINION.

NEW ORLEANS *v.* GAINES.

1. Where a master, on reference, has followed the order of the judgment and enforced its directions, no objection can be taken, on appeal, to what he has done when the appeal arises upon exceptions to his report, and not on objection to the original judgment under which the reference to him was made.
2. Though by the law of Louisiana a defendant, ordered by judicial decree to restore possession of real estate which it has been adjudged that he has held, *malâ fide*, during his whole term of possession, have a right, if the party recovering as true owner desire to retain improvements which the possessor, *malâ fide*, has put on them, to demand the value of the materials and price of workmanship of such improvements; yet where, in a peculiar and complicated case, in which specific amounts and estimates were not possible to be made, and the case had to be adjusted largely on a system of equitable compensations, if the party finally dispossessed have, by the decree, received in fact and good conscience the value of his improvements, the court will not allow him to call for another and more specific payment.
3. The possessor, in continuous bad faith, of real estate which the true owner at last recovers, is chargeable, under the claim of *mesne* profits, with what the premises are reasonably worth annually, and interest thereon

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* White *v.* Hart, 13 Wallace, 646; Von Hoffman *v.* The City of Quincy, 4 Id. 535.

to the time of the trial. An allowance of five per cent. interest in a Louisiana case held to have been proper.

4. On a claim for *mesne* profits by a true owner against a possessor in continuous bad faith, there is nothing in the Civil Code of Louisiana which limits the claim to profits for three years. On the contrary, the rule of English equity there prevails, and a decree is properly made of profits from the time that the complainant's title accrued. In the present case the profits of fifteen years were given, with interest on them at five per cent.

APPEAL from a decree of the Circuit Court for the District of Louisiana; the case being thus:

In the year 1856 Mrs. Myra Clark Gaines filed a bill in the court below against the city of New Orleans, in which she sought to recover valuable real estate in New Orleans owned by one Daniel Clark, including a certain block or square described, on which a draining-house and out-buildings, with a draining-machine for draining the city, was now and had been for many years situated.

The bill alleged that she was the only and legitimate child of Clark; that Clark had left a valid will, made in 1813, by which he devised all his estate to her; that this will having been lost or destroyed, and she a minor till 1827 and ignorant of her parentage and rights, a provisional will, dated in 1811, of which Richard Relf and Beverly Chew were executors, and Clark's mother, Mary Clark, was universal legatee, was admitted to probate and ordered to be executed; that the will of 1813, which revoked the will of 1811, was subsequently found, and, in 1856, established; that Relf and Chew, under pretended authority as executors of Clark and as attorneys in fact of his mother, had, in 1821, without right or authority, and in bad faith, sold this lot and others at public auction to one Evariste Blanc; that Blanc, equally without right or authority, and in bad faith, had sold it and others, by act of sale, on the 26th of September, 1834, to the city of New Orleans; that the city had notice of the fraudulent character of the proceedings of Relf and Chew, &c., and of the worthlessness of the title, &c., which they acquired. The bill prayed a delivery of the property and an account of the rents and profits.

Statement of the case.

After a long and expensive litigation, including an appeal to this court, Mrs. Gaines succeeded in her case,* and in pursuance of a mandate from this court, the court below, in June, 1870, entered a decree in her favor; decreeing that she was Clark's only legitimate child, and as his universal legatee was entitled to the lots in question; that the sale by Relf and Chew and that also by Evariste Blanc was wholly unauthorized and illegal, and utterly null and void; and that the city of New Orleans at the time it purchased the property was bound to take notice of the circumstances which rendered the actings and doings of Chew and Relf in the premises utterly null and void, and "ought to be deemed and held, and was thereby deemed and held, to have purchased the property in question with full notice that the sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and the said act of sale to the said Evariste Blanc were unauthorized, illegal, null, and void, and in derogation and fraud of the persons entitled to the succession of Daniel Clark. The court further decreed that Mrs. Gaines, as Clark's only and legitimate child and universal legatee, was entitled to the property with all the yearly rents and profits accruing from it since it came into possession of the city, on the 26th of September, 1834, and decreeing an account accordingly, referred it to the master to take the same.

The master reported that the city had never rented the lot on which the draining-house and machinery was built, nor received from it any rents or profits except by an increase of the city revenue, brought about by the fact that the draining-machine had drained a large part of the city, and by making it of use had largely augmented the property in the city that was taxed. While, therefore, he "found it difficult to fix the amount of rents and profits for which the city was liable on this lot," he presented certain facts and figures from which the court could reach an equitable result. These were thus: The city, *it was estimated*, had received

* See Gaines *v.* New Orleans, 6 Wallace, 642.

from increased taxation of *other* property, during the term embraced by the order (including interest), $208,825.

Now, this particular lot of land, it was testified, was originally worth $200. The buildings erected by the city, independent of the machinery, cost $18,000. The putting up of the machinery was finished July 1st, 1835 or 1836 (some witnesses testifying to the one year and some to the other), and it was testified that a fair rental of the land and building was $2400 a year. The expense of repairs was $500.

The master, accordingly—disallowing to the city the benefit of the "prescription of three years," which it set up against the claim for rents—charged the city on this basis:

Rental value from July 1st, 1835, to November 1st, 1870, ...	$84,800 00	
Interest on the rents, at five per cent., .	72,800 00	
		$157,600 00
And allowed the city:		
Expenses of repairs, ...	$17,166 66	
Interest on repairs, ...	15,166 55	
		32,333 21
And thus made the city chargeable with the difference, ...		$125,266 79

On exceptions to his report, one of them was that as the draining-machine and buildings necessary therefor were made and erected by the city, with materials belonging to it, the only right of Mrs. Gaines as to them was, either to keep the same and reimburse to the city their value and the price of workmanship, or to require the city to take away or demolish them; that the obligation, under the law of Louisiana, rested upon Mrs. Gaines to elect which she would do; and that the city had demanded of her, through the master, that she should make such election, and that the master refused to direct or require her so to do, and thus denied the city its rights under the law.

The master to this reported that the city, by its counsel, had cited Article 500 of the Civil Code of Louisiana before him, and stated that it would call upon the complainant (then present) to elect whether she would keep said works and improvements placed upon the land by the city or pay

the city for the same; and the master added that he had "regarded this as a mere notice of what the defendant intended to do at some future time, but as the point was not presented in writing nor subsequently alluded to, he had assumed that it had been abandoned."

In this state of things, and after the disallowance of some other exceptions, the report came before the Circuit Court (BRADLEY, J.). After examining those exceptions the learned justice came to the main matter, the allowance of the $125,266.79. On that subject he said:

"The case of the city is a peculiar one. The estimation of the rents and profits in that case is so uncertain and speculative that I do not feel entirely satisfied as to the decision that should be made. The master evidently felt the same embarrassment."

And after referring to the different estimates made by the master, and specially to the one above given on p. 627, the learned justice said:

"As the master has not signified his adoption of either of these estimates, but has stated the facts to the court for its equitable determination, I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the drainage-machine for the past thirty-five years against the cost of constructions and repairs, and to charge the city with the rents of the building and land, less the ordinary repairs of the buildings, amounting, as shown by the report, to the sum of $125,266.79. Whilst the profits and advantages of the drainage-machine were indefinite and uncertain in amount, there is no doubt of their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged."

The learned justice of the Circuit Court accordingly ordered a confirmation of the report. From that decree this appeal came.

Messrs. Miles Taylor and J. McConnell, for the appellant (suggesting that whereas the draining-machine was finished July 1st, in 1836, and that alone gave the land a value for

rent, a charge for one year too much had in any view, been made), insisted upon certain exceptions, as follows:

1st. That the decree was erroneous in that it had the effect of giving to the complainant the buildings and machinery erected by the city, with the materials and at the expense of the city, without paying the value of the materials and the cost of the workmanship, or any other price whatever.

2d. That the sum of the rents and profits above stated was made up in part by the allowance of interest, at the rate of five per cent. per annum, on each year's rent, from the end of the year. This, it was argued, was in violation of the doctrines of the code of Louisiana of 1825, as shown in its articles 1939 and 1905.

3d. That the refusal to allow the plea of prescription in bar of all rents or profits for the use of the square, which were received by the city more than three years anterior to the institution of the suit on the 26th of December, 1856, was an error.

Messrs. J. Emott and J. Q. A. Fellowes, contra.

Mr. Justice HUNT delivered the opinion of the court.

The appeal before the court arises upon exceptions to the master's report only, and not to the original judgment.

1. It is only where the master or the judge, in acting upon his report, has departed from the order of the judgment or has omitted to enforce its provisions, that a just objection can arise. The judgment has decided that the plaintiff was the owner of this property in question in 1834, when the defendant entered into its possession; that then and at all times since the defendant has illegally kept the plaintiff out of its possession, and has itself been in its possession during the same period, and that it obtained and during all this time held such possession wrongfully and in bad faith.

This statement furnishes an answer to the suggestion that the rents and profits were allowed for one year, during

which the city was not in possession. This is not an open question. It is settled by the judgment, and the allowance is in accordance with the decision.

It is also decided, "that the city of New Orleans ought to be deemed and held, and is hereby deemed and held, to have purchased the property in question with full notice that the said sale at auction, under the pretended authority of the said Richard Relf and Beverly Chew, and the said act of sale to the said Evariste Blanc, were unauthorized, illegal, null, and void, and in derogation and fraud of the rights of the person or persons entitled to the succession of the said Daniel Clark." This sale to Evariste Blanc was the source from which the city derived its title to the property in question. During the whole time of its holding, the city was a possessor in bad faith of the property of the plaintiff. The Civil Code of Louisiana declares as follows:

"ARTICLE 3414. The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another.

"ARTICLE 3415. The possessor in bad faith is he who possesses as master, but who assumes this quality, when he well knows that he has no title to the thing, or that his title is vicious and defective."

By the same code a possessor in good faith may enjoy the fruits of the property until it is claimed by the owner, and is bound to account only from the time of a demand for restitution. He is also entitled, when evicted, to be reimbursed for the expenses he may have incurred on it. (Article 3416.)

To the same purport are Articles 500 and 501.

"When plantations, constructions, and works have been made by a third person, and with such person's own materials, the owner of the soil has a right to keep them, or compel this third person to take away or demolish the same. If the owner requires the demolition of such works they shall be demolished at the expense of the person who erected them without any

compensation; such person may even be sentenced to pay damages, if the case require it, for the prejudice which the owner of the soil may have sustained. If the owner keeps the works, he owes to the owner of the materials nothing but the reimbursement of their value and of the price of workmanship, without any regard to the greater or less value which the soil may have acquired thereby.

"Nevertheless, if the plantations, edifices, or works have been done by a third person evicted, but not sentenced to make restitution of the fruits because such person possessed *bonâ fide*, the owner shall not have a right to demand the demolition of the works, plantation, or edifices, but he shall have his choice either to reimburse the value of the materials and the price of the workmanship, or to reimburse a sum equal to the enhanced value of the soil."

The case of the present defendant is an instance where the works were done, not by one not sentenced to make restitution because such person possessed *bonâ fide*, but by one who was sentenced to make restitution, and who was expressly adjudged to possess *malâ fide*.

Mrs. Gaines, therefore, had the right to keep the improvements upon reimbursing their value and the price of the workmanship, or to compel the city to demolish and remove them. She has not been called upon legally to elect which course she would adopt. On the hearing an oral notice was given that she would be called upon to elect, which the master understood to be in the future, and not a present notice. The matter was never again presented, and the master considered the subject as abandoned. She may now properly rest upon her right to have the works demolished and removed. This would give the city the value of the materials only as taken down at its own expense and when separated from their position upon the land. This allowance has, however, already been made to the city. In the opinion of the judge at the circuit he uses this language: "I have come to the conclusion that it would be equitable and just to set off the profits derived by the city from the drainage-machine for the past thirty-five years against the cost of construction and repairs. . . . Whilst the profits

and advantages (he says) of the drainage-machine are uncertain and indefinite in amount, there is no doubt of their reality, nor, if we can place any reliance upon the estimates, is there any doubt of their being amply sufficient to reimburse the city for all its expenditures, including even the rent with which it is charged."

It is evident from this statement that there has been already allowed to the city a sum not only equal to the value of the materials of the improvements, if they were demolished, but of their actual cost. The city has, therefore, no cause of complaint on this score, and the point under consideration must be held against it.

2. The question of the allowance of interest on the items of rent was not made before the master or before the judge at the circuit, and is not properly before us. Interest was allowed at the rate of five per cent., the rate fixed by the Code of Louisiana. In *Vandevoort* v. *Gould*,* it was adjudged that mesne profits consist of what the premises are reasonably worth annually, with the interest to the time of the trial. "Less than this," it is said, "would not give the plaintiff full and complete indemnity for the injury to his rights." Such is also the express declaration of Article 1939 of the Civil Code of Louisiana.

The Articles of the Code, 1939 and 1905, are not, as it is urged, in hostility to this principle. The latter by its terms relates to contracts. By the former, liens which are due for the restitution of profits bear interest from the day the debtor was in default. By the judgment it is found that the city held this property wrongfully from the outset, and thus (which is the only sense in which the word can here be used) was in default continually.

The remaining question to be considered is upon the allowance of the plea of prescription. It is alleged as error that the plea of prescription was not allowed in bar of the claim

* 36 New York, 639, 647.

for all the rents and profits which had accrued more than three years prior to the commencement of the action. The Civil Code enumerates as causes of action which are the subject of the prescription of three years—"the action for arrearages of rent charge, annuities, and alimony, or of the hire of movables or immovables." (Article 3503.) "In general all personal actions except those above enumerated are prescribed by ten years, if the creditor be present, and by twenty years if he be absent." (Article 3508.)

These articles do not govern the present case. They prescribe actions which the party had the legal right to bring. They do not apply to rights like the present, which result from the determination of another action. Until the decree in the main suit there was here no existing cause of action to recover the mesne profits. No special action could be maintained for them until the title to the property should be judicially determined. It is controlled rather by the title "Of the Right of Accession to what is produced by the thing."*

"Fruits of the earth, whether spontaneous or cultivated, belong to the proprietor by right of accession."†

"The fruits of the thing belong to its owner, although they may have been produced by the work and labor of a third person or from seeds sown by him, on the owner's reimbursing such person for his expenses."‡

"The produce of the thing does not belong to the simple possessor, and must be returned with the thing to the owner who claims the same, unless the possessor held it *bonâ fide*."§

Speaking strictly, there was not only no cause of action, but no right to the mesne profits until the judgment in the original suit.

There is no article of the Code to which our attention is called which limits this claim to the profits for three years. On the contrary, the rules of the civil law and the general principles of equity jurisprudence hold that there is no such limit. It will be observed that this question does not in-

* Civil Code, 490–494. † Article 490. ‡ Ib. 493. § Ib. 494.

volve the allowance for improvements or to its extent. That point has been already disposed of, and the defendant has been allowed for the improvements and beneficial structures made by it during the term. We are now endeavoring to ascertain whether the recovery for the rents and profits which have been adjudged to be paid shall be limited as required by the defendant.

The rule is thus laid down in Justinian:

"If any man shall have purchased or by any other means honestly acquired lands from another whom he believed to be the true owner, when in fact he was not, it is agreeable to natural reason that the fruits which he shall have gathered shall become his own on account of his care in the culture; and therefore if the true owner afterwards appear and claim his lands he can have no action against the *bonâ fide* possessor for produce consumed. But this exemption is not granted to him who knowingly keeps possession of another's estate, and therefore he is compellable to account for *all the mesne profits,* together with the land."*

The chancery rule is thus laid down in Peere Williams:†

"Where one is in possession of lands belonging to an infant, if the infant when of age makes out his title, he shall recover the profits in equity from the first accruing of his title, and not from the filing of the bill only. So the defendant shall account for the profits from the time the plaintiff's title accrued, and not from the filing of the bill only, if the defendant has concealed the deeds and writings making out the plaintiff's title."

In *Dormer* v. *Fortescue*,‡ Lord Hardwicke says:

"There are several cases where the court does decree an account of rents and profits, and that from the time the title accrued, as where there is a trust and an equitable title merely, or where a widow claims dower merely, but needs the aid of chancery to find out the lands, the court will give her the profits from the time of the demand not only, but from the time of her title accrued."

* Justinian Inst., lib. 2, tit. 1, § 35.

† Bennet *v.* Whitehead, 2 Peere Williams, 645.

‡ 3 Atkyns, 128.

Statement of the case.

In the case before him he decreed an account upon these principles, for a period of fifteen years.

The present action was commenced by Mrs. Gaines nearly seventeen years ago. It was a bill in equity praying for a discovery, for an accounting for rents and profits, and for general relief. After much tribulation she has reached the point of an accounting, which the defendant has brought before us on appeal. We think there is no prescription of the rents and profits, but that the allowance in this respect was properly made.

Upon the whole case we are of the opinion that the decree or order upon the master's report must be affirmed, and the

EXCEPTIONS THERETO DISALLOWED.

MEAD *v.* THOMPSON.

1. If a petition to the Circuit Court to re-examine a decree of the District Court in Bankruptcy, pray the court to "*review*" and reverse that decree and "to grant such further order and relief as may seem just," the jurisdiction invoked must be regarded as the supervisory jurisdiction which is allowed to Circuit Courts acting as courts of equity by the second section of the Bankrupt Act.
2. From the action of the Circuit Court in the exercise of such jurisdiction no appeal lies to this court.

THIS was a motion of *Mr. A. J. Parker, for John Thompson, a bankrupt*, to dismiss two appeals by his creditors from a decree of the Circuit Court for the Southern District of New York, affirming a decree of discharge granted to him by the District Court.

The case was thus:

The "Act to establish a uniform system of Bankruptcy throughout the United States," approved March 2d, 1867, which gives to the District Courts exclusive original jurisdiction in matters of bankruptcy, enacts by its—

"SECTION 2. That the several Circuit Courts . . . within and

for the districts where the proceedings in bankruptcy shall be pending, shall have a *general superintendence and jurisdiction in all cases and questions, arising under the act;* and may . . . upon bill, petition, or other process of any party aggrieved hear and determine the case *as a court of equity.*"

By the 8th section it is enacted:

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

And by the 9th section:

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

This act being in force, John Thompson applied to the District Court for the Southern District of New York to be discharged from his debts as a bankrupt. One E. F. Mead, and also the Merchants' Exchange National Bank, opposed his discharge. The District Court, however, granted it. This was on the 14th June, 1869. On the 24th, following, Mead gave notice to the bankrupt that he thereby "*appealed*" to the Circuit Court from the decree of the District Court granting the discharge. And on the 3d of July he entered into the usual bond (which on the same day was filed and served by a copy), reciting that whereas he had "*appealed* to the Circuit Court, &c., to reverse the decision rendered . . . by the judge of the District Court, &c., and the order entered thereupon in said court granting a discharge," and binding himself to "prosecute said appeal" to effect, &c. On the 24th he filed his petition to the Circuit Court, setting forth Thompson's application for a discharge, his (Mead's) opposition, setting forth also the "specification

of his objections to said discharge"—a paper that had been put before the register in bankruptcy, and alleging fraudulent conveyances by Thompson of various items of property to his sons, &c.,—representing that his (Mead's) debt, proved before the register, was more than $500, and praying the Circuit judge "to *review* the said decision and reverse the same . . . and decree that the said bankrupt is not entitled to his discharge . . . *and for such further order and relief in the premises* as to the court may seem just."

Similar proceedings, it was assumed, took place on the part of the Merchants' Exchange National Bank; though no petition appeared in the transcript of the record.

The petitions were heard together in the Circuit Court when, April 13th, 1871, this order was there made:

"The petitions of E. F. Mead, by E. N. Taft, Esquire, his solicitor, and the Merchants' Exchange National Bank, by G. A. Seixas, Esquire, their solicitor, creditors of the said John Thompson, bankrupt, *for a review* of the order granted by the United States District Court for the Southern District of New York, on the 14th day of June, 1869, declaring said bankrupt forever discharged from all his debts, provable under the act of Congress entitled 'An act to establish a uniform system of Bankruptcy throughout the United States,' approved March 2d, 1867, having been brought to a hearing before this court, after hearing E. N. Taft and G. A. Seixas, in behalf of said creditors, respectively, and E. More, of counsel for said bankrupt, it is ordered and adjudged that the said order, entered in the said District Court, declaring the said John Thompson, bankrupt, discharged from all his debts as aforesaid, be, and the same hereby is, in all things affirmed.

"L. B. WOODRUFF,
"Circuit Judge."

From this affirmation of the decree of discharge, Mead and the bank appealed to this court, and their appeals it was that Mr. Parker moved to dismiss.

Messrs. E. More and A. J. Parker, in support of the motion; Mr. R. D. Benedict, contra.

Mr. Justice STRONG delivered the opinion of the court.

In *Morgan* v. *Thornhill*,* and in *Hall* v. *Allen*,† it was held that no appeal lies to this court from a decree of a Circuit Court, made in the exercise of the supervisory jurisdiction conferred upon it by the second section of the Bankrupt Act of March 2d, 1867. If, then, the decree from which these appeals have been taken was made in the exercise of that jurisdiction, they are unauthorized, and they must be dismissed. And that they were thus made is very plainly exhibited in the record. The order of the District Court discharging the bankrupt, was made on the 14th day of June, 1869, and on the 24th of that month, Mead, one of the present appellants, filed in the office of the clerk of that court, a notice that he did thereby appeal from the order of the Circuit Court. This was followed by a bond for costs, which was filed and served by copy on the 3d of July, and on the same day a petition for review of the order of the District judge was verified and served. The prayer of the petition was that the Circuit judge would review the decision of the District judge and reverse the same, and grant such further order or relief as might seem just.

Whatever may have been intended, on the 24th day of June, when the notice of an appeal was given, it is plain that the appellant sought relief afterwards only by his petition of review under the first clause of the second section of the act.

And the same remark may be made respecting the Merchants' Exchange National Bank, of New York, the other appellants to this court. Indeed, the record exhibits no notice given by them of an intention to appeal from the order of the District Court, nor even any petition for a review. It is intimated, however, in the proceedings of the Circuit Court, that such a petition was presented, and it may be assumed to have been a fact.

The present appellants then came before the Circuit Court, not as appellants from the order of discharge made

* 11 Wallace, 65.

† 12 Id. 452.

Statement of the case.

by the District judge, but as applicants for the general superintending power of the Circuit Court over all questions arising under the Bankrupt Act; merely as petitioners for that revision which we have held to be final. And only that revisory jurisdiction was exercised. This is evident from the decision of the Circuit Court, made April 13th, 1871, from which these appeals have been taken.*

Whether, if appeals had been taken from the District Court and prosecuted in the Circuit Court, and if the Circuit Court had heard and decided them, an appeal would lie to this court, need not now be determined, for we have no such case before us. The present, being appeals from a decision made by the Circuit Court in the exercise of its supervisory jurisdiction, cannot be entertained.

APPEALS DISMISSED.

COMMERCIAL BANK *v.* ROCHESTER.

Where the court perceives from the pleadings themselves that a case may have been decided on the form of remedy which the practice in the State courts required the plaintiff to adopt, or on the technical insufficiency of the pleading—and especially where it perceives this more plainly from reported decisions in the State courts—jurisdiction of the case will not be entertained under the 25th section of the Judiciary Act, though the court can also perceive that the case *might* have been decided on grounds which would have brought it within that section, and which, therefore, would have given to the court jurisdiction.

ERROR to the Supreme Court of the State of New York.

The Commercial Bank of Rochester brought suit in one of the State courts of New York against the city of Rochester, to recover a tax which the said city had levied and collected on $100,000 of the capital of the bank, which was invested in the bonds of the United States. The petition set out the bank's ownership of these bonds; the incorporation of the

* Quoted *supra*, p. 637.—REP.

city of Rochester by the State of New York, with power to assess and levy taxes on property not exempt from assessment and levy; the appointment of assessors by the city; the assessment and levy by them of the tax; the bank's representation to the assessors that the bonds, being parts of several loans to the Federal government, were exempt from taxation and ought not to be assessed as part of the bank's capital, and that the bank insisted upon this position; that moreover it had showed to the assessors what the property of the bank which could be lawfully assessed was; but that the assessors disregarding the right of the bank refused to remit any part of the assessment; and that the money assessed and levied on the said bonds was finally paid only under order of the city to the assessors to demand it, and under compulsion and protest.

The petition prayed for a judgment for the amount thus paid.

To this petition a demurrer was interposed; the only ground of it being this general one, "that the complaint did not state facts sufficient to constitute a cause of action."

On these pleadings, the Court of Appeals of New York adjudged that the demurrer was well taken.

From that judgment the case was brought here by the bank, on an assumption by it that the court below had *necessarily* decided that the tax assessed and levied by the city was lawfully levied, though assessed and levied on bonds of the United States; and therefore (the city and its assessors deriving their powers from the State), that the case fell within the 25th section of the Judiciary Act, one section of which gives a writ of error from this court to the highest court of a State, "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."

There was no assignment of errors in the record of the proceedings in any of the courts below.

A question of jurisdiction being suggested, and whether

any *such* issue had been involved in the pleadings and judgment as necessarily brought the case within the 25th section, it was said in support of the jurisdiction, that the action of the assessors under a State law, the ownership by the bank of the Federal stocks, the assessment and levy, as well as the unlawfulness of both, being all set forth, together with the fact of payment on compulsion and protest, and the decision by the highest court of the State that the levy and assessment were lawful—these being all shown in the pleadings,—the case came plainly within the 25th section, and jurisdiction existed.

To this it was answered that it nowhere at all appeared in the pleadings that the State courts had "decided that the assessment and levy were lawful;" that, contrariwise, it might perfectly well be that on those pleadings the court recognized the unlawfulness of the assessment and levy; and well be that all that the Court of Appeals had decided was that the plaintiff had *mistaken its remedy;* that in point of fact, this, and this only, was what that court had decided, as would be proved by a reference to the report of the case;* and that as appeared by numerous decisions in New York,† an action to recover back money paid was not the proper remedy, but that the action of the assessors—they having jurisdiction of the person and subject-matter—being of a judicial character, was conclusive until reversed by mandamus, certiorari, or other proper proceedings.

Mr. Theodore Bacon, for the plaintiff in error; Mr. G. W. Miller, contra.

Mr. Justice MILLER delivered the opinion of the court.

As the demurrer does not point out any special defect in the petition, and as there is no assignment of errors in the record of the proceedings in any of the State courts, we

* 42 Barbour's Supreme Court, 488.

† The People *v.* The Glen's Falls Insurance Co., 11 Tiffany (38 New York), 89; The People *v.* The Assessors of Brooklyn, 39 Id. 81; Barhyt *v.* Sheperd, 35 Id. 255; Swift *v.* City of Poughkeepsie, 37 Id. 511.

find great difficulty in ascertaining the ground on which the Court of Appeals decided the case.

It has been so often held by this court, that the question on which the plaintiff in error relies to give it jurisdiction, must appear to have been decided by the State court, that it has become one of the settled principles on that subject.

It is said in this case that the court *must* have decided in favor of the validity of the tax, which it is conceded would have given this court jurisdiction. But this does not appear either affirmatively or by necessary intendment. For the case may have been decided on the form of the remedy which the practice in the State courts required the plaintiff to adopt, or on the technical insufficiency of the pleading.

In this uncertainty of the record as an indication, we might, without going further, dismiss the case on that ground. But we are referred to decisions in the State court which hold that the remedy for illegal or excessive assessment is by *certiorari*, issued in that proceeding, and that as the modes of reviewing these assessments are in their nature judicial, the judgment is, until reversed or set aside, conclusive.

Undoubtedly the Court of Appeals of New York is the proper tribunal to decide this question, and as one of policy in the embarrassing matter of contesting tax levies, it is within the province of State law; and we are not authorized in this case to say that that court did not decide it correctly, or that it made any decision adverse to the exemption of the securities of the United States from State taxation.

In this respect the case is precisely in principle like that of *The Insurance Co.* v. *The Treasurer*.* It is accordingly

DISMISSED FOR WANT OF JURISDICTION.

* 11 Wallace, 204.

Statement of the case.

CAMMACK *v.* LEWIS.

A. owing B. $70, by B.'s advice takes out a policy of life insurance in $3000 for seven years; he, B., agreeing to pay the premiums during the term. A. dies intestate seven months after the policy is issued, leaving a widow and children. B., the creditor, produces A.'s note to him for $3000, dated on the same day with the policy, but given confessedly without consideration, and also an assignment of the policy to him. There is also found among A.'s, the debtor's, papers one signed by B., the creditor (but not by A.), dated three months after the policy had issued and been assigned, by which B., the creditor, agrees that in case of A 's, his debtor's, death and the payment to him, B., by the insurers, of the full amount of the policy, he will pay to the "wife of A. (the debtor), his heirs and assigns," one-third of the amount so received. B., the creditor, having received from the insured the whole $3000, pays the wife, who has not yet taken letters of administration on her husband's estate, a third, less some small and admitted deductions; which third—ignorant of the full extent of her rights, acting hastily and without consideration, and largely influenced by the advice of one of her husband's friends, himself ignorant of many facts of the case—she receives as for her proportion of the sum paid under the policy. She afterwards takes out administration on her husband's estate; and in her capacity of administratrix sues for the remainder of the $3000. *Held*—

1st. That, so far as B. was concerned, the policy being one of $3000 to secure $70 was a sheer wagering policy; without any claim to be considered as one meant to secure the debt.

2d. That there being nothing beyond the execution of the note for $3000 to show that A. was a participant in any fraud on the insurers, but on the contrary it rather appearing that he looked upon B. as a friend to whom he was willing to trust the policy; *held* further, and as a consequence, that B. was bound to account to A.'s estate for the whole sum, less any deductions for premiums or other just offset; and the assignment of the policy was valid only to that extent.

3d. That the third, which the widow received, having been received by her when ignorant of the full extent of her rights, and received hastily, without consideration, and when influenced by the advice of a friend of her husband, while ignorant of many facts of the case, did not conclude her. Independently of this, that if she had a right as administratrix to recover the $3000, the receipt by her of $1000 before she took out administration could not defeat the right.

APPEAL from the Supreme Court for the District of Columbia; the case being thus:

One John E. Lewis, of Washington, D. C., being in bad health and owing by note $70, which he was not then able to

pay, to a certain C. Cammack, Jr., tailor, for clothing, procured June 19th, 1868, at Cammack's suggestion, an insurance on his life, in the New Jersey Mutual Life Insurance Company, which had an agency in Washington, for $3000. The policy, No. 2885, was for seven years. Cammack paid the premium for the first year; and immediately after the policy was made out, Lewis gave to Cammack a note for $3000; there having been no consideration for the same; and assigned the policy to him. On the 9th of January following—that is to say, seven months after the issuing of the policy—Lewis died, leaving a widow and two children; and Cammack having paid, of course, but the first year's premium, a sum of $25. After Lewis's death there was found among his papers a document, in Cammack's handwriting, thus

"WASHINGTON, D. C., September 15, 1868.

"This agreement witnesseth that I, the undersigned, for value received, do bind myself, and heirs, or legal representatives, to pay unto Maggie Lewis, wife of John E. Lewis, his heirs and assigns, the sum of one thousand dollars, in event of the said John E. Lewis's death; the said amount being first realized by me from an insurance on his (the said Lewis's) life, duly assigned to me, and held by me, otherwise this agreement to be held null and void. Number of the policy 2885, in the New Jersey Mutual Life Insurance Company.

"C. CAMMACK, JR."

Among Lewis's particular friends was a Mr. W. E. Chandlee, of Washington, whom he was in the habit of consulting on business matters. About a week before his death, Lewis showed to him the draft of a will of which he desired Chandlee to be executor. And with a view of enabling Chandlee to properly administer things, he dictated to him a list of all the debts which he, as he said, expected would be brought in against his estate, and which he desired Chandlee as his executor to pay. Among them was the $70, due by the note to Cammack for clothing, and "$25 on account of life insurance." Chandlee knew what this last item was for, without explanation; for Lewis had consulted him previously to his life's being insured, and told him that

it was insured very soon after the policy issued. "His statement to me," said Chandlee, in giving an account of the matter, "was that his life was insured by Mr. Cammack, in the New Jersey Mutual Life Insurance Company, for the sum of $3000, and that at any time that he was able to pay to the said Cammack the amount of premiums that the said Cammack should have paid on account of the policy, with interest on the same, and the amount he owed Cammack for clothing, that Cammack would restore the policy to him."

Cammack was not present at any part of this account, and when it was told to him he denied the correctness of Lewis's understanding of the matter.

Lewis did not live to sign his will, and so Chandlee did not become his executor in form. Still, "feeling," as he said, "disposed to render the same assistance to his widow as if the will had been signed, and Lewis having put into his possession for safe-keeping his private papers, among which was the memorandum set out above and signed by Cammack," he went and saw Cammack, who had already made application to the insurance company for the amount of the insurance. Chandlee's account of the whole transaction was thus:

"Cammack told me that it might save time and trouble to have a written requisition from Mrs. Lewis, upon the company, to pay the money over to him (Cammack), as they might consider it their duty, otherwise, to pay it over to her, in which case it would occasion delay; but he didn't know that it would be necessary. I remarked to him that I didn't think it would make any difference as far as his claim was concerned, whether the money was paid to him directly, or to Mrs. Lewis; that I felt sure she would settle the matter, as called for in the agreement, and I would take the responsibility that she would do so. I then saw Mrs. Lewis and asked her if she intended to settle the matter of insurance in which Cammack was interested, according to the agreement in my possession. She expressed her willingness that it should be settled on that basis, just as Mr. Lewis had provided that it should be. Mr. Cammack then wrote a requisition for Mrs. Lewis to sign, gave it to me, saying, 'Take this to Mrs. Lewis, and see if she will sign it. If she

objects, and the company will not pay the money to me, I will let them pay it to her, and trust to her for a settlement.' I took the requisition to Mrs. Lewis, told her what it was for, and she signed it. It was thus:

"WASHINGTON CITY, D. C., January 20th, 1869.

"TO THE NEW JERSEY MUTUAL LIFE INSURANCE CO.

"GENTLEMEN: The claim of C. Cammack, Jr., of said city, secured by assignment of policy No. 2885, in your company, on the life of my late husband, John E. Lewis, is a just and legal claim, and it is my desire and direction that your company pay to said Cammack the proceeds thereof.

"Witness my hand and seal on the aforementioned date.

"MRS. J. E. LEWIS." [SEAL.]

"Witness:

"W. E. CHANDLEE,

"JAMES GRIFFITH."

"On this request Cammack made an affidavit thus:

"DISTRICT OF COLUMBIA,

WASHINGTON CITY, *ss*:

"C. Cammack, Jr., of city aforesaid, being duly sworn, saith that he was acquainted with John Edward Lewis, deceased, during his lifetime; that he was the person insured under policy No. 2885, in the New Jersey Life Insurance Company, which said policy was assigned to the deponent; that the full and true sum of three thousand dollars was and is now due to me from said John Edward Lewis or his estate; and that no part of the said sum has been paid this deponent by said Lewis or any one on his behalf.

"C. CAMMACK, JR.

"Sworn to and subscribed before me this 23d January, 1869.

[SEAL.] "J. H. MCCUTCHEN,
"Notary Public."

On this request and affidavit Cammack got the $3000 from the insurance company, and sent to Mrs. Lewis his check for $950, with a memorandum in one corner. The whole was thus:

No. 459. WASHINGTON, D. C., February 5, 1869.

NATIONAL METROPOLITAN BANK,

Pay to . . . . . Mrs. John E. Lewis, ... or Order, nine hundred and fifty dollars.

C. CAMMACK, JR.

$950.00.

In full for her proportion of policy No. 2885, in the New Jersey Mutual Life Insurance Co.

The check, of course, was in professed discharge of the paper dated September 15th, 1868, *supra*, p. 644; the sum sent being one-third of the $3000, less a deduction of $25 for the premium paid for insurance, and for another small account which Cammack had against Lewis.

Mrs. Lewis went with Mr. Chandlee to the bank, where under his eye she indorsed the check and drew the money; $950.

At a subsequent date, having taken out letters of administration on her husband's estate, in which as already mentioned there were besides herself two children to participate, she filed a bill to recover the remainder of the $3000.

Cammack set up, by way of defence, that the policy was taken out under an agreement between Lewis and himself that he should pay the premiums for the seven years the policy was to run, and in consideration of those payments, and what Lewis owed him, he should, in the event of Lewis's death during the life of the policy, receive two-thirds of the amount of the policy, and pay over the other third to Lewis's wife or his heirs; and in support of this he relied on the instrument signed by himself, dated September 15th, 1868, and, as already stated, found among Lewis's papers; and relied on the further fact of that sum (with a small and just deduction) having been received by Mrs. Lewis, on the policy. But the defence was not sustained; and the court below, holding that Cammack held the policy under the assignment as a mere security for what Lewis owed him, decreed that he should pay over the balance after deducting that small sum. From that decree Cammack appealed.

Mr. T. T. Crittenden, for the appellant; Messrs. A. McCallum and T. J. Durant, contra.

Mr. Justice MILLER delivered the opinion of the court.

If the transaction as set up by Cammack be true, then, so far as he was concerned, it was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for $3000 to cover a debt of $70 is of itself a mere

wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretence to be a *bonâ fide* effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get $2000 out of the $3000; nor is it weakened by the fact that the policy was taken out in the name of Lewis and assigned by him to Cammack. This view of the subject receives confirmation from the note executed by Lewis to Cammack for the precise amount of the risk in the policy, which, if Cammack's account be true, was without consideration, and could only have been intended for some purpose of deception; probably to impose on the insurance company.

Under these circumstances, we think that Cammack could, in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterwards make on account of it, and that the assignment of the policy to him was only valid to that extent.

Whether Lewis was a participant in the fraud, does not fully appear. Such conversations of his as are proved tend to show that he looked upon Cammack as a friend, to whom he was willing to trust the policy assigned, and that he never supposed more would be claimed by Cammack than what he owed him. It is also probable that he believed he would survive the life of the policy, and with the single exception of the note for $3000, given by him without consideration, there is nothing proved against him inconsistent with that view of the matter, and with his fair dealing. At all events, we do not see such evidence on his part of a corrupt transaction, as to forbid the court from doing justice between his administratrix and Cammack, after the amount secured by the policy has been paid by the company to the latter.

The receipt of the one-third of the insurance money by the complainant does not, we think, under all the circumstances of the case, conclude her as a settlement of the matter in dispute. It is obvious that she was ignorant of the full extent of her rights; that she acted hastily and

without due consideration, and was largely influenced by the advice of Mr. Chandlee, who had been her husband's friend and adviser, and who was prompted to do what he did by Cammack, while in ignorance of many of the facts of the case.

Besides, the bill in this case, as appears on its face, is brought by her as administratrix, and the receipt by her of the one-third paid on the policy was before any administrator had been appointed. If she has a right to recover all the $3000 as administratrix, it could not be defeated by her receipt of $1000, paid to her in her own right before any administration had been taken out on Lewis's estate.

On the whole, we are of opinion that the decree of the Supreme Court should be affirmed, and it is

SO ORDERED.

RAILROAD COMPANY *v.* HANNING.

1. This court cannot decide that a charge is wrong which submits it to the jury to say whether a wharf was a public place upon which all persons were accustomed to come and go at pleasure, and were by law permitted so to do, when the record does not contain the evidence upon which the question arose. The court cannot assume that the charge was erroneous.
2. The general rule is that when an injury has been sustained by the negligent manner in which a wharf or other work is constructed or protected, the principal is liable for the acts and negligence of the agent in the course of the employment, although he did not authorize or know of the acts complained of. When the actor ceases to be a servant or agent and is, himself, the master, he alone is responsible.
3. When a contractor agrees with a railroad company to furnish the materials and labor for building a wharf, to put in posts, piles, &c., as the company should require, making an old wharf as good as new, and a new one in the most workmanlike manner; to submit to the supervisor and direction of the company's engineer, and to do the work to his satisfaction: *held*, that the company had the general and special control of the work, and that the contractor was their agent; and that the company was responsible for an injury occurring through the negligence of the contractor or of those in his employment.
4. An act of the General Assembly of the State of Louisiana, referring to a certain railroad corporation, enacted that the said corporation should

Statement of the case.

not be liable for debts incurred by those who should contract with it for building its road, &c., "nor shall said company be liable for any injury to person or property caused by the act or omission of the persons so contracting with it." *Held*, that this was a convenient form of declaring the common-law rights of the company, and conferred no exemption on it.

5. Until notice has been given of the changed character of the place, one passing over a wharf or platform over which the public has been accustomed to pass, cannot be made a trespasser for so passing; although the wharf or platform is now no longer used for the purpose of passage.

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

The New Orleans, Mobile, and Chattanooga Railroad Company—the station-house grounds of whose road in New Orleans came down in one part of the city to the *batture* of the Mississippi—obtained conveyances of the batture property in front, the same being accurately described by maps annexed to them, and were desirous of building in front of their *batture* a wharf on the river, and also of repairing an old wharf there.

With a view of enabling them to do this, the General Assembly of Louisiana, by a joint resolution passed March 6th, 1869, gave the company—

"The right to inclose and occupy for its purposes and uses, and in such manner as the directors of the said company may determine, that portion of the levee, batture, and wharf, in the city of New Orleans, between and from [certain streets described] to the lower line of the batture, rights owned by said company."

And the joint resolution provided that—

"No steamship or other vessel shall occupy or lie at said wharf, or receive or discharge cargo thereat, except by and with the consent of the said company."

On the 21st of January, 1870, the General Assembly also passed an act,* relating to the company, whose second section was in these words:

* No. 31, Sessions Acts, p. 35.

Statement of the case.

"The said corporation, its officers, or employés, shall not in any case be liable for any debts contracted or liabilities incurred by any person or persons who shall have contracted, or who shall contract with it, to *construct any portion of its road, buildings*, or *appurtenances*, or its *rolling stock*, or to *furnish any materials or labor to be used for such construction*, or *for its maintenance or operation.*

"*Nor shall said company, its officers, or employés, be liable for any injury to person or property, or loss of life, which shall be caused by any act or omission of any person or persons* so *contracting with it, or any of his or their employés or agents.*"

In this state of things, on the 28th of November, 1870, the railroad company, through its division engineer, G. W. Bayley, made an agreement with one Michael Carvin, thus:

"Michael Carvin agrees to furnish the timber, planking, and iron work, and all the labor necessary for the rebuilding of the company's wharf in front of their depot grounds, . . . with such mooring-posts, cluster-piles for fenders every twenty feet, rows of piles on boundary lines, above and below, slips or inclines, as the company, through their engineer, may require, for the sum of $40 per square of one hundred square feet, it being understood that only the best quality of twelve-inch square yellow pine timber shall be used for piles, caps, stringers, fenders, and blocking, and the best of three-inch yellow pine planks for covering or flooring, such of the old piles as are sound and good to be sawed off and blocks placed thereon, but new caps, stringers, and planking to be used throughout. The old wharf to be made as good as new, and the new wharf in the best workmanlike manner; two hundred feet of wharf, from the lower line, to be completed in two weeks, and the whole within one month from this date.

"It is also understood and agreed that the said G. W. Bayley, division engineer of the company, shall supervise and direct the work hereby agreed to be done, and that the said work shall be done to his satisfaction.

"Payment to be made in currency, on the 10th of January, 1871, the company's regular pay-day, at the rate of $40 per square for completed wharf, as above specified, on the approval of the estimate or bill for same by said G. W. Bayley, division engineer."

During the progress of the work thus provided for, one Hanning, while walking, as he alleged, across the wharf and using all proper precautions, was precipitated down an embankment the distance of ten feet and received serious injury; the injury, as he further alleged, being wholly caused by the company's negligently removing the planks on the wharf and negligently laying the planking thereon, contrary to its obligations in the matter. He accordingly sued the company, alleging that the wharf was a "public wharf."

The place where the wharf was, it appeared, prior to the passage of the joint resolution of March 6th, 1869, authorizing the railroad company to inclose and occupy it for its own purposes and uses, had, like the banks of all rivers in Louisiana, from an early date, been open to the public for passing along.

The court below, refusing to give instructions requested by the plaintiff of an opposite kind, charged that if the jury should believe from the evidence that the wharf had always been free and open to the public, then that when the legislature gave to the company the right to occupy it, it was the duty of the company to take means to warn the public that the rights of the public had ceased, so that persons might avoid going upon it, and that as the company had neglected to take any precautions in this respect, they were liable for the damage.

It also charged that the company was answerable for the acts of its contractor, under the contract with Carvin.

The jury found $10,000 damages for the plaintiff; and judgment being entered accordingly, the present writ of error was taken.

The record sent here was a meagre one. It did not furnish any evidence of what sort of a wharf, as *ex gr.*, whether public or private, this wharf was, further than as might be inferred from the joint resolution of March 6th, 1869, the conveyances of property adjoining it, and the contract with Carvin. Neither did it appear what brought the plaintiff on the wharf, whether lawful business, idleness, curiosity, or some bad purpose.

Argument for the person hurt.

Messrs. J. A. and D. G. Campbell, for the plaintiff in error:

1. We admit that a servitude of public utility is reserved upon the banks of all of the navigable waters in Louisiana. But in this case this condition of public use ceased with the adoption of the joint resolution of the 6th of March, 1869, and the occupation of the wharf by the railroad company, under their title. This resolution of the legislature discharged the land of the reserved public servitude, and authorized the corporation, as riparian owners, to maintain a wharf in their front for their own uses and purposes, in such manner as the board of directors might determine. The act, therefore, of the defendant, Hanning, in coming upon this property without any business relations with, or invitation, or inducement from the corporation, was a trespass; for we know of no law, custom, or usage which requires a proprietor to maintain fences, sign-boards, inclosures, or sentinels about his property. Addison, in his work on Torts,* says:

"If a man's land is not surrounded with an actual inclosure, the law encircles it with an imaginary barrier, which to pass, is to break and enter his close."

A wharfinger, no doubt, is bound to keep his wharf in a proper condition for intercourse which he *invites;* but "a mere passive acquiescence by the owner or occupier, in a certain use of his land by others, involves no liability."† The court in its instruction discarded from its consideration any duty on the part of the defendant to inquire into the title to the property, of its condition, or of his own responsibility to mark where he went. The facts visible to him were of themselves sufficient to put him upon his guard. He saw an inclosure of the levee, and a railway passing over a portion of it, and parties engaged in stripping the wharf of its timbers, and things in confusion about him.

* Chapter 6, § 1.

† Bolch *v.* Smith, 7 Hurlstone & Norman, 736; Sweeny *v.* Railroad Co., 10 Allen, 368.

Common sense would have told him as readily as a sign-board, that such places were dangerous and to be avoided.

2. By force of the contract with Carvin the wharf at the time of the accident was in *his* possession. The negligence, if any there was, was his, not that of the company; and the company is not responsible for any negligence by him or by those employed by him. The general principle is now settled, that a person, either natural or artificial, is not liable for the acts or negligence of another, unless the relation of master and servant, or principal and agent, exist between them; that when an injury is done to a person exercising an independent employment, the party employing him is not responsible to the person injured.* Nor will the reservation of the power to supervise or to inspect the work, throw the liability upon the employer. This is the doctrine laid down in the important English cases of *Knight* v. *Fox*,† and *Steel* v. *Southeastern Railroad Company*,‡ and affirmed in our own courts.§

3. The wharf and batture back of it are in front of the depot grounds of the corporation, and are at the termination of the eastern line of the ferry across the Mississippi River, as will appear from acts of the legislature of Louisiana,‖ which the court will judicially notice. The construction of the wharf was a stage in the construction of the road.

Now the statute of January 21st, 1870, expressly defined and limited the liability of the railroad company, and declared that the company should not be liable for any injury to persons which shall be caused by any act or omission of any person contracting with the company to construct any portion of its road, or to furnish any materials or labor to be used for such construction. This comprises exactly such a case as the present, supposing that the injury was caused by Carvin's neglect.

* Hilliard *v.* Richardson, 3 Gray, 359; Scammon *v.* City of Chicago, 25 Illinois, 425; Pack *v.* Mayor of New York, 4 Selden, 222.

† 1 English Law and Equity, 477.

‡ 32 Id. 366.

§ Painter *v.* City of Pittsburg, 46 Pennsylvania State, 220.

‖ Acts of 1870, p. 57; Acts of 1868, p. 31.

Opinion of the court.

We conclude, that the corporation is not liable for an injury to the person of one who, having no business with them, or inducement or invitation to come upon their property, came upon it for an idle promenade, and coming upon it, found it in disorder and insecurity from the acts of a contractor engaged in repairing and reconstructing it, and without any agency on the part of the corporation, fell through the floor.

Mr. T. J. Durant, contra.

Mr. Justice HUNT delivered the opinion of the court.

The first objection presented by the defendant below is, that the wharf in question was not a public wharf; that the plaintiff came upon the same without business, invitation, or inducement; that he was a trespasser, and if he suffered injury it was in consequence of his own wrong.

We are not furnished with the evidence necessary for the decision of this question. The record does not state whether this was the wharf of an active steamboat company, where all travellers were permitted and substantially invited to come and go; whether the plaintiff was there upon the special invitation of some one connected with the wharf; whether by public use and general permission he might deem himself invited to be there, or whether he was an idler without pretence of right or business. The judge submitted the question to the jury, whether the wharf, at the time of the accident, was, and for many years had been, a public place, upon which all people were permitted by law to come and go, and did come and go at pleasure. The jury found the affirmative of this proposition. The only evidence set forth on this point contained in the record, is the legislative resolution of March 6th, 1869, certain conveyances of property adjoining the wharf, as described in maps annexed, and the contract of the company with Carvin. The resolution authorizes the defendants to inclose and occupy for its use, certain portions of the levee, batture, and wharf, in the city of New Orleans, and provides that no vessel shall occupy

said wharf except by the permission of the company. The contract with Carvin is important upon another branch of the case, but has no significance upon the question of the manner of occupying the wharf, or to show how or why the plaintiff was on the wharf, at the time he received the injury. So far as it states general rules and propositions, the charge of the judge seems to be correct. Whether it was sound, as applied to the case presented by the evidence, we have not the means of ascertaining. No error appears, and we cannot assume that it is erroneous.

The second objection urged by the defendant below, arises upon the contract with Carvin, already mentioned. It is insisted that the wharf at the time of the accident was in the possession of Carvin; that the negligence, if any, was his, not that of the company; and that the company is not responsible for any negligence by him or those employed by him.

By this contract Carvin agrees: 1, to furnish the materials and the labor necessary for the rebuilding of the wharf in question; 2, to build it with such mooring-posts, cluster-piles for fenders every twenty feet, rows of piles on boundary lines above and below, slips or inclines, as the company, through their engineer, may require, making the old wharf as good as new, and the new in the most workmanlike manner; 3, to complete the whole within a month; 4, to submit to the supervision and direction of the engineer of the company; 5, to do the work to his satisfaction. The company do not yield to Carvin the possession or control of the wharf. They may direct the number of mooring-posts, cluster-piles for fenders, rows of piles, slips, and inclines, paying according to the number of square feet covered. They are at liberty to direct how much material shall be used, and how it shall be laid to make the old wharf as good as new, and to make the new of the best workmanship. They are to supervise the work to be done. They are to direct how it shall be done. This includes the power of controlling and managing the entire performance of the

work, within the general limits mentioned. It includes the possession of the wharf, the direction, management, and control of all the details of the work. It makes Carvin their agent and servant, receiving a larger or smaller compensation, as they may expand or contract his work.

The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of.* So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Difficult questions arise in the application of this rule. Nice shades of distinction exist, and many of the cases are hard to be reconciled. Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That, rebuilt, was to be as good as new. The new was to be of the best workmanship. This is quite indefinite and authorizes not only, but requires a great amount of care and direction on the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done, but how it shall be done. This is an important test of liability.†

Camp v. *The Wardens*,‡ was a case arising in Louisiana,

* Story on Agency, § 452; 2 Addison on Torts, 343, 2d edition.

† Kelly *v.* Mayor, 11 New York, 432. ‡ 7 Louisiana Annual, 322.

and very much like the present in its facts. The owners were there held liable. All the authorities are cited and commented upon by the court, both of the common and the civil law. The civil law, it was said, held the same rules on this subject as the common law.*

In *Painter* v. *Mayor*,† Strong, J., holds the defendant not to be liable, and says, "The defendants have no control over the men employed by the contractors or over the contractors themselves. They could not dismiss them or direct the work." The cases are reviewed and the rule laid down as it is herein above stated.

Knight v. *Fox*,‡ and *Steel* v. *Southeastern Railroad Co.*,§ are cited by the defendant. The first contains nothing in hostility to the suggestion made. In *Steel* v. *Southeastern Railroad Co.* it was held that the company was not liable for any injury done by the contractor, and the contract contained an authority to the company to superintend and direct the work. The case shows that the act which caused the injury was committed in violation of their orders. They expressly forbade the digging of a certain channel. It was dug in violation of this direction, and for the damage resulting therefrom, the court held them not to be liable. This order to the contrary does not necessarily exempt the principal, but it is a circumstance of weight.‖

It is said that by the act of the General Assembly, passed January 21st, 1870, the liability of this corporation is defined in a number of cases. The second section of the act declares "that the said corporation, its officers, or employés, shall not, in any case, be liable for any debts contracted or liabilities incurred by any person or persons who shall have contracted, or who shall contract with it, to *construct any por-*

* Pothier on Obligations, § 121, 453; Droit Civil, de Touillier, Book 2, tit. 8, § 284, vol. 2.

† 46 Pennsylvania State, 213. ‡ 1 English Law and Equity, 477.

§ 32 Id. 366.

‖ Pack *v.* Mayor, 8 New York, 222; see also Storrs *v.* City of Utica, 17 Id. 104; Higgins *v.* The Watervliet Turnpike Co., 46 Id. 23; Robbins *v.* Chicago, 4 Wallace, 679.

tion of its road, buildings, or appurtenances, or its rolling stock, or to furnish any materials or labor to be used for such construction, or for its maintenance or operation. Nor shall said company, its officers, or employés, be liable for any injury to person or property, or loss of life, which shall be caused by any act or omission of any person or persons so contracting with it, or any of his or their employés or agents."

This was doubtless intended as a declaration of the rights of the company convenient to be embodied in its charter, and is in affirmance of the existing law. It contains two general principles: 1st, that the corporation shall not be liable for the debts to third parties of those contracting to construct its road or to furnish materials therefor. It would not be upon general principles of law. The statement, in fact, confers no exemption. 2d, that it shall not be liable for injury to person or property caused by the acts of such contractors or their servants. In each of these instances the exemption is in the case of contractors, who are themselves the principals, not when they are the agents or servants of the company. In each case there could be no liability at common law had the statute not been passed. We think that, upon general principles of law, the company in this case are responsible for the negligence of Carvin, and that this statute does not alter its position.

It would seem that, prior to the passage of the act authorizing the defendants to occupy and possess the wharf, it had been open to the public, free to the passage of all, at their pleasure to come and go. The judge charged, in substance, that this right of passage to the public continued until some notice should be given to those accustomed to use it that their rights had ended. This principle is one of quite general application. A railroad or steamboat company, by the departure and arrival of their conveyances, give an invitation to all who desire to approach their boats or cars to pass over their wharf or platform. One accustomed so to pass cannot be deemed a trespasser in repeating his act after a new station or landing has been adopted and the cars or boats have ceased to use the old one. To exclude the

passer's right so as to make him in fault, and to prevent his recovery for an injury sustained by leaving the place in a bad condition, notice must have been given of its changed character, and that the rights of passers are terminated. This principle is so familiar, and exists in so many forms, that it is unnecessary to elaborate it.*

Upon the whole record we are all of the opinion that the judgment should be

AFFIRMED.

UNITED STATES *v.* BENNETT.

The act of Congress of the 11th of January, 1868, which enacted that *from and after its passage* no distilled spirits should be withdrawn or removed from any warehouse for the purpose of transportation, &c., until the full tax on such spirits had been duly paid to the collector of the proper district, and repealed all acts and parts of acts inconsistent with its provisions, had no reference to distilled spirits which had been withdrawn from a bonded warehouse for transportation *before* its enactment.

Hence, when prior acts authorized the removal for the purpose of transportation of distilled spirits without payment of duties on giving bond, and enacted also that in case any such bond should become forfeited by breach of any of its obligations, the obligors in it should pay full duties and 50 per cent. on them besides: *held*, that the statute of 11th January, 1868, was not operative to prevent a recovery on a bond given before its passage, on a removal of spirits made when the bond was given.

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

By the acts of July 1st, 1862,† and July 13th, 1866,‡ it was made lawful to transport distilled spirits without payment of taxes, from a bonded warehouse owned by the distiller to any general bonded warehouse used under the internal revenue laws, upon giving a "transportation bond," and complying with certain regulations prescribed. One duty of the party transporting, was the production to the

* 2 Addison on Torts, 141; Corby *v.* Hill, 4 Common Bench, N. S. 556.

† Sections 46, 47, 12 Stat. at Large, 449.

‡ Sections 40 *et seq.*, 14 Id. 160, *et seq.*

collector where his distillery is, of a certificate of the collector to whose district the spirits were to be removed, that they were duly received and stored in the warehouse or district to which they were shipped. And, by an act of March 2d, 1867,* it is enacted:

"That in case any bond, under which any distilled spirits shall have been withdrawn from a bonded warehouse, is forfeited by failure to furnish or produce, at the proper time, the evidence required by law or regulation, that the articles named in the bond were duly received and actually stored in the warehouse or district to which they were shipped, or by other breach of the obligation, the obligors in the bond shall pay the total amount of duties upon the articles removed under the bond, together with 50 per centum upon that amount."

These acts being in force, Bennett & Carpenter gave their bond, dated August 19th, 1867, conditioned that they would within thirty days from the date thereof, transport fifty barrels of distilled spirits from their bonded warehouse at Greenville, Ohio, directly to the bonded warehouse owned by Church Howe at Boston, Massachusetts, and deliver them to the collector of internal revenue of that district; and that they should, within fifteen days, produce to the collector of internal revenue of the fourth district of Ohio the certificate of such collector that the spirits had been duly delivered and placed in the warehouse designated, according to law.

This bond being in existence and in the possession of the United States, Congress, on the 11th of January, 1868, passed an act entitled "An act to *prevent frauds* in the collection of the tax on distilled spirits."† It read thus:

"*Be it enacted that from and after the passage of this act*, no distilled spirits shall be withdrawn or removed from any warehouse for the purpose of transportation, redistillation, rectification, change of package, exportation, or for any other purpose whatever, until the full tax on such spirits shall have been duly paid to the collector of the proper district. And all acts, and parts

* Section 23, 14 Id. 482, 483.

† 15 Stat. at Large, 834.

of acts, *inconsistent with the provisions of this act*, are hereby repealed."

On the 17th of April, 1869,—that is to say, about fifteen months after the passage of the last above quoted act,—the United States brought an action of debt on the bond which, as already mentioned, Bennett & Carpenter had given on the 19th of August, 1867.

The breaches assigned were that Bennett & Carpenter did remove the spirits from their warehouse at Greenville, but did not transport them, or, within thirty days from the date of their obligation, complete the transportation of the same to the bonded warehouse of Church Howe at Boston, and deliver the same to the collector of internal revenue thereat; and that they did not within fifteen days thereafter produce to the collector of the fourth district of Ohio the certificate of such collector, showing that the spirits had been duly delivered and placed in the warehouse of Church Howe, according to law.

The defendants interposed no traverse of the breaches alleged, but pleaded that after they had failed to comply with the conditions of their bond, to wit, on the 1st day of January, 1868, the assessor of the fourth district of Ohio assessed Bennett & Carpenter for their non-compliance the full taxes imposed by law on the said spirits, and that they paid to the said collector all the taxes thus assessed. They further pleaded that though they had not paid the penalty assessed against them, the said Bennett & Carpenter, on the said 1st day of January, for failure to comply with the conditions of their bond, yet that before it became payable under the assessment, the law providing for such penalty was wholly repealed, without any saving clause. To this plea the plaintiffs demurred, and the court gave judgment for the defendants. To that judgment the United States took this writ of error.

The plea admitted, of course, the execution of the bond, the breach of its conditions, and the non-payment of the penalty assessed against Bennett & Carpenter for the breach. It relied only upon the averment that the statute under which

the bond was given was repealed before the penalty became payable. Whether it was repealed, or not, was of course a question of law, and was the only question in the case.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, for the plaintiff in error; Mr. H. L. Burnett, with whom was Mr. J. D. Cox, contra.

Mr. Justice STRONG, having stated the case, delivered the opinion of the court.

It is very obvious, we think, that this case is not the case of an entire repeal of a former act which imposed a penalty. The act of 1868 repealed former acts only so far as they were inconsistent with its provisions. It is needful, therefore, to note carefully what its provisions were. Plainly, it had no reference to spirits that had been withdrawn from a bonded warehouse for transportation to another before its enactment. It provided a system for the future, and looked exclusively to that. It regulated conduct from and after its passage, and declared that thereafter no spirits should be removed without payment of the full tax. It was only as the prior acts might affect spirits in bonded warehouses after its enactment that they could be inconsistent with its provisions. So far those acts were repealed. But spirits which had been removed before were not in its purview. We are unable to perceive how provisions respecting transportation in 1867 can be inconsistent with regulations respecting custody in 1868. The subjects are not the same, and the statutes are rules of action intended for different times. We think, therefore, that in their application to removals of distilled spirits in 1867, the acts of Congress of 1862, 1866, and 1867 were unaffected by the act of 1868, and consequently that the plea of the defendants was no sufficient answer to the plaintiffs' declaration. Hence the demurrer should have been sustained.

JUDGMENT REVERSED, and the cause remitted for further proceedings

IN CONFORMITY WITH THIS OPINION.

Syllabus.

NOTE.

At the same time with the case above reported, were argued by the same counsel and adjudged another case between the same parties, also the case of *United States* v. *Crane et al.*, and of the *United States* v. *Crane, Wells et al.;* cases which the court declared to be in principle exactly like the case which it had just decided. For the reasons above therein given, the judgment in each was reversed, and the record remitted for further proceedings in accordance with the opinion in that case.

INSURANCE COMPANY *v.* LYMAN.

A., knowing that his vessel had been lost on the 8th of January, 1870, but concealing his knowledge of the fact, applied for, on the 15th following, and got a written policy of insurance dated on that day, on her, "lost or not lost," from the 1st of January, 1870, to the 1st of April following. The insurance company, discovering afterwards that when he applied for this policy he knew of the loss, refused to pay. He brought suit, setting out his written policy, but declaring on it in such a way as was meant to show that the execution of it was but "a compliance with and a formal statement" of an agreement to make the insurance, which he alleged had been entered into between himself and the insurers on the 31st of December, 1869, and before the loss. *Held*—

1. That parol proof was not admissible to show that the contract of insurance was actually made before the loss occurred, though executed and delivered, and paid for afterward, for that to allow such proof would be to contradict and vary the terms of the policy in a matter material to the contract.
2. That the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party could abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose.
3. That the fact that the plaintiff went to the insurance office about half-past three o'clock in the afternoon, saw a clerk or person (whom he was not able afterwards to identify) standing at the desk, to whom he applied to have the vessel insured, who told him that "the secretary had gone home, and that there was no one in the office who could do it, but said he would speak to the secretary when he came in, in the morning, and have it attended to the first thing," is not sufficient evidence of a completed

Statement of the case.

contract—an agreement assented to by both parties at any one time—to be submitted to a jury in a suit as on a verbal contract for insurance, and assuming that the case was one where no written contract had ever been executed.

ERROR to the Circuit Court for the District of Louisiana.

Lyman & Co. brought their action in the court below against the Merchants' Mutual Insurance Company of New Orleans, for the sum of $12,000, the value of the brig "Sailor Boy," lost at sea on the 8th of January, 1870, and which was insured, as they allege, by the said company. Their petition set forth that on the 30th of October, 1869, the company had issued a policy to them on the brig for the sum named, which insured her until January 1st, 1870.

That on the 15th December, 1869, they applied to the company to insure them in the same sum, upon the same vessel for three months, from the said 1st January, 1870.

That after taking time to consider, the company, on December 24th, 1869, proposed to renew the insurance for the premium of $600, and that on December 31st the plaintiffs accepted this proposition for renewal, and that the company on that day agreed with them that it would issue the policy, and make it out and send it to them, and receive the premium.

That on the 15th January, 1870, the plaintiffs sent for the policy and paid the premium, and the company issued to plaintiffs the policy annexed to the petition; that the said policy was but a compliance with and a formal statement of the agreement to renew the insurance, made December 31st, 1869.

That on the 8th of January, 1870, the brig was lost, &c.

Along with their petition, the plaintiffs filed two policies of insurance, on their face such as above stated; that is to say, one dated October 30th, 1869, for two months, expiring January 1st, 1870, and one dated January 15th, 1870, and which, by its terms, purported to make an insurance "from the 1st January, 1870, to the 1st of April, 1870."

On the trial it appeared that the plaintiffs, when they renewed the policy of the 15th January, and paid the premium

for insurance, knew that the vessel was lost, and that the defendants had no such knowledge or information.

As on this state of facts it would be obvious that no action could be sustained on the *policy*—and indeed that, in point of fact, the taking of such a policy, and causing the defendant to sign it would have been a fraud—the plaintiffs framed their petition on the assumption, and directed their evidence to the showing that the execution of the policy was but carrying into effect an agreement made before the loss of the vessel.

In order to sustain this their case they offered in evidence the deposition of their agent, which gave an account of conversations had by him in reference to a renewal of the insurance with some one in the defendants' office. The defendants objected to this testimony, on the ground that there was a written application for and contract of insurance between the parties for the same amount of insurance and same amount of premium, on the same object insured, the vessel called "Sailor Boy," by the same plaintiffs as insured, and same defendants as insurers, for the same space of time, to wit, from the 1st day of January, 1870, to the 31st March, 1870; that the plaintiffs had no right to contradict the written application aforesaid by proof of a previous verbal contract; that the plaintiffs' right of action, if any, was on the written application and contract aforesaid, and that they could not ignore the said written contract to fall back on an alleged previous verbal contract of the same tenor and purport; that the evidence showing that when the said written contract was executed, the plaintiffs and their agents were aware of the fact of the previous loss and abandonment of the "Sailor Boy," the said written application and policy were not binding in law, but were nevertheless the contract of the parties subject to be gainsaid by proper allegations and proof of fraud; that the plaintiffs could not ignore the written contract.

But the court ruled as follows:

"The plaintiffs put their entire case upon a verbal contract

to renew the insurance made, as they allege, on the 31st day of December, eight days before the loss. They admit that when they sent for the written policy, on the 15th of January, they knew of the loss, and that they could not recover on the written policy standing by itself, but they say that the real contract was made on the 31st of December, and that they had a right to go to the jury on that issue."

The court accordingly overruled the objection and admitted the testimony.

The testimony admitted was that of a single witness. It went to show that on the 15th December, 1869, he was directed by the agent of the plaintiffs "to go to the company's office and see if they would renew the policy, and to get the rate; that he saw the secretary, who said that the company would renew, but that he could not then give the rate, but would let the agent know; that the witness had himself done nothing further in the matter till December 31st, though he heard that the company had informed the agent of the rate, 5 p. c., and that it was satisfactory; that on the 31st he was again told by the agent to go and renew the policy; that about half-past three in the afternoon of that day he went to the company's office, and asked to have the policy renewed; that a clerk, or person standing at the desk, to whom he applied, told him *that the secretary had gone home, and that there was no one in the office who could do it, but that he would speak to the secretary when he came in, in the morning*, and have it attended to the first thing; that the witness did nothing further until the 15th January, when the agent of the plaintiffs sent him to the company for the policy."

The witness stated the transaction of that day as follows:

"I went to the office of the defendants, and asked the man at the corner of the desk for the policy on the 'Sailor Boy.' He turned over his book, but could not find it; said he would go and see the secretary. He went into the back office and returned with the secretary. The secretary said that he did not know that a policy had been ordered. I told him that I had ordered it the 31st of December. He said there had been no application made out. I told him I did not know anything

about that; that no one said anything about an application to me. He said there should be one, and told the clerk to make one out for me to sign. The clerk made it out, and I signed it, and paid the premium, $510. The secretary asked me if anything had been heard from the vessel; I said, 'Not that I knew of.'"

Upon cross-examination the witness testified that he was requested by the president of the company, after payment of the insurance money had been demanded, to come to the office and identify the person to whom he had made application on 31st December, but that he was not able to recognize or identify any one as the person.

A verdict was given, and judgment entered for the plaintiffs, for the sum insured, and interest.

The case being now here on error,

Mr. W. M. Evarts, for the insurance company, plaintiff in error, argued that there was error:

1st. In admitting evidence of a parol contract of insurance of the same subject, and for the same risk between the same parties, as the written policy given in evidence by the plaintiffs. For that the plaintiff had a complete written contract made on the 15th of January, upon a written application made on that day; and by a policy on that day dated. And that the fact that it was void from a fraud of his part, did not make it less the written contract of the parties, or a contract of that date, nor affect its efficacy under the rule of evidence, to exclude parol evidence of a written contract.

2d. In submitting to the jury the evidence offered as showing or tending to show a contract of insurance by the defendant, made on the 31st of December, when the said evidence showed no such contract, but on the contrary showed a failure to make any contract, or to treat concerning such a contract. For that the proof showed that all that happened on that day, was that the messenger of the plaintiffs went to the insurance office, after business hours, and failed to find any one with whom to treat concerning the insurance.

Mr. T. J. Durant, contra:

1st. The evidence was not offered to contradict the written contract, but to show the circumstances under which it was made, and to show to what state of facts it really referred, by explaining that the instrument, made on the 15th January, only put in writing what had been agreed to between the parties on the 31st December previous, to which date and fact the policy related back. In other words, it was offered to show that the policy was but the expression, in a written form, of the verbal contract previously made.

2d. But we had a right to abandon our written contract altogether, and recover on our parol contract, not relying on the written policy except as evidence, if we chose so to use it, and as giving part of the history of the transaction.

Thus viewing the case, the fact that the vessel was lost on the 8th of January, and that the loss was known to the assured is unimportant.

Corporations may contract by parol, and a verbal contract to issue a policy may be as binding as any contract in writing.

The evidence did tend, in some degree certainly, to show the exact thing which it was offered to show, and was proper to go to the jury for what it was worth.

Mr. Justice MILLER delivered the opinion of the court.

Undoubtedly a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved and become the foundation of a recovery as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its application to it, that other written instruments have.

Counsel for the defendants in error here, relies on two propositions, namely, that the policy, though executed Janu-

ary 5th, is really but the expression of a verbal contract, made the 31st day of December previous, and that the loss of the vessel between those two dates does not invalidate the contract, though known to the insured and kept secret from the insurers; and secondly, that they can abandon the written contract altogether and recover on the parol contract.

We do not think that either of these propositions is sound.

Whatever may have been the precise facts concerning the negotiations for a renewal of the insurance previous to the execution of the policy, they evidently had reference to a written contract, to be made by the company.

When the company came to make this instrument, they were entitled to the information which the plaintiffs had of the loss of the vessel. If then they had made the policy, it would have bound them, and no question would have been raised of the validity of the instrument or of fraud practiced by the insured.

On the other hand, if they had refused to make a policy, no injury would have been done to the plaintiffs, and they would then have stood on their parol contract if they had one, and did not need a policy procured by fraudulent concealment of a material fact at the time it was executed and the premium paid.

To permit the plaintiffs, therefore, to prove by parol that the contract of insurance was actually made before the loss occurred, though executed and delivered and paid for afterward, is to contradict and vary the terms of the policy in a matter material to the contract, which we understand to be opposed to the rule on that subject in the law of Louisiana as well as at the common law.

We think it equally clear, that the terms of the contract having been reduced to writing, signed by one party and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument, as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose. The doctrine is too well settled that all previous negotiations and verbal statements are

merged and excluded when the parties assent to a written instrument as expressing the agreement. And it is hardly necessary to say, that the party who has destroyed the validity of that contract by his own fraud, cannot for *that reason* treat it as if it had never been made, and recover on the verbal statements made before its execution.

We may add that, as the only testimony offered to prove this parol contract, was the deposition of a single witness, made part of the bill of exceptions, we do not see in that deposition sufficient evidence of a completed contract, of an agreement assented to by both parties at any one time, to be submitted to a jury, even if the written contract had never been executed.

JUDGMENT REVERSED, with directions to grant

A NEW TRIAL.

HAFFIN *v.* MASON.

If a collector of internal revenue under the Internal Revenue Act of June 30th, 1864, have a proper warrant from the assessor for the collection of taxes specially assessed for deficiency of an original return, he cannot be sued in trespass for distraining and selling the taxpayer's property, on such person's refusal to pay the new assessment, even though such assessment have been illegally made. The warrant of the assessor is a justification to him. *Erskine* v. *Hohnbach* (14 Wallace, 613) affirmed.

Hence, a recovery cannot be had in an action of trespass against him and an assessor for an assessment made by the assessor, in disregard of the act, however such recovery could be had against the assessor in an action against him alone.

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

The act of June 30th, 1864, "to provide internal revenue to support the government," &c.,* makes it the duty of distillers to make and return to the assessor of their district, a

* Sections 11, 14, 13 Stat. at Large, 225, 226.

list of the merchandise made or sold by them; and if they make a list which in the opinion of the assessor is false or fraudulent, or contains any understatement or undervaluation, it is made the duty of the assessor—it being made "lawful" for him first to give notice to the party, and summon such party before him to give testimony and to answer interrogatories respecting his trade and sales, and in case of a neglect of the party on such notice to come before him, then to have him summoned before the judge of the district whose duty it is made by himself or his commissioner, on the parties being brought before him, to hear the case—to make, according to the best information he can obtain, a *true* list, according to a form which the statute prescribes, "of the property, goods, wares, and merchandise, and all articles or objects liable to duty or tax, . . . and assess the duty thereon," adding in certain cases penalties prescribed; "and the amount" so added to the duty "shall in all cases," says the act, "be collected by the collector at the same time and in the same manner with the duties; and the lists or returns so made . . . shall be taken and reputed as good and sufficient lists or returns for all legal purposes." Other parts of the act authorize distress and sale of the party's property for non-payment of duties lawfully assessed.

With this act in force Hyatt, assessor of internal revenue for one of the districts of New York, being, or professing to be, of the opinion that Haffin and Wagner, distillers there—who had made certain returns which they alleged to be *true*, and paid taxes upon *them*—had not in a list rendered by them, made a true return of liquors which they had distilled during a term specified, made out—in a form somewhat peculiar, and purporting to be an assessment upon "deficiency on returns," and without giving to the distillers any notice of the increased enumeration or of his action, and so without giving them any opportunity to be heard—a new list, which, having duly certified, he gave to one Mason, the collector of the district, that he might collect the amount charged. Mason made a demand at the distillery for payment of the sum, and payment being refused, he distrained

upon the distillery and other property of the distillers and sold it at auction; the distillers being present and protesting against the sale. Hereupon they brought an action of trespass against both Hyatt and Mason, on the ground that the whole proceeding was wrongful, as they had made correct returns of their business, paid all the taxes properly chargeable upon it, and done nothing which justified the action of the assessor. Plea, "not guilty." On the trial the plaintiffs having given evidence tending to show, as they considered, a non-compliance by Hyatt, the assessor, with requisitions made by the internal revenue act, requisitions (as they considered) *precedent* to any lawful levy on a new list—and the new list in this case being in evidence without objection, and without any point raised as to its form or sufficiency—requested the court to charge "that the defendants were liable in this action, and that the plaintiffs were entitled to judgment for the value of the property seized and sold by the defendant, Mason, as aforesaid."

The court refused so to charge, and directed the jury to find for the defendants, which they did. Judgment having been entered accordingly, the plaintiffs brought the case here.

Messrs. J. Hubley Ashton and H. F. Averill, for the plaintiffs in error:

1. The only authority which Mason had for seizing and selling the property, was the "list" given him by Hyatt. In this "list" he must find justification, or he is a trespasser. Now this list affords him no protection, unless under the Internal Revenue Act Hyatt had the power to make it. And these statutes, so far as they operate to take away the rights of the citizen, must be construed strictly. They cannot have an equitable construction, nor be extended by implication. Every substantial requisite of the law must be shown to have been complied with. No presumption can be raised in behalf of a collector who sells property for taxes to cover any radical defect in the proceedings. Now, here the assessor was bound to give notice to the distillers of his dissatisfac-

tion with their returns, in order that they might show them to have been true. When it was made lawful for him to do this, it was made obligatory. The assessor is not to proceed inquisitorially, and to be at once detective, prosecutor, and judge. Suppose that in fact the returns which the plaintiffs made were true. What a case have we of oppression by a subaltern officer of the revenue. Undoubtedly their notice was a prerequisite.

2. The list was void on its face. It purports to be an assessment upon "deficiency on returns" of distilled spirits. There is no tax known to the law "on deficiency on returns."

3. That both defendants are liable for the trespass, would seem from the case of *Smith* v. *Shaw*.*

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, Assistant Attorney-General, contra.

Mr. Justice DAVIS delivered the opinion of the court.

In the view we take of the case, it is not necessary to notice anything that occurred at the trial, except the refusal of the court, on the request of the plaintiffs, to charge "that the defendants were liable in this action, and that the plaintiffs were entitled to judgment for the value of the property seized and sold by the defendant, Mason." The refusal to give this instruction was excepted to and is assigned for error. If, in the state of this record, *both* these defendants were not liable in an action of trespass, the charge, as prayed, was incorrect, and therefore properly refused.

We are not required to consider whether the assessor was not liable, because the proposition which the court was asked to sanction assumed the liability of both, and a party cannot assign for error the refusal of an instruction to which he has not the right to the full extent as stated, nor is the court bound to modify the instruction moved for by counsel, so as to bring it within the rules of law.† If the plaintiffs wished

* 12 Johnson, 257.

† Catts *v.* Phalen, 2 Howard, 382; Buck *v.* Chesapeake Insurance Co., 1 Peters, 159.

to test the question whether, under the evidence in the case, they could not recover against the assessor alone, they should have fashioned their instruction to meet that emergency.

If they did not choose to do this, they are precluded from raising the question here, and the only point for decision is whether the court below erred in refusing the instruction in the terms in which it was presented.

A ministerial officer, in a case in which it is his duty to act, cannot on any principle of law be made a trespasser. This court, in the recent case of *Erskine* v. *Hohnbach*,* applying this doctrine to a collector of internal revenue, say, that his duties in the enforcement of a tax-list are purely ministerial, and that "the assessment duly certified to him is 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, constitutes his protection."

The assessment in this case, duly certified by Hyatt, the assessor, was received in evidence without objection, and no point was raised as to its form or sufficiency. If, then, the assessor had the right to decide the question, whether the plaintiffs were liable to the increased taxation, the list delivered by him to the collector, properly certified, was his warrant to seize and sell the property, in case the taxes were not paid, after he had made demand for them.

It was not the business of the collector to inquire into the case to ascertain whether the assessor had reached a proper conclusion upon the matter submitted to his judgment, nor had he any right to refuse to enforce the assessment.

The act of June 30th, 1864,† confers authority on the assessor to make an increased enumeration in case the distiller has not rendered a true account of his business, and directs the manner of proceeding, in order to find out the deficiency. This mode was not pursued by the assessor, and as the case stands, it would seem that the plaintiffs have been adjudged to pay a large amount of money without the opportunity to be heard, and which they swear they do not owe the United States. It is presumed the assessor had

* 14 Wallace, 613.

† Section 14, 13 Stat. at Large, 226, 227.

grounds for his action, which would relieve the case of its apparent hardship, but whether he had or not, the collector is protected. This officer had the right to suppose the taxes were due, and that all proper steps had been taken to ascertain this fact. If he could not rightfully act on this supposition, it is difficult to see how he could be protected in collecting taxes, when the authority of the assessor to levy them was given by law, and the precept for their collection was regular on its face. It follows, from these views, that the Circuit Court was right in refusing the instruction as prayed for, and that, on the ground that the collector was not a trespasser, the judgment must be

AFFIRMED.

THE LUCILLE.

1. A schooner approaching a steamer coming towards her on a parallel line, with the difference of half a point in the course of the two, tending to a convergence, does right when she keeps on her course; and the steamer is bound to keep out of her way, and to allow her a free and unobstructed passage. Whatever is necessary for this it is the steamer's duty to do, and to avoid whatever obstructs or endangers the sailing vessel in her course.
2. Fault on the part of the sailing vessel at the moment preceding a collision (assuming fault to have existed) does not absolve a steamer, which has suffered herself and a sailing vessel to get in such dangerous proximity as to cause inevitable confusion, and collision as a consequence.
3. These doctrines—doctrines declared in *The Carroll* (8 Wallace, 302), and *The Fannie* (11 Id. 238)—redeclared and applied.
4. A decree of a District Court where interest was not in terms given, affirmed in this court, April 28th, 1872, with interest at the rate allowed in the district where given, from its date, March 12th, 1869; the appeals being considered not well founded.

APPEAL from the decree of the Circuit Court for the District of Maryland, in a case of collision; the facts being thus:

A little after midnight of December 20th, 1868, the moon not shining, but the night not being a dark one, the schooner

Champion, sailing up Chesapeake Bay for Baltimore and keeping about five miles from the western shore of the bay, was seen at the distance of two miles on the *southeast* by the steamer Lucille going down the bay and out to sea. The wind was a very light breeze from the southeast; and the course of the schooner north-by-west, her sails well set on the *port* side. The course of the steamer was south-by-east-half-east, and her rate about seven or eight miles an hour. In a little while, there being no allegation of any natural cause for a catastrophe, nor allegation of want of proper lights, or that they were not seen, the steamer came stem on, upon the schooner, the steamer's port bow striking the schooner's starboard bow; the sails of the schooner *still upon the port side*, jibing over and injuring the steamer somewhat, but the schooner herself being "ripped right open, fore and aft," and going very soon to the bottom with her cargo and three of her crew; the captain climbing up on the steamer and escaping with his life.

Hereupon the owners of the schooner promptly, January 2d, 1869, libelled the steamer in the District Court for Maryland; alleging that the schooner had kept on her course in order that the steamer might pass to her starboard; that the steamer saw her in abundant time to get out of her way; that the steamer made no attempt in time to change her course; that when the schooner saw that there was danger of a collision it was too late for her to do anything effective to prevent it, and that the catastrophe was chargeable to the negligence and mismanagement of the steamer alone.

The answer of the steamer alleged that going on the courses that the vessels were going, "they would have passed each other at a considerable distance apart, but that without any danger prompting, and from pure negligence and want of care, the schooner, when she was nearly opposite the steamer, changed her course to the westward and came directly on the said steamer."

The steamer sought to support this view of the case by the testimony of one of her men, who swore that "when the schooner struck, she was heading across the bay, her head

toward the southwest;" and by the testimony of her captain, who swore that after the catastrophe, and after the master of the schooner had got on board of the Lucille, he said, in conversation, that "he had put his helm hard up," *i. e.*, had put it to the windward.*

The schooner, on the other hand, denied that she had changed her course, except in the moment of imminent peril and to escape certain destruction; and relied on the testimony of witnesses for the steamer who testified that they had noted the change, though they spoke of it as a change then accomplished—"when the steamer was within thirty yards of her"—"two minutes before the collision;" and relied also on the testimony of seamen from their own vessel that "the schooner could not have changed her course so far round as west, as her sails would have jibed and gone over to starboard," which it was testified positively they never did till the collision took place.

The schooner, which had been recently purchased by the libellants, was not a new vessel, but she had been lately put into good order by them, and with her cargo, oysters, was shown to have been worth $2800; and on the 12th of March, 1869, the District Court condemned the steamer in that sum. On the 12th of April following, her owners appealed to the Circuit Court, and on the 5th of January, 1871, the decree of the District Court was affirmed; the decree in neither court, however, providing in terms that it should bear interest. On the 14th of January, 1871, they appealed to this court, and the case was argued on the 10th of April, 1873.

Mr. W. S. Waters, for the appellants, owners of the steamer:

The master of the schooner, after coming on the steamer, admitted that he had "put his helm up." This put the vessel on a west or southwest course; and that the vessel was actually going on this course is proved by a witness from the steamer, who swears "that when the schooner

* The effect of this, of course, as the wind was from the southeast, would have been to bring the schooner in contact with the steamer.

struck us she was heading across the bay, her head towards the southwest." The schooner, therefore, instead of keeping on her course, as she ought to have done, changed her course; and by so doing produced the catastrophe.

Messrs. W. S. Bryan and T. A. Seth, contra:

The case is a plain one, we apprehend, for the schooner. We have had two decrees the same way on facts. We submit the case to this court, asking it to give us such interest by way of additional damages as may compensate us for the delay we have sustained by the numerous and, as we conceive, unjustified appeals of the other side.

Mr. Justice HUNT now, April 28th, 1873, delivered the opinion of the court.

The principles of law applicable to this case are well settled. They are not disputed by either party. In the case of *The Carroll** it is thus laid down: "Nautical rules require that where a steamship and sailing vessel are approaching each other from opposite directions, or on intersecting lines, the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely means of precaution as will necessarily prevent the two boats from coming in contact. Fault on the part of the sailing vessel at the moment preceding a collision does not absolve a steamer which has suffered herself and a sailing vessel to get in such dangerous proximity as to cause inevitable alarm and confusion, and collision as a consequence. The steamer, as having committed a far greater fault in allowing such proximity to be brought about, is chargeable with all the damages resulting from a collision."

The rule laid down in the case of *The Fannie*,† is still more applicable to the case before us. It was held that a schooner meeting a steamer approaching her on a parallel line, with the difference of half a point in the course of the two, ought to have kept on her course; that a steamer ap-

* 8 Wallace, 302.

† 11 Id. 238.

proaching a sailing vessel is bound to keep out of her way, and to allow her a free and unobstructed passage. Whatever is necessary for this it is her duty to do, and to avoid whatever obstructs or endangers the sailing vessel in her course. If, therefore, the sailing vessel does not change her course so as to embarrass the steamer, and render it difficult for her to avoid a collision, the steamer alone is answerable for the damage of a collision, if there is one.

The schooner was sailing up the bay, on a course of north-by-west, with a very light breeze from the southeast. The steamer was sailing down the bay, with a course south-by-east-half-east, at about seven or eight miles an hour. When the steamer's men first saw the schooner the vessels were about two miles apart. The vessels, it will be observed, were on courses nearly parallel. The half-point of difference tended to a convergence.

Upon this state of facts the duty of the sailing vessel was to continue upon her course, leaving it to the steamer to avoid the collision. It was the plain duty of the steamer to accept this responsibility, and to assume that such would be the action of the schooner. The schooner was considerably to the eastward of the steamer, and it would seem that by simply bearing a half-point to the west, by which the convergence would be destroyed and perfectly parallel lines would result, that the steamer could have accomplished the safety of the passage. If there was any reason why this could not be done, which does not appear, a bearing to the east, by which the convergence would have been increased, would have carried the steamer in safety across the bows of the schooner. Neither course was adopted, but pursuing the middle course, so often the path of safety, but in this case most injudicious, of remaining on the course of south-by-east-half-east, the vessels came together.

The steamer seeks to avoid this difficulty by the allegation that the schooner changed her course, putting up her helm, that is, putting it to starboard, and thus throwing the schooner across the bows of the steamer. This view is sought to be sustained by the evidence that the captain

stated that he had put up his helm, and that the schooner was struck on her starboard bow by the port bow of the steamer. It is argued that this situation could have been produced in no other way.

We cannot believe that the schooner, bound northerly to Baltimore, with a breeze from the southeast, would have been sailing on a southwesterly course. This was quite out of her direction, and cannot be admitted, and yet it is the effect of the theory we are considering. Again, if such had been the course of the schooner it would have thrown her sails to the starboard, whereas it is proved that her sails were on the port side, and so remained until the actual collision, when they shifted to the starboard, doing some injury to the steamer. If the schooner put up her helm, it was in the moment of anxiety, and to avoid the danger of collision, which was then imminent. It is quite probable that seeing the steamer coming upon her, she put up her helm and sheered to the west, as the best means of escape. The steamer, at about the same moment, must have put her helm aport, and thus the port bow of the steamer and the starboard bow of the schooner were brought together. This is the natural explanation of the position, and is consistent with the evidence on the subject.

We are satisfied that no change was made in the course of the steamer until she was almost upon the schooner, as some of the witnesses express it, when she was within two minutes of the collision, as others say, when within thirty yards of the schooner, and that the collision was the result of her negligence.

There is no reason to suppose that the damages are excessive. The vessel had been purchased recently, and had been repaired after the purchase. The value of the vessel and of the cargo were sufficiently established, and the decree was within the amount proven.

The decree should be AFFIRMED WITH INTEREST from its date, March 12th, 1869, at the rate of interest allowed by the laws of Maryland.

BURROWS *v.* THE MARSHAL.

No *appeal* lies to this court from the Circuit Court for the discharge of a rule on the marshal, to show cause why he should not make to one—asserting himself to be a purchaser on execution, under a judgment, at a marshal's sale—a deed for real estate sold; and for an order on the person asking the rule to pay the costs.

ON motion to dismiss an appeal from the Circuit Court for the District of North Carolina.

The 22d section of the Judiciary Act of 1789,* after enacting that certain final decrees in District Courts may be re-examined, and reversed or affirmed, in Circuit Courts, "*upon writ of error*," enacts further:

"And *upon like process* may final judgments and decrees in civil actions and suits in equity in a Circuit Court, brought there by original process, &c., be re-examined, reversed or affirmed, in the Supreme Court, &c."

An amendment to this act, passed in 1803,† enacts:

"That from all final judgments or decrees rendered or to be rendered in any Circuit Court in any cases of *equity, admiralty, and maritime jurisdiction, and of prize or no prize*, an *appeal* . . . shall be allowed to the Supreme Court of the United States."

With these acts in force, an execution duly issued from the Circuit Court for the District of North Carolina on a judgment against one Taylor, and under it real estate owned by him was sold by the marshal, and the money paid into the marshal's office. Notwithstanding this the marshal advertised the same land for sale under other executions. Hereupon one Burrows, alleging that *he* had purchased and paid for the land, and had tendered the marshal a proper draft of a deed to him, obtained a rule on the marshal to show cause why he should not make such a deed, and why another sale under the other executions should not be stayed.

* 1 Stat. at Large, 84.

† 2 Id. 244.

The marshal set up by way of answer that Burrows was not the purchaser, but that one Meacham was; that the land had sold at an enormous sacrifice, the result of a fraudulent combination between Burrows, Meacham, and Taylor, to prevent competition in the bidding.

The court below having heard the case on its merits dismissed Burrows's petition, and ordered him to pay all the costs. From this, its action, he brought the case to this court by an *appeal.*

Mr. S. F. Phillips, Solicitor-General, in support of the motion, argued, that if the discharge of the rule below was in any true sense a "*final* judgment or decree," and such a judgment or decree as was within the supervisory jurisdiction of this court at all, it could only be so on writ of error. The proceeding in which Burrows made his motion below was at law, and the motion was a motion at law. Under the act of 1803, indeed, *appeals* were allowed in a special class of cases, but this case did not fall within that class.

Messrs. W. A. Graham and H. W. Guion, contra.

Mr. Justice CLIFFORD delivered the opinion of the court.

Two judgments, as the appellant represents, were rendered in the Circuit Court, at Raleigh, November Term, 1869, against one Taylor, in favor of the creditors therein named, for certain specified amounts, and that the same were placed in the hands of a deputy marshal for collection; that the marshal having levied the executions upon a certain described parcel of land, advertised the same for sale according to law, and that the petitioner became the purchaser thereof, being the highest bidder at the sale, for the sum of one hundred and ten dollars, which, as he alleges, he paid to the deputy marshal; that at the ensuing term of the court he applied to the marshal to execute to him as the purchaser a deed of the interest so purchased and paid for as aforesaid; that the marshal having refused to comply with the request, he then prepared and tendered to the marshal a

proper draft for a deed, and requested him to execute the same, which he refused and still refuses to do, and has given notice that he will sell the premises upon other executions in his hands. Wherefore the petitioner prayed the Circuit Court to lay a rule upon the appellee, as such marshal, to show cause at the next term of the court why he should not make to him as the purchaser a good and sufficient deed in fee simple of the described tract, and he also prayed for an order staying all further proceedings under the said other executions in his hands towards a resale of the premises which he purchased.

Subsequently the appellee appeared and filed an answer, and the record shows that the court, at the succeeding November Term, rendered judgment for the appellee, directing that the rule be discharged and that the petitioner pay all costs. Whereupon the petitioner appealed to this court.

Such a motion as the one first described and the rule granted under it were proceedings at law, and so also were the judgment and the order of the court directing that the petitioner should pay all costs, and the court is of the opinion that the judgment could not be removed into this court in any other way than by a writ of error; that an appeal will not lie to this court in such a case under the twenty-second section of the Judiciary Act, and that the appeal must be

DISMISSED FOR WANT OF JURISDICTION.

HAMPTON *v.* ROUSE.

Where a writ of error was made returnable to the first Monday of December (a return day then, within a month, abolished by act of Congress), instead of being made returnable the second Monday of October, next ensuing, the day which the act fixed thenceforth as the return day, *held* that the mistake was amendable under the third section of the act of June 1st, 1872, "to further the administration of justice," which empowers the court to allow amendments in certain cases, including the

case "where the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ."

ON motion to amend a writ of error.

Prior to the 24th of January, 1873, the annual session of this court began on the first Monday of *December* in each year; and writs of error were, of course, returnable to that day. But by an act approved on the 24th, just mentioned,* the day was changed; Congress enacting that thenceforth the session should commence "on the second Monday of *October* of each year."

By an act of a previous date, the act of June 1st, 1872, "to further the administration of justice,"† it had been thus, in the third section of the act, provided:

"That the Supreme Court may, at any time, in its discretion, and upon such terms as it may deem just, and where the defect has not injured and the amendment will not prejudice the defendant in error, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, *or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ.*"

In this state of statutory enactment, one Hampton, against whom, in a suit against him by Rouse, a judgment had been given in the Circuit Court for the Southern District of Mississippi, took a writ of error to this court. The writ bore teste of the *25th of February*, 1873, about one month after the law changing the return day had passed, and before it was much known. And it was made returnable in the old way, that is to say, to the first Monday of December then next ensuing.

Mr. W. W. Boyce, in support of the motion to amend, relied on the act of June 1st, 1872, above quoted; Mr. P. Phillips, contra, now moved to dismiss the writ.

* See the act, 14 Wallace, vii.

† 17 Stat. at Large, 197.

Mr. Justice SWAYNE delivered the opinion of the court.

The case is before us on a motion to amend the writ. It bears teste on the 25th of February, 1873, and was made returnable on the first Monday of December, instead of the second Monday of October, then next ensuing. The commencement of the terms of this court was changed from the former to the latter time by the act of January 24th, 1873. The passage of this act was doubtless unknown to the clerk when he issued the writ. Authority to amend it in the particular in question is given by the third section of the "act to further the administration of justice," of June 1st, 1872.

THE MOTION IS GRANTED, and the amendment may be MADE ACCORDINGLY.

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2. Cannot, on error, be *assumed* by this court to have been erroneous. Hence a judgment cannot be reversed on an allegation of error in a charge, unless the record contain sufficient evidence to enable this court to pass on the case. *Railroad Company* v. *Hanning*, 649; and see *Flanders* v. *Tweed*, 450.
3. That it may not have covered an entire case is no ground for reversal, where no specific instructions have been asked for and no error is perceived in those given. *Shutte* v. *Thompson*, 151.

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2. Where, under the *forms* of a forfeiture and sale of a rebel's estate, &c., as under this act, nothing, owing to a defect in the proceedings, or in some of them, has really passed to the purchaser, and the rights of the rebel have been uninjured, no damages but nominal ones can be recovered by him of a marshal for an alleged false return. *Pelham* v. *Way*, 196.

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The mere assemblage in a church body where the congregational government prevails, of a majority of a congregation forcibly and illegally excluded by a minority from a church edifice in which, as part of the congregation, they had been rightfully worshipping—in another place—the majority thus excluded maintaining still the old church

CONGREGATIONAL CHURCH (*continucd*).

organization, the same trustees, and the same deacons—is not a relinquishment of rights in the church abandoned, and the majority thus excluded may assert, through the civil courts, their rights to the church property. In a congregational church, the majority, if they adhere to the organization and to the doctrines, represent the church. *Bouldin* v. *Alexander*, 131.

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3. A statute of a State imposing a tax upon the gross receipts of railroad companies is not unconstitutional, though the gross receipts are made up in part from freights received for transportation of merchandise from the State to another State, or into the State from another. *State Tax on Railway Gross Receipts*, 284.
4. A law of a State taxing bonds of a debtor within the State, held by a person outside of it, is unconstitutional, and the fact that the bonds are secured by a mortgage on land in the State, does not affect the case. *Case of the State Tax on Foreign-held Bonds*, 300.
5. A State law (whether a State constitution or State statute) which withdraws from the lien of a judgment, property which when the judgment was obtained, the lien, under then existing State statutes, bound, is unconstitutional. *Gunn* v. *Barry*, 610.
6. The fact that the Congress of the United States may, under the reconstruction acts, have insisted on certain *other* provisions which the State had not adopted, going into the State constitution where such a provision is found, and in certain others still which it had adopted, going out of it, before senators and representatives from the State should be admitted into Congress, does not make the constitution an act of Congress. *Ib.*
7. The 20th section of the act of July 20th, 1868 (to the effect that in no case shall a distiller be assessed for a less amount of spirits than 80 per cent. of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent., he shall also be assessed upon the excess), laying, as it does, a tax uniform in its operation, and establishing one rule for all distillers, is constitutional. *United States* v. *Singer*, 112.
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1. A party binding himself to deliver personal property can only be relieved in this respect on the ground of clear refusal of the other party to receive or becoming disabled to perform his part of the contract. *Smoot's Case*, 37.
2. Thus, a party agreeing to furnish horses to the government (certain rules then existing as to time and manner for inspection), cannot, on the adoption of new rules, such new rules not rendering it impossible for him to comply with his contract, and neither disabling the government from receiving and paying for the horses, nor being a notification that the government would not have them, abandon it and sue for the profits which he might have made, though he neither bought, nor delivered, nor tendered any horses, as he had agreed to do. *Ib.*
3. Unless ambiguous or technical, evidence of usage or custom to interpret, not favored. *Partridge* v. *The Insurance Company*, 573.
4. A contract made by a city which had passed a resolution to destroy a certain sort of property, to pay to its owners the value of it, held obligatory, though the resolution and contract were made in view of certain capture of the city by a beleaguering army, and though, as it proved, the property would have been destroyed at all events, and by a wholly different cause, if the city had not destroyed it. *City of Richmond* v. *Smith*, 429.

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2. Disallowed also in a like suit on an injunction bond. *Oelrichs* v. *Spain*, 211.

COURT OF CLAIMS.

1. Jurisdiction of, limited to cases of contracts, express or implied, with the government. *Smoot's Case*, 36.
2. Bound in the construction and enforcement of such contracts, to apply the ordinary principles which govern contracts between individuals. *Ib.*
3. No recovery to be had in, on a contract of charter by which the contractor bears the "marine risks," and the government the "war risks," and where a loss occurs by a risk decided to be of the former kind. *Reybold* v. *United States*, 202.

"CREDITS."

Meaning of the word in the Confiscation Act of July 17th, 1862. *Brown* v. *Kennedy*, 591; *Pelham* v. *Way*, 196.

CUSTOM.

Evidence of, to control the meaning of written contracts not plainly ambiguous or technical, not favored. *Partridge* v. *The Insurance Company*, 573.

DEED.

Of a lunatic, void. *Dexter* v. *Hall*, 9.

DEPOSITIONS.

De bene esse, under act of September 2d, 1789. Formalities in the taking of, required by the act, may be waived by the party for whose protection they are intended. What amounts to such waiver. *Shutte* v. *Thomson*, 151.

DESERTER.

One who was restored to duty by order of his department commander, without trial, on condition that he make good the time lost (about two months), and who complied with the condition, and was honorably

DESERTER (*continued*).

discharged at the expiration of his term of service, *held* entitled to bounty money, notwithstanding his desertion. *United States* v. *Kelly*, 34.

DISTILLER. See *Official Bonds; Transportation of Spirits.*

1. The meaning of the 20th section of the act of July, 1868, relating to the assessment of distiller's spirits is, that in no case shall the distiller be assessed for a less amount of spirits than 80 per cent. of the producing capacity of his distillery, and if the spirits actually produced by him exceed this 80 per cent. he shall also be assessed upon the excess. *United States* v. *Singer*, 111.
2. The law is constitutional. *Ib.*

DISTRICT OF COLUMBIA.

Effect in the, of the "tacit lien" given by the act of Congress of February 22d, 1867, in favor of landlords. This stated. *Fowler* v. *Rapley*, 328.

ECCLESIASTICAL AND CIVIL COURTS.

Although the latter sort of courts will not in the case of persons excommunicated by competent church authority, go behind that authority and inquire whether the persons have been regularly or irregularly excommunicated, the said courts may inquire whether the expulsion was the act of the church or of persons who were not the church, and who, consequently, had no right to excommunicate any one. *Boulden* v. *Alexander*, 132.

ENEMY, PUBLIC. See *Trading with Public Enemy.*

EQUITY. See *Bankruptcy; Louisiana*, 1; *Parties; Practice*, 4.

1. Will not restrain the collection of a tax solely on the ground of its illegality, or where the proceedings to collect it are void on their face. Some cause presenting a case of equity jurisdiction must be alleged. *Hannewinkle* v. *Georgetown*, 547.
2. Nor, unless the vendee has suffered injury by delay not capable of being compensated by damages, rescind a fully executed contract for sale of lands, with a covenant of warranty, where a defect of title existing when the conveyance was made, is offered, before final hearing, to be cured by the tender of a perfect title. *Kimball* v. *West*, 377.
3. Nor grant relief against payment of a bond where the bill shows a complete defence and full means of relief at law. *Grand Chute* v. *Winegar*, 373.
4. Jurisdiction in, will be sustained when time, expense, and multiplicity of suits will be saved, as also when the case contains an element of trust. *Oelrichs* v. *Spain*, 211.
5. An injunction bond given to one who held the legal title to a fund, will enable him at law to recover, to the full extent, damages touching the entire fund; and a court of equity will follow the law in its proper distribution. *Ib.*
6. A release, even when sealed, cannot be set up in equity to defeat those who were not parties to it, and who had separate interests. *Ib.*

EQUITY (*continued*).

7. Estate of a surety bound jointly but not severally with his principal, discharged in law on his death, the other obligor surviving; and in equity also in the absence of equitable circumstances making him liable. *Pickersgill* v. *Lahens*, 141.
8. A receipt of a woman, before taking out letters of administration, by which she surrendered for an inadequate consideration rights of herself and of her children, in her husband's estate, on which she afterwards took out administration, *held* void, as hastily and inconsiderately made, and when influenced by a friend, himself ignorant of many facts in the case. *Cammack* v. *Lewis*, 643.
9. A life insurance policy (in $3000) which, if held to be intended for the benefit of a creditor (to the amount of $70) who took it out, would owing to the smallness of his debt necessarily be considered a sheer wagering policy, *held* under special circumstances to have been taken by him in trust for the debtor; his own debt, however, to be first provided for. *Ib.*

ERROR.

Though it be error to sustain *in part*, and overrule *in part* a demurrer which is *single*, yet a complainant by amending his bill, and a defendant by answering afterwards both waive their right to allege error; as a defendant specially does in such a case in this court by not appealing. *Marshall* v. *Vicksburg*, 146.

EVIDENCE.

1. Where an act of Congress granting lands to a State, for school purposes, required the selection of them by the register and receiver of the proper land district—such selection when made and entered in the register's books, to vest the title of the lands in the State—in such case, if the register's book be lost or destroyed, the fact of the selection may be proved by other evidence. *Hedrick* v. *Hughes*, 124.
2. A book of record kept by a county school commissioner, now dead, of his transactions in selling the school lands in the county, deposited in the county clerk's office, and preserved as a public monument among the county archives, is *de facto* a public record, and proper evidence of the commissioner's official acts. It is also admissible as the entries of a deceased person, made in the course of his official duty, in a matter of public concern, to prove his official transactions. *Ib.*
3. If a township plat be lost or destroyed, it may be proved by a copy; and memoranda on such copy, not contained in the original, if accounted for and explained, will not exclude the copy as evidence of the contents of the original, even though such memoranda be a translation of corresponding memoranda in the original. *Ib.*
4. When evidence has been given tending to show the insanity of a grantor, and other evidence tending to show his sanity, a medical expert cannot be asked his opinion respecting that person's sanity or insanity, forming his opinion from the facts and symptoms detailed in the evidence. *Dexter* v. *Hall*, 9.
5. Such a witness may be asked his opinion upon a case hypothetically stated, or upon a case where the facts are certain and found; but he

EVIDENCE (*continued*).

will not be allowed to determine from the evidence what the facts are, and to give his opinion upon them. *Dexter* v. *Hall*, 9.

6. A vessel condemned for violation of the revenue laws on a clear *primâ facie* case made out against her by the government and not rebutted by the claimants. *The John Griffin*, 29.
7. When a suit turns on the question whether money claimed in it by the plaintiff has been advanced to the defendant, in one capacity or in another, testimony of what a person who had settled an account on the subject with the defendant *said* that the defendant told him, is not evidence, and the fact that the court in allowing the evidence to go to the jury, told them that they might consider it for what it was worth, does not alter the case. *Young* v. *Godbe*, 562.
8. Where the language of a written contract is neither ambiguous nor technical, parol evidence is not received to explain it and so establish a new term to it. *Partridge* v. *The Insurance Company*, 573.
9. In questions of boundary, reputation in the neighborhood at the present day is not admissible, unless it be traditionary, or derived from ancient sources, or from those who had peculiar means of knowing what the reputation of the boundary was in an ancient day. *Shutte* v. *Thompson*, 151.
10. Under a statute enacting that "parol evidence shall not be received to prove any acknowledgment or promise of a party deceased to pay any debt or liability against his succession, in order to take such debt or liability out of prescription, or to revive the same after prescription has run or been completed; but in all such cases the acknowledgment or promise to pay shall be proved by written evidence, signed by the party to be charged, or by his specially authorized agent or attorney in fact;" neither oral statements of conversations and admissions of a decedent, tending to prove an acknowledgment of a debt, as due, within the period of prescription, nor indorsements, by himself, on the bond of payments made of interest up to a term which took it out of that period, are admissible in a suit against his estate to charge it. *Adger* v. *Alston*, 555.
11. Evidence which, in connection with other evidence offered, tends to make out a defence, is properly receivable, though it may not itself prove all the facts necessary to constitute a defence. *Deitsch* v. *Wiggins*, 540.
12. Where a party knowing of the loss of a vessel has her insured by a written policy (lost or not lost) he cannot by parol proof show that the contract for insurance was made before the loss, though executed and paid for afterwards. *Insurance Company* v. *Lyman*, 664.
13. Nor abandon the written instrument as of no value in ascertaining what the contract was and rely on the verbal negotiations. *Ib.*
14. Certain evidence held insufficient to be submitted to a jury of a parol contract of insurance. *Ib.*
15. Parol evidence may be given to show that a bill of sale of a vessel in terms absolute was, in fact, but a mortgage. *Morgan's Assignees* v. *Shinn*, 105.

EXEMPTION LAWS. See *Constitutional Law*, 5, 6.

EXPERT. See *Evidence*, 4, 5.

FEES. See *Counsel Fees.*

On objection, to an allowance below of clerks' or marshals' as excessive, this court will not interfere unless record shows what the fees were. *Flanders* v. *Tweed*, 450.

FEME COVERT.

A separate estate for, may be created by any language clearly expressing an intent to create it. *Prout* v. *Roby*, 471.

FINAL DECREE. See *Jurisdiction*, 8; *Practice*, 13–15.

FISHWAYS.

The larger rivers in Massachusetts are subject to the right of the legislature to compel the owners of dams in them to erect fishways in them. *Holyoke Company* v. *Lyman*, 500.

FORFEITURE. See *Confiscation Act; Re-entry.*

FRAUDS, STATUTE OF. See *Evidence*, 10.

FREIGHT, TAX ON. See *Constitutional Law*, 2.

FRIVOLOUS WRITS OF ERROR.

Punished by affirmance, with ten per cent. damages. *Pennywit* v. *Eaton*, 382.

GROSS RECEIPTS OF RAILWAYS, TAX ON. See *Constitutional Law*, 3.

ILLEGAL TAX. See *Constitutional Law*, 2–4; *Equity*, 1; *Interest*, 1.

INCOME TAX. See *Internal Revenue*, 1.

INFANT. See *Negligence.*

INFORMALITY. See *Plea*, 1.

INJUNCTION BOND.

1. Such bond, given to one who held the legal title to a fund, will enable him at law to recover to the full extent damages touching the entire fund; and a court of equity will follow the law in its proper distribution. *Oelrichs* v *Spain*, 211.
2. Counsel fees are not recoverable on such bonds. *Ib.*
3. Sureties in an, cannot go behind the decree to raise a question of illegality as to an agreement on which it is founded. *Ib.*
4. Not required by a statute of New York, which enacts that "the party applying therefor shall execute a bond with one or more sufficient sureties," to be joint merely. *Pickersgill* v. *Lahens*, 140.

INSANITY. See *Evidence*, 4, 5.

Power of attorney by one insane, void. *Dexter* v. *Hall*, 9.

INSURANCE. See *Evidence*, 12–14; *Life Insurance.*

INTEREST.

1. Where an illegal tax has been collected, the citizen who has paid it

INTEREST (*continued*).

and has been obliged to bring suit against the collector is entitled to interest, in the event of recovery, from the time of the alleged exaction. *Erskine* v. *Van Arsdale*, 75.

2. Where interest as a general thing is due and there is no statute in the place where the account is settled and the transaction takes place, giving interest, in such a case it is to be allowed at a reasonable rate, and conforming to the custom which obtains in the community in dealings of the same character as the one on which the suit arises, by way of damages for unreasonably withholding an overdue account. *Young* v. *Godbe*, 562.

3. Interest on loans made previous to, and maturing after, the commencement of the war, ceased to run during the subsequent continuance of the war, although interest was stipulated in the contract. *Brown* v. *Hiatts*, 177.

INTERNAL REVENUE. See *Collector of Internal Revenue; Constitutional Law*, 7; *Distiller; Official Bonds; Tax Illegally Paid; Transportation of Spirits.*

1. The advance in the value of personal property during a series of years does not constitute the "gains, profits, or income" of any one particular year of the series, although the entire amount of the advance be at one time turned into money by a sale of the property. *Gray* v. *Darlington*, 63.

2. Under the act of Congress of July 13th, 1866, iron castings, cast for thimble-skeins and pipe-boxes, between the 1st of September, 1866, and the 1st of March, 1867, were subject to an internal revenue tax. *Cheney* v. *Van Arsdale*, 68.

3. Under the act of March 2d, 1867, thimble-skeins and pipe-boxes, made of iron, are exempt from duty, whether cast or wrought. *Erskine* v. *Van Arsdale*, 75.

JOINT OBLIGOR. See *Equity*, 7.

JURISDICTION. See *Error; Practice*, 1, 2, 4.

I. Of the Supreme Court of the United States.

(*a*) It has jurisdiction—

1. (Other things allowing) of an appeal by a mortgagor alone where a decree has been against him personally, and against others as trustees. *Railroad* v. *Johnson*, 8.

2. Under the 25th section, where the record shows that in a suit on a contract the defendants set up that the contract had been rendered of no force by provisions of the Constitution of the United States and of certain acts of Congress, and that the decision of the highest court of the State was against the right, title, privilege, or exemption thus specially set up. *Railroads* v. *Richmond*, 3.

3. Or where on a bill to enforce a vendor's lien, the vendee set up that the deed which the complainant had given him was insufficiently stamped, and the Supreme Court of a State, disregarding the objection, enforced the lien. *Hall* v. *Jordan*, 393.

JURISDICTION (*continued*).

4. And this jurisdiction under the 25th section will be entertained where the court can see a Federal question raised under it, though raised somewhat obscurely; and though they had "a very clear conviction" that the decision of the State court was correct. *Pennywit* v. *Eaton*, 380.

(*b*) It has NOT jurisdiction—

5. Under the 25th section, where the decision below on a contract is, that it is good or bad on principles of public policy. *Tarver* v. *Keach*, 67.
6. Nor where the case *may* have been decided on the form of remedy which the State courts require a plaintiff to adopt; or on the technical insufficiency of the pleading. *Commercial Bank* v. *Rochester*, 639.
7. Nor where the decision is only that an act of the legislature of the State is repugnant to the constitution of the State. *Salomons* v. *Graham*, 208.
8. Nor, under the 22d section, as of a "final decree," of a decree of the highest court of a State which, merely dissolving an injunction granted in an inferior court, leaves the whole case to be disposed of on its merits. *Moses* v. *The Mayor*, 387.
9. Nor, under any section of any act, of the action of the Circuit Court exercising "supervisory jurisdiction" as a court of equity over a decree in bankruptcy, under the 2d section of the Bankrupt Act. *Mead* v. *Thompson*, 635.

II. OF THE CIRCUIT COURTS OF THE UNITED STATES.

III. OF THE DISTRICT COURTS OF THE UNITED STATES.

IV. OF THE COURT OF CLAIMS.

10. The allowance of an appeal to this court by the Court of Claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking such allowance can be made. *Ex parte Roberts*, 384.

LANDLORD AND TENANT. See *District of Columbia; Comity, Judicial*, 1.

LEGAL TENDER. See *Constitutional Law*, 1.

LIFE INSURANCE. See *Equity*, 9; *Evidence*, 12–14.

1. The rules to be applied, stated in the case of a policy of life assurance, where there is a condition in the instrument that if the assured shall "die by his own hand," the policy shall be void, and the death of the party is in fact by suicide. *Life Insurance Company* v. *Terry*, 580.
2. A policy for $3000, taken by one who has no interest in the life of the party assured beyond a debt of $70, is a sheer wagering policy. *Cammack* v. *Lewis*, 643.

LIMITATIONS, STATUTE OF. See *Statutes of Limitations.*

LOUISIANA. See *Comity, Judicial*, 1; *Evidence*, 10; *Statutes of Limitations*, 2; *Mesne Profits.*

1. Though in Louisiana a party from whom real estate there has been recovered by suit, have a right to demand that the person recovering pay him the value of the materials and price of workmanship of build-

LOUISIANA *(continued)*.

ings on the premises, if such person choose to keep them, yet such a demand will not be enforced where, in a peculiar and complicated case, the party has already in the decree against him been allowed in another form, what, in good conscience, the buildings were worth. *New Orleans* v. *Gaines*, 624.

2. The statute of 21st January, 1870, declaring the rights of the New Orleans, Mobile, and Chattanooga Railroad Company, confers no exemption on it from its common-law liabilities. *Railroad Company* v. *Hanning*, 649.

LUNATIC. See *Evidence*, 4, 5.

Power of attorney by one, void. *Dexter* v. *Hall*, 9.

MANDAMUS.

When ancillary to a jurisdiction already acquired and when not. In the latter case will not lie from the National courts to State officers. *Graham* v. *Norton*, 427.

MARINE RISKS.

Distinguished from war risks. *Reybold* v. *United States*, 203.

MARRIED WOMAN.

A separate estate for, created by any words clearly expressing an intent to create it. *Prout* v. *Roby*, 471.

MARSHAL'S RETURN. See *Conclusiveness of Marshal's Return.*

MASSACHUSETTS. See *Constitutional Law*, 8.

The rights of fishery in its larger rivers are public rights, and subject to the right of the State to compel the owners of dams to construct fishways. *Holyoke* v. *Lyman*, 500.

MERGER. See *Consolidation of Railroads.*

MESNE PROFITS.

1. The possessor, in continuous bad faith, of real estate which the true owner at last recovers, is chargeable, under the claim of such profits, with what the premises are reasonably worth annually, and interest thereon to the time of the trial. Five per cent. interest in a Louisiana case proper. *New Orleans* v. *Gaines*, 624.

2. On claim by a true owner against a possessor in continuous bad faith of lands in Louisiana, the rule of English equity prevails, and a decree is properly made of profits from the time that the complainant's title accrued. There is nothing in the code of that State which limits it to three years. *Ib.*

MILITARY SERVICE. See *Deserter.*

MINISTERIAL OFFICER.

Cannot be made a trespasser in any case where it is his duty to act. *Haffin* v. *Mason*, 671.

MISSOURI. See *Evidence*, 1–3.

The act of Congress of March 6th, 1820, admitting the State of into the Union, and the act of March 3d, 1823, respecting grants of land to that State, without further grant or patent, vested in the State the

MISSOURI (*continued*).

16th section of each township for school purposes. The effect of the acts stated, in cases where this section had been sold or disposed of by the government. *Hedrick* v. *Hughes*, 123.

MORTGAGE OF VESSELS.

1. A bill of sale of a vessel, absolute in its terms, may be shown by parol evidence to be only a mortgage. *Morgan's Assignee* v. *Shinn*, 105.
2. The facts that the bill of sale was recorded; that the vessel was re-enrolled in the name of the transferee; that a policy of insurance was taken out in his name as owner, and that no note or bond was taken by him, will not overcome positive evidence that the bill was taken as a mere security for a loan. *Ib.*
3. A mortgagee of an interest in a vessel, not in his possession, is under no obligation to contribute for repairs which he did not order. And it makes no difference that the vessel be registered in his name. *Ib.*

MUNICIPAL BONDS.

1. In a suit against a municipal corporation by a *bonâ fide* holder of its bonds, whose title accrued before maturity, the corporation cannot show by way of defence, if the legal authority of the corporation to issue the bonds is sufficiently comprehensive, a want of compliance on its part with formalities required by the statute authorizing the issue of the bonds, or show fraud in their own agents in issuing them. *Grand Chute* v. *Winegar*, 355.
2. Relief will not be given in equity against the enforcement of, when bill shows a complete defence and full means of relief at law. *Id.* 374.

MUNICIPAL CORPORATIONS. See *Municipal Bonds; Practice*, 6.

1. The trustees or representative officers of a parish, county, or other local jurisdiction, invested with the usual powers of administration in specific matters, and the power of levying taxes to defray the necessary expenditures of the jurisdiction, have no implied authority to issue negotiable securities, payable in future, of such a character as to be unimpeachable in the hands of *bonâ fide* holders, for the purpose of raising money or funding a previous debt. *Police Jury* v. *Britton*, 566.
2. Their ordinances are not "revenue laws" of the State, within meaning of act of June 30th, 1870, to advance cases on the docket. *Davenport City* v. *Dows*, 390.

NEGLIGENCE. See *Contributory Negligence.*

In suits against a railroad company, by a person outside the car, for injuries received, where the defence involves the question of the party's own negligence, an infant of tender years is not held to the same law as is an adult. By the adult there must be given that care and attention for his own protection that is ordinarily exercised by persons of intelligence and discretion. Of an infant of tender years less discretion is required, and the degree depends upon his age and knowledge. The caution required is according to the maturity and capacity of the child, a matter to be determined in each case by the circumstances of that case. *Railroad Company* v. *Gladman*, 401.

NEGOTIABLE SECURITIES. See *Municipal Corporations*, 1.

NOMINAL DAMAGES.

When, under the act of July 17th, "to seize and confiscate the property of rebels," &c., the proceedings have been such that notwithstanding a sale in form, *intended* to divest the rebel of his property, the property has not, after all, been divested in law, and the rebel's rights remain uninjured, he cannot in an action against the marshal for a false return recover more than nominal damages. *Pelham* v. *Way*, 196.

NON COMPOS MENTIS. See *Evidence*, 4, 5.

Power of attorney by one, void. *Dexter* v. *Hall*, 9.

NOTICE. See *Trespasser*, 1; *Trustee ex maleficio.*

OFFICIAL BONDS. See *Transportation of Spirits.*

Cover not merely duties imposed by existing law, but duties belonging to and naturally connected with the office or business in which the bonds are given, imposed by subsequent law, provided, however, that the new duties have relation to such office or business. *United States* v. *Singer*, 112.

PAROL EVIDENCE. See *Evidence*, 10, 12, 15.

PARTIES.

On a bill by the heir of A., grantee of ground on ground rent (of which ground B., the grantor, had improperly taken possession as for non-payment of the ground rent, and received the general rents), the bill being to have an account, and if a certain sum had been received, to have a conveyance of the ground, free of the ground rent, to A. in accordance with a covenant to convey to A. and her heirs on payment of a certain sum—the executor or administrator of A. is not a necessary defendant. *Prout* v. *Roby*, 471.

PATENT.

I. General Principles Relating to.

1. Where three elements are claimed in a patent, in combination, the use of two of the elements only does not infringe the patent. *Gould* v. *Ress*, 187.
2. The introduction of a newly-discovered element or ingredient, or one not theretofore known to be an equivalent, would not constitute an infringement. *Ib.*

PIPE-BOXES. See *Internal Revenue*, 2, 3.

PLEA. See *Practice*, 11.

1. An admitted informality in one, not a case for error after a traverse of its allegations and issue and trial; there having been no demurrer. *Deitsch* v. *Wiggins*, 539.
2. *Nil debet* and *non est factum* not necessarily inconsistent. *Grand Chute* v. *Winegar*, 373.
3. One in bar, which is, in substance, the same as one in abatement, already passed on by a jury against the party setting it up, is properly stricken out by the court before trial. *Ib.*

PRACTICE. See *Appeal; Charge of Court; Error; Fees; Mandamus; Plea.*

I. In the Supreme Court.

(*a*) *In cases generally.*

1. A case entertained where a mortgagor alone appealed, the decree below being against him personally, though there was a decree also against other persons as trustees. *Railroad Company* v. *Johnson*, 8.
2. The Supreme Court cannot examine the action of the Circuit Court on a motion to dismiss for want of proper citizenship, when the record does not show the facts of the case nor on what grounds the court proceeded. *Kearney* v. *Denn*, 51; and see *Flanders* v. *Tweed*, 450.
3. Judgment affirmed with 10 per cent. damages in a case brought here in disregard of the law as already settled by precedents of the court. *Pennywit* v. *Eaton*, 382.
4. In the jurisprudence of the United States, the objection that there is an adequate remedy at law raises a jurisdictional question, and may be enforced by the court *sua sponte*, though not raised by the pleadings, nor suggested by counsel. *Oelrichs* v. *Spain*, 211.
5. Where parties waive a trial by jury and submit all issues of fact to the Circuit Court, they cannot raise, in this court, questions as to the effect of evidence. *City of Richmond* v. *Smith*, 430.
6. The ordinances of municipal corporations laying taxes cannot be regarded as the revenue laws of the State from which they derive their power of laying taxes, within the meaning of the act of June 30th, 1870, which makes it the duty of the court to give to causes, where the execution of the *revenue laws of any State* are enjoined or suspended by judicial order, preference over all other civil causes. *Davenport City* v. *Dows*, 390.
7. Where no request is made for specific instructions and no error is perceived in the instructions actually given, the fact that the charge may not have covered the entire case is not ground for reversal. *Shutte* v. *Thompson*, 151.
8. The court will pass without notice errors meant to be assigned by the plaintiff in error, but which are not assigned in the way prescribed by the rules of court. *Deitsch* v. *Wiggins*, 539.
9. And dismiss his case where his brief does not conform to these rules. *Portland Company* v. *United States*, 1.
10. Where on a bill by one asserting himself to be the heir-at-law of another, the answer denies the heirship, and on an issue directed, the heirship is found, and the court decrees for the complainant accordingly, no objection being made to anything that occurred at the trial and no application to set aside the verdict, this court will not, in the absence of the evidence given before the jury, go behind the decree of the court. *Prout* v. *Roby*, 472.
11. Where it was plain that though (on an objection of its inconsistency with another plea, pleaded with it) a plea had been technically struck out, yet that no evidence was rejected on account of its absence, but that the defendant litigated every question of fact as fully as if that pleading had remained, and that though much evidence offered by the

PRACTICE (*continued*).

defendant was rejected, none was so rejected because of the absence of a proper plea, this court refused to reverse. *Grand Chute* v. *Winegar*, 356

II. In Circuit and District Courts. See *Practice*, 5.

12. Evidence which, in connection with other evidence offered, tends to make out a defence, is properly receivable, though it may not itself prove all the facts necessary to constitute a defence. *Deitsch* v. *Wiggins*, 540.

13. A final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others. *Frow* v. *De La Vega*, 552.

14. If one of several defendants to a bill making a joint charge of conspiracy and fraud, make default, his default and a formal decree *pro confesso* may be entered, but no final decree on the merits until the case is disposed of with regard to the other defendants. *Ib.*

15. If the bill in such case be dismissed on the merits, it will be dismissed as to the defendant in default, as well as the others. *Ib.*

16. Where, in proceedings in State courts, the laws of a State allow a set-off pleaded to be interposed and tried in the same suit with the claim against which it is pleaded, the same thing may be done when the suit is brought or transferred into the Federal courts from them. *Partridge* v. *The Insurance Company*, 573.

17. A prayer for instructions which assumes as existing, matters of which no proof is found in the record, and which are simply inferred to be facts by counsel making the prayer, ought not to be granted. *Railroad Company* v. *Gladman*, 401.

III. In District Courts.

IV. In the Court of Claims.

18. The allowance of an appeal to this court by the Court of Claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking such allowance can be made. *Ex parte Roberts*, 384.

PRE-EMPTION LAWS.

Of the United States. Their nature and effect stated. *The Yosemite Valley Case*, 77.

PRESUMPTION. See *California*.

PRINCIPAL AND AGENT. See *Ministerial Officer*.

1. Liability of a person for negligence of another in the service of such person, and in the course of his employment. The matter considered. *Railroad Company* v. *Hanning*, 649.

2. A statute enacting that a railroad company shall not be liable "for any injury done to person or property caused by the act or omission of persons contracting with it," is a mere declaration of its common law rights, and confers no exemption on it, from the ordinary liabilities of such a company. *Ib.*

PUBLIC ENEMY. See *Trading with Public Enemy*.

PUBLIC LANDS. See *Evidence*, 1–3.

One does not, by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. The effect of the pre-emption laws stated. *The Yosemite Valley Case*, 77.

PUBLIC MONEY. See *Collectors and Receivers of Public Money.*

PUBLIC POLICY. See *Trading with Public Enemy.*

Bonds issued by authority of the convention of Arkansas, which attempted to carry that State out of the Union, for the purpose of supporting the war levied by the insurrectionary bodies then controlling that State against the Federal government, do not constitute a valid consideration for a promissory note. *Hanauer* v. *Woodruff*, 439.

"PURCHASING AGENTS." See *Rebellion, The*, 1.

RAILROAD. See *Consolidation of Railroads.*

REBELLION, THE. See *Confiscation Act; Contract*, 4, 5; *Interest*, 3; *Nominal Damages; Public Policy; Statutes of Limitations; Trading with Public Enemy.*

1. Under the statutory provisions, treasury regulations, and executive orders concerning the purchase of the products of insurrectionary States, private citizens were prohibited from trading at all in the insurrectionary districts, and purchasing agents acting on behalf of the United States, had no authority to negotiate with any one in relation to the purchase of such products, unless at the time of the negotiation the party either owned or controlled them. *Maddox* v. *United States*, 58.

2. The forcible seizure, during the late rebellion, by the rebel authorities of public money of the United States, in the hands of loyal government agents, against their will and without their fault or negligence, was a sufficient discharge from their obligations, under their bonds, to keep such money safely and pay it over when required, to the United States. *United States* v. *Thomas*, 337.

RECEIVERS AND COLLECTORS OF PUBLIC MONEY.

Though under bond to keep it safely and pay it when received, not bound to render their moneys at all events. Excused, if prevented by the act of God, or the public enemy, without any neglect or fault on their part. Their liability stated. *United States* v. *Thomas*, 337.

RECORD OF DEED. See *Virginia*, 1.

RE-ENTRY.

At the common law, where a right is claimed for the non-payment of rent, there must be proof of a demand of the precise sum due, at a convenient time before sunset on the day when the rent is due, upon the land, at the most notorious place of it, though there be no person on the land to pay. *Prout* v. *Roby*, 472.

REGISTRY OF VESSELS. See *Mortgage of Vessels.*

"REGULATION OF COMMERCE." See *Constitutional Law*, 2, 3.

RELEASE.

Not under seal, not a technical bar even in a suit at law; and even when sealed cannot be set up in equity to defeat those who were not parties to it, and had separate interests. *Oelrichs* v. *Spain*, 211.

RENT. See *District of Columbia; Re-entry.*

REPEAL OF CHARTER. See *Constitutional Law*, 8.

REPUTATION. See *Evidence*, 9.

RESCISSION OF CONTRACT. See *Equity*, 2.

RES INTER ALIOS ACTA. See *Res Judicata.*

RES JUDICATA. See *Practice*, 10.

A judgment of an Orphans' Court of Maryland passing directly on the legitimacy of a son who was applying for administration to his father's estate, *held* to be inadmissible to show the illegitimacy of his sisters by the same connection, though the judgment was entered only after an issue directed to ascertain whether the father was *ever* lawfully married to the admitted mother of the children, either before or subsequently to the birth of the son, and after a verdict in the negative. *Kearney* v. *Denn*, 51.

REVENUE LAWS. See *Practice*, 6.

A vessel condemned for violation of, in a clear *primâ facie* case, not rebutted. *The John Griffin*, 29.

RIGHT OF WAY. See *Trespasser*, 1.

RISKS.

Marine distinguished from war. *Reybold* v. *United States*, 202.

RULES OF COURT.

A compliance with, in the preparation of briefs, and the assignment of errors, enforced under penalty of the party's losing his case. *Portland Company* v. *United States*, 1; *Deitsch* v. *Wiggins*, 539.

SEPARATE ESTATE. See *Feme Covert.*

SET-OFF. See *Practice*, 16.

SHIPS. See *Mortgage of Vessels.*

SMUGGLING.

A vessel condemned for, on a clear *primâ facie* case against her, not rebutted. *The John Griffin*, 29.

STATUTE OF FRAUDS. See *Evidence*, 10.

STATUTES OF LIMITATIONS. See *California.*

1. Of the several States did not run during the late civil war against the right of action of parties upon contracts made previous to, and maturing after, the commencement of the war. *Brown* v. *Hiatts*, 177.
2. Where a suit was brought in Louisiana, for a debt due January 1st, 1858, the writ being served February 29th, 1868, *held* that in view of the decision in *The Protector* (12 Wallace, 700), the plea of what is known in Louisiana as "prescription of five years" could not be sustained. *Adger* v. *Alston*, 555.

STATUTES OF THE UNITED STATES.
The following, among others referred to, commented on and explained:
September 24th, 1789. See *Deposition; Jurisdiction; Mandamus.*
March 2d, 1799. See *Smuggling.*
March 6th, 1820. See *Missouri.*
March 3d, 1823. See *Missouri.*
August 19th, 1841. See *Bankrupt Act*, 2.
February 25th, 1862. See *Constitutional Law*, 1.
July 17th, 1862. See *Confiscation Act.*
June 30th, 1864. See *Trespasser*, 2; *Yosemite Valley*
July 13th, 1866. See *Internal Revenue*, 2.
February 22d, 1867. See *District of Columbia.*
March 2d, 1867. See *Bankrupt Law*, 1; *Constitutional Law*, 6; *Internal Revenue*, 1, 3.
January 11th, 1868. See *Transportation of Spirits.*
July 20th, 1868. See *Distiller.*
June 1st, 1872. See *Amendment.*

STREET RAILWAY COMPANIES. See *Negligence.*
The respective obligations of these, on the one hand, and of persons (including children) crossing the tracks on which the rail-cars run on the other, stated. *Railroad Company* v. *Gladmon*, 401.

SUICIDE. See *Life Insurance*, 1.

"SUPERVISORY JURISDICTION."
Over decrees of the District Court in bankruptcy. What constitutes such jurisdiction under the 2d section of the Bankrupt Act? *Mead* v. *Thompson*, 635.

SURETY. See *Equity*, 6.

"TACIT LIEN." See *District of Columbia.*

TAX. See *Consolidation of Railroads; Constitutional Law*, 2–4, 9; *Equity*, 1.
Distinguished from a wharfage charge. *Marshall* v. *Vicksburg*, 147.

TAX, ILLEGALLY PAID.
May always be recovered back, if the collector understands from the payer that the tax is regarded as illegal and that suit will be instituted to recover it; and in the event of recovery, the taxpayer is entitled to interest from the time of the exaction. *Erskine* v. *Van Arsdale*, 75.

TENDER, LEGAL. See *Constitutional Law*, 1.

THIMBLE-SKEINS. See *Internal Revenue*, 2, 3.

TRADING WITH PUBLIC ENEMY.
Every kind of commercial dealing or intercourse between two countries at war, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, is void. *Montgomery* v. *United States*, 395.

TRANSPORTATION OF SPIRITS.
The act of Congress of the 11th of January, 1868, which enacted that *from and after its passage* no distilled spirits should be withdrawn or removed from any warehouse for the purpose of transportation, &c., and

TRANSPORTATION OF SPIRITS (*continued*).

repealed all acts and parts of acts *inconsistent* with its provisions, had no reference to distilled spirits which had been withdrawn from a bonded warehouse for transportation *before* its enactment, and was accordingly not operative to prevent a recovery on a bond given before its passage, on a transportation of spirits made when the bond was given. *United States* v. *Bennett*, 660.

TRESPASS DE BONIS ASPORTATIS.

1. In an action of, where the issue involves the question as to where the ownership of the property was, evidence tending directly to show that an alleged sale, which the plaintiff relied on as the basis of his action, was a fraudulent sale, is pertinent to the issue; and its rejection, error. *Deitsch* v. *Wiggins*, 539.
2. What constitutes a sufficient plea in. *Ib.*

TRESPASSER.

1. Until notice has been given of the changed character of the place, one passing over a wharf or platform over which the public has been accustomed to pass, cannot be made such for so passing; although the wharf or platform is now no longer used for the purpose of passage. *Railroad Company* v. *Hanning*, 650.
2. Ministerial officer cannot be made one in any case where it is his duty to act. *Haffin v. Mason*, 671.

TRUSTEES. See *Trustees ex Maleficio*.

1. When a person conveys in fee to persons whom he names a lot and church edifice upon it for the use of a Baptist church—an unincorporated religious body—specified, the trustees are not removable at the will of the *cestui que trusts* and without cause shown. *Bouldin* v. *Alexander*, 131.
2. Of church property are not necessarily, in the Baptist Church, communicants in the same. *Ib.*

TRUSTEES EX MALEFICIO.

1. A person lending money to a trustee on a pledge of trust stocks, and selling the stocks for repayment of the loan, will be compelled to account for them, if he have either actual or constructive notice that the trustee was abusing his trust, and applying the money lent to his own purposes. *Duncan* v. *Jaudon*, 165.
2. The lender will be held to have had this notice when the certificates of the stocks pledged show on their face that the stock is held in trust, and when, apparently, the loan was for a private purpose of the trustee, and this fact would have been revealed by an inquiry. *Ib.*
3. The duty of inquiry is imposed on a lender lending on stocks, where the certificate of them reveals a trust. *Ib.*
4. These principles are not affected by the fact that the stocks pledged may be such as the trustee under the instrument creating his trust had no right to invest in; as *ex. gr.*, stock of a canal company, when he was bound to invest in State or Federal loans. *Ib.*
5. Notice to the cashier of a bank, or of bankers, that the stock pledged is trust stock, is notice to them. *Ib.*

USAGE.

Evidence of, to control the meaning of written contracts not plainly ambiguous or technical, not favored. *Partridge* v. *The Insurance Company*, 573.

VERDICT, EFFECT OF. See *Practice*, 10.

VESSELS. See *Mortgage of Vessels.*

VESTED RIGHTS. See *Constitutional Law*, 4–6, 8.

VIRGINIA.

1. Requisites for record of a deed under statute of December 8th, 1792. *Shutte* v. *Thompson*, 152.
2. Titles under its statutes, to land in West Virginia, inoperative; the statutes having been repealed by the latter State before the titles were made. *Ib.*

WAGERING POLICY. See *Life Insurance.*

WAIVER.

1. May be made by the party for whose protection they are given, of the requirements of the act of September 2d, 1789, authorizing the taking of depositions *de bene esse* in certain cases. What amounts to such a waiver. *Shutte* v. *Thompson*, 151.
2. May be made of right to take a writ of error, by amending and answering over. *Marshall* v. *Vicksburg*, 146.

WAR, ACT OF. See *Contract*, 4.

WAR RISKS.

What, as distinguished from marine. *Reybold* v. *United States*, 202.

WATER-POWER.

A grant of a right to draw from a canal so much water as will pass through an aperture of given size and given position in the side of the canal is substantially a grant of a right to take a certain quantity of water in bulk or weight. *Canal Company* v. *Hill*, 94.

WEST VIRGINIA. See *Virginia.*

WHARFAGE.

Right to collect, under a special contract, construed. *Marshall* v. *Vicksburg*, 146.

WRIT OF ERROR. See *Amendment; Appeal; Jurisdiction.*

Frivolous ones punished by affirmance, with 10 per cent. damages. *Pennywit* v. *Eaton*, 382.

YOSEMITE VALLEY.

The act of Congress of June 30th, 1864, granting this valley and the Mariposa Big Tree Grove to the State of California passed the title of those premises to the State, subject to the trust specified therein, that they should be held for public use, resort, and recreation, and be inalienable for all time. *The Yosemite Valley Case*, 77.